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Is the majority decision in *Parbhoo's Case* (AIR 1941 All 402 FB) still good law, in other words, is the accused who pleads an exception, entitled to be acquitted if upon a consideration of the evidence as a whole

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LAW COMMISSION OF INDIA REVISION OF THE INDIAN PENAL CODE QUESTIONNAIRE

(From :—Joint Secy. and Legal
Adviser to the Govt. of
India, New Delhi.)

APPLICATION OF THE CODE

1. Extra-territorial operation of the Code in respect of aliens is at present confined to offences committed on ships or aircraft registered in India (Section 4). Should this be enlarged in any manner, e. g., to offences committed by aliens in the service of Government outside India?

PUNISHMENTS

2. The punishments provided in the Code are death, imprisonment for life, rigorous and simple imprisonment, forfeiture of property and fine. Do you consider it necessary or desirable to add any other punishments, e. g. :

(a) banishment for a term to a specified locality within India ;

(b) externment for a term from a specified locality ;

(c) corrective labour ;

(d) imposition of a duty to make amends to the victim, by repairing the damage done by the offence ;

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(e) publication of name of the offender and details of the offence and sentence ;

(f) confiscation.

In respect of what offences or types of offences would such punishments be appropriate?

3. The Code lays down only the maximum punishment for offences, and no minimum punishment except in very few cases. Are you in favour of laying down a minimum term of imprisonment for any offences? If so, for what offences?

4. Should imprisonment for life as the punishment prescribed for some offences be replaced by imprisonment for a specified long term, e. g. 20 years?

5. Have you any general suggestions to make for a reduction or increase in the quantum of punishment for various offences under the Code?

6. Are you in favour of providing any special form of punishment (such as, ordering suspension or winding up of business), for persistent violations of the law by Corporations?

7. (a) Where an offence is conjointly committed by a group of persons (say,

exceeding ten in number) should the maximum punishment be higher than the maximum prescribed for that offence?

(b) For instance should 'gherao' (wrongful restraint by a large group of persons) be made a separate offence with a severe punishment?

(c) Have you any other additions to suggest for dealing with violent crimes committed by organised groups or by unruly crowds?

8 When a person commits an offence in a state of intoxication (self induced) should that be made a ground for enhanced punishment?

9 (a) Do you think that there are too many provisions in the Code dealing with aggravated form of particular offences and the law should be simplified in this respect?

(b) Would it be preferable to give a list of aggravating and another of mitigating circumstances and provide generally that in case of aggravating circumstances the ordinary maximum punishment will be doubled and in case of mitigating circumstances it will be halved?

GENERAL EXCEPTIONS

10 Would you allow mistake of law to be pleaded either as a defence or as a mitigating circumstance for offences constituted by contravention of subordinate legislation such as statutory rules bye laws, orders and the like?

11 Do you consider that any increase is necessary in the minimum age of criminal responsibility which is 7 years at present (section 82)? If so what should it be?

12 (a) Should the existing provision (section 84) relating to the defence of insanity be modified or expanded in any way?

(b) Should the test be related to the offender's incapacity to know that the act is wrong or to his incapacity to know that it is punishable?

(c) Should the defence of insanity be available in cases where the offender although aware of the wrongful or even criminal nature of his act is unable to desist from doing it because of his mental condition?

13 There is at present no right of private defence in cases in which there is time to have recourse to the protection of public authorities (section 99) Do you think that this restriction is necessary or that it should be removed or that it should be modified?

14 In regard to entrapment cases where the Law enforcement officers or their agents directly instigate the commission of an offence as distinct from those cases where they merely provide the opportunity for the commission of the offence would you say—

(a) that the procedure adopted is so unfair and unethical that the accused should be deemed not to have committed any offence or

(b) that at any rate a lesser sentence should be provided in the Code?

ABETMENT AND ATTEMPT

15 Where a person abets an offence by instigating a minor to commit it, should the abettor be punishable with a punishment higher than that prescribed for abetment in general?

16 Are you in favour of introducing the principle of full vicarious liability of the master for an offence committed by a servant in the course of his employment for the benefit of the master?

17 At present preparation to commit an offence is by itself an offence in very few cases. Would it be desirable to increase this number and if so in respect of what types of offences?

OFFENCES AGAINST THE STATE

18 Do you consider that the law relating to sedition should be amplified or modified? If so in what respect?

OFFENCES AFFECTING THE HUMAN BODY

19 Should euthanasia (or mercy killing as it is popularly called) be exempted from punishment either as homicide or as abetment of suicide?

20 Should there be a provision in the Code for punishing a person who drives another person by systematic cruel treatment to commit suicide?

21 (a) Should attempt to commit suicide be punishable at all?

(b) Where a person threatens to put an end to his life or attempts to do so with a view to compelling another person or authority to do or omit to do anything which that person or authority is not bound to do or, as the case may be omit to do should such act be made punishable?

22 The Code contains a few provisions for punishing sexual offences (rape unnatural offence etc) Are any additions to or alterations in these provisions necessary?

23. (a) Should unnatural offences be punishable at all or with heavy sentences as provided in section 377 ?

(b) Should exception be made for cases where the offence consists of acts done in private between consenting adults ?

OTHER OFFENCES

24. (a) Should adultery be punishable at all ?

(b) If so, should the offence be limited to men only, as in section 497 ?

25. (a) Should defamation as at present elaborately defined in section 499 be punishable at all ?

(b) Would it be preferable to limit criminal defamation to cases where a

person defames another person (living or dead) intending or knowing it to be likely that such act will lead to a breach of the peace ?

26. In view of Article 12 of the Universal Declaration of Human Rights (1948), do you think that the criminal law ought to recognise and protect the right of privacy, and, if so, what kind of interference with that right should, in your view, be punishable ?

LIMITATION FOR PROSECUTIONS

27. Do you consider that there should be a statutory period of limitation for prosecution for any offences under the Code, and, if so, for what offences ?

CONTEMPT OF COURT AND POWER OF PRESIDING OFFICER AND EVIDENCE ACT

(By SATISH CHANDRA GUPTA, M. A., LL. B., *Advocate, Moradabad.*)

It will be not out of scope to say that courts of Administration of Justice have some privileged position and their orders should be obeyed and if they are not obeyed, there is clear obstructing justice, which in other words is nothing except contempt of court. The contempt of court has been widely discussed in many decisions but in this small article, I will emphasise on the contempt particularly its criminal consequences rather than civil.

From time to time it had been held by high judicial pronouncements that a proceeding for contempt cannot be regarded as a criminal proceeding merely because it ends in imposing punishment on the contemner. Contempts have been divided broadly in 2 classes according to the purpose which is subserved by the proceeding. Contempt which is punished for disobedience of an order of the court with a view to enforcing the rights of private parties is distinguished from the contempt which is punished for vindicating the dignity of the court. The latter is regarded as a criminal and punitive, while the former is regarded as a civil and remedial.

But it should not be forgotten that whatever be the purpose of the proceeding, a proceeding for punishing contempt has always been regarded as sui generis and of an anomalous nature. The proceeding for contempt is not regulated by the ordinary law of criminal procedure AIR 1952 Nag 180 : 1952 Cri L J 749.

As held by Allahabad High Court in a recent decision reported in AIR 1960 All 281 : 1960 Cri L J 442, "even civil contempt when proceedings are taken under the Contempt of Courts Act, assumes a quasi-criminal nature."

It is no doubt true as provided in section 9 of Contempt of Courts Act of 1952, that contempt proceedings are quasi-criminal and as laid down in AIR 1955 All 638 : 1955 Cri L J 1451 "a person who commits contempt of court by obstructing the course of justice cannot escape punishment by interfering with the contempt proceedings by winning over the complainant". This aspect of criminal liability in law is often not understood.

The Allahabad High Court in AIR 1955 All 483 : 1955 Ori L J 1223 (Desai and Beg JJ.) held :

"Refusal to accept or evade service of a summons may not be contempt, but refusal to accept or evade service of an injunction order is contempt, because there is a fundamental difference between a summons and an injunction order To refuse to accept an injunction order is to interfere with the course of justice by refusing to acquire the knowledge without which the court's order cannot be complied with". It is submitted that to the best of my study this view is not overruled.

Evidence Act and Contempt and Mode of Proof.

It should also be noted that no provisions of Evidence Act are applicable in contempt proceeding. The court has to adopt its own procedure. It was held in AIR 1955 All 638 : 1955 Ori L J 1451 that the court, in contempt proceeding

" is competent to adopt its own procedure for deriving satisfaction. It stands to reason that when the law does not prescribe manner in which contempt should be brought to the notice of the court and when it has not

been defined what contempt is, there cannot be any law, as to the onus of proof or the method of proof in contempt proceedings.

See also Halsbury's Laws of England Volume VIII paragraph 67. It is therefore not true to say that contempt must be proved in the manner laid down in Evidence Act, the court undoubtedly has to be satisfied that contempt has been committed, but is competent to adopt its own procedure for deriving satisfaction.

In cases of criminal contempt the facts can be proved by affidavits. Rule 12 of Chapter 3 of Rules of Court (All) 1955 clearly shows and allows contempt to be proved through an affidavit. Since Evidence Act expressly does not apply to affidavit proving a fact by affidavit is not barred.

This aspect of procedure finds support from the Ruling reported in AIR 1954 All 628 1954 Cri L J 1141 (FB) where it is observed that 'Contempt proceedings are usually decided on

the basis of affidavits and it is not illegal to find a person guilty on the strength of affidavits alone." And keeping in view this the correct procedure is, as held in the above ruling and which is the current law of the day that if a court of law holds a person guilty of contempt on the basis of an affidavit only, no constitutional right under Article 21 of the Constitution is infringed. Further it should also be noted that position of a contemner and accused is different. The alleged contemner is not and cannot be an accused and as held in AIR 1951 Pat 448 62 Cri L J 558, the contemner can always file an affidavit or make a statement on oath.

The whole aspect of contempt of court is very wide. It depends upon particular facts or the case. The same thing may be contempt under one circumstance and no contempt under another circumstance.

Being a wide subject it requires serious and careful study.

A STUDY OF SECTION 279, PENAL CODE VIS-A-VIS SECTIONS 337, 339 AND 304 A, PENAL CODE

(By V K SHARMA, Advocate and Lecturer Govt Law College Indore, (M P))

In Shivram v State AIR 1965 All 196= 1965-1 Cri L J 524 applicant (accused) was convicted under Ss 279 and 304 A Penal Code and sentenced on each count. And on appeal the Sessions Judge Jhansi had confirmed the conviction and sentence passed against him. It was contended inter alia before the High Court that a conviction under S 279 Penal Code is not justified when the applicant has been convicted under S 304 A Penal Code which includes the lesser offence. This contention was upheld but as the sentences passed on both counts were concurrent his Lordship did not feel inclined to interfere because applicant practically received no benefit if his conviction and sentence under S 279 Penal Code were set aside.

It was held at para 20 of the decision as under —

Offences defined by Ss 279 and 280 and 336 and 337 and 339 could be viewed as minor offences included within S 304 A, Penal Code.

The Allahabad High Court has thus taken a view that an accused when convicted under S 304-A Penal Code cannot be convicted under S 279 Penal Code or for any other minor offences like S 337 or S 339, Penal Code.

Similar view was taken in L F Collet v Emperor 1929 Mad WN 395 wherein Ananthakrishna Aiyar J observes at p 414 as under —

The learned Crown Prosecutor admits that the conviction under S 279 Penal Code separately could not stand in the circumstances, if the accused is convicted under Ss 337 and 304 A, Penal Code. Accordingly the conviction under S 279 Penal Code and the sentence of 6 months rigorous imprisonment passed under that section are quashed.

Yet another decision taking a similar view is reported in (1935) Mad WN 924 and in State v Jagdish Madh BLR 1952 Cr 302 (DB)—a decision of the erstwhile Madhya Bharat High Court—which was overruled in a later decision of a Full Bench of that Court reported in State v Gulam Meer AIR 1956 Madh B 141=1956 Cri L J 624 (FB).

A contrary view appears in State of Bihar v Mangalsingh AIR 1953 Pat 56= 1953 Cri L J 518 (DB). In that case the State's appeal against acquittal under Ss 279 337 and 304 A Penal Code was allowed and the respondent's conviction was recorded on all the counts. In Raghavan Pillai v State AIR 1954 Tra Co 25= 1954 Cr L J 7 also the accused was held

guilty under Ss. 279, 304-A, 337* and 338, Penal Code for rashly driving a loaded truck and thereby causing death of one person and grievous hurt to three others. Apart from the Full Bench case reported in AIR 1956 Madh Bha 141 (FB), Bombay, Madras and Rajasthan High Courts take the view that offences under S. 279 on the one hand and Ss. 337 or 338 on the other are distinct in their nature and character. *State v. P. S. Karmalkar Prabhakar*, AIR 1960 Bom 269 = 1960 Cr L J 814; AIR 1958 Mad 286 = 1958 Cr L J 775 and *Madhosingh v. State*, 1961 Raj L W 404.

When the learned Judges of the High Courts do not take the same view of the matter under present discussion, it is not possible to say categorically that this or that view is the correct one. However, in my humble opinion the view taken in the decisions of Bihar, Bombay, Patna and the later decision of Madras High Court lay down the correct law.

My reasons for the humble view I take are as under :—

1. The scheme of the Indian Penal Code suggests that offences under S. 279 on the one hand and Ss. 337, 338 and 304-A, Penal Code on the other are different in their nature and character.

Section 279, Penal Code finds place in Chapter XIV and may be classified as “an offence affecting the public safety” where—

*Incidentally, it may also be mentioned here that their Lordships who constituted the Division Bench in AIR 1954 Tra Co. 25 erred in confirming conviction of the accused applicant under S. 337, Penal Code also. In that case no simple hurt was shown to have been caused to any person and the accused applicant was convicted under S. 338, Penal Code already which included the minor offence under S. 337, Penal Code.

as, offences under Ss. 337, 338 and 304-A, Penal Code find place in Chapter XVI which speaks “of offences affecting the human body”. Thus, hurt—simple or grievous—is as much an offence against human body as homicide by rashness or negligence contemplated under S. 304-A falling under Chapter XVI.

To put it differently, offences under S. 337 or 338, Penal Code involve hurt—simple or grievous—to any person, and S. 304 A also involves hurt to any person with the only difference that it proves fatal. But S. 279 is a distinct offence and a person can be separately convicted on a charge under S. 279, Penal Code.

2. Section 279, Penal Code cannot be called a minor offence included in Ss. 304-A, 337 or 338, Penal Code because all the ingredients of S. 279, Penal Code are not included in the latter class of offences. Whereas S. 279, Penal Code prohibits and makes punishable mere rash or negligent driving on a public way only, Ss. 337, 338 and 304-A, Penal Code make culpable rashness or negligence punishable if hurt is actually caused whether on a public way or at any other place.

3. Section 279 cannot be called a minor offence included in S. 337 or S. 338 because the former section provides heavier fine; maximum limit of fine provided under the former section is double the maximum limit in the latter sections. Sections 337 and 338 are thus not aggravated forms of S. 279, Penal Code.

4. Section 279 cannot be included in S. 337 or S. 338, Penal Code, because offences under Ss. 337 and 338 are compoundable in nature whereas the offence under S. 279, Penal Code is non-compoundable.

ON BAIL

(By SUDHAMOY BANERJI, Advocate, Midnapore (W. B.))

However much some of us in India may express dislike against the English language, and the English people, we cannot forget for a moment that the system of administration of justice as introduced by the British Government in India, has been retained by us in toto. In that system personal liberty was held to be of utmost importance and it was not to be curtailed except for compelling reasons. Unlike in some other countries in the world, presumption of innocence of an accused was a starting point in

every criminal trial. It is always the duty of the prosecution to remove that protecting coat of presumption of innocence of the accused, completely before the accused can be held guilty and be convicted and sentenced. The slightest reasonable doubt in the case for prosecution entitles its rejection in toto by the Court and the accused is entitled to clean acquittal.

This well-recognised and time-honoured principle in the British system of criminal trials is based on a recognition of

the inherent right of everybody to retain his or her birth right to personal liberty. This personal liberty could be curtailed only when it became unavoidably necessary in the greater interest of the society and to facilitate unhampered trials in Court. Greater interest of the Society may very well require and justify detention in Hajat of such person who may reasonably be considered by a Court to be *prima facie* guilty of a deliberate murder for which death sentence is prescribed in law. Unhampered trial in Court may also demand and justify detention in Hajat of such persons who are *prima facie* likely to abscond and thereby delay or defeat their trial in Court. Except for such compelling reason bail should not be refused to any accused. And this is what we found repeatedly pronounced in numerous judicial decisions in India. These decisions used to be honoured and followed strictly by trial Courts upto 1947 and for some years thereafter. But in the present times we have a sad experience of our learned Magistrates and Judges paying no heed to these salutary time honoured principles and they generally refuse bail to the accused. This can be described as arbitrary. It also exhibits a complete denial of the fundamental guarantee of personal liberty except according to procedure established by law — as adumbrated in Article 21 of the Indian Constitution.

It was held in quite a number of rulings of the Hon'ble High Courts in India that — granting of bail was the general principle and policy rather than its refusal which demands some exceptional and compelling reason to justify the refusal. But we find now a days quite the opposite state of affairs.

We may unhesitatingly say that this sort of refusal of bail is quite shocking to the legal conscience and our learned Judges would do real good if they can be more generous and mindful of the spirit of the law. Poor accused persons may not naturally be able to go upto the Hon'ble High Court for redress and relief. The learned lower Courts should not forget or ignore the sanctity of personal liberty to which everybody is ordinarily entitled under the law as it is.

I remember an occasion of the past when we had I C S District & Sessions Judges. One learned I C S Judge rather lightly asked me when I requested him to fix a short date for hearing of the bail application — why is your client so anxious to come out from jail quickly? My respectful reply was — 'How can I convince your Honour about it as your Honour had never the misfortune of experiencing life in Jail? The learned Judge took this reply in good spirit and fixed a much shorter date as prayed for for hearing of the matter. On another occasion a barrister Judge asked the Public Prosecutor during the hearing of a bail matter how and why the undertrial accused would be kept behind the prison-bar when he was still to be presumed innocent under the law? And he readily granted bail.

As we lawyers are recognised to be inseparable part of the Court and unavoidably necessary for the administration of justice I send my views for publication with all due respect to Courts concerned. Let us have a brighter prospect in the administration of criminal law in our Courts.

CAN A PUBLIC PROSECUTOR DEFEND AN ACCUSED PERSON?

(By D G MHAISKAR B A (HONS) LL B, Sholapur)

In this part of the country there is a practice of Public Prosecutors being engaged to defend accused persons when they are Government officials.

This practice is against Law because —

(1) All prosecutions are on behalf of the State. In Halsbury's Laws of England 3rd Edition Vol 10 page 272 it has been observed —

Legal punishment is punishment awarded in a process which is instituted at the suit of the Crown standing forward as a Prosecutor on behalf of the subject on Public grounds."

A foot note further says —

Any private person in the absence of statutory provisions to the contrary can commence a Criminal prosecution, but the prosecution is always at the suit of the Crown. Hence it is that the Criminal proceedings were called pleas of the Crown.

This principle is followed in *Queen Empress v Murari Gokuldas* ILR 13 Bom p 339 where it is observed —

It must be remembered that all offences affected the public as well as the injured and that in all prosecutions the Crown is

the prosecutor. The proceeding is always treated as a proceeding between the Crown and the accused. The Crown either proceeds itself or lends its name. The offence is dealt with as an invasion of public peace and not mere contention between complainant and the accused."

In *Mahadevlal v. Dhanraj Maisri*, 12 Calcutta Weekly Notes, 750, it is observed:—

"The Prosecutor in all Criminal cases is the Crown."

Shri Seerwai in his commentaries on the Constitution of the India says on p 202 — lines 1 to 5 as under:—

"Also in the administration of Criminal Law all prosecutions are by the State and this is so even when a prosecution arises from a private complaint."

Now the Public Prosecutor being an agent of the State could not act against the interest of the State. The prosecution is always in the interest of the State

The word Public Prosecutor is defined in S. 4 (t), Criminal P. C. —

"He is appointed by the Government in exercise of the powers vested in them by S. 492, Criminal P. C. and he is always to conduct the prosecution on behalf of the State. He is thus a creature of Law and not of Government. His duties are laid down in Ss. 4, 270, 422, 492, 493 & 494 & 495 of the Criminal P. C."

They will show that a Public Prosecutor has always to prosecute because the interests of the State lie that way only

Then S. 340, Criminal P. C. will show that the accused is entitled to be defended by a Pleader of his choice. It does not say that he could be defended by a Public Prosecutor.

The word 'Pleader' has been defined in S. 4 (r) separately. This will also go to show that the Code defined the duties of the Public Prosecutor as being separate from that of a Pleader.

As a judge or Magistrate is appointed by the Government under S. 6 of the Criminal P. C. so also a Public Prosecutor is appointed by Government under S. 492, Criminal P. C. So the power flows to the Government from an enactment of the Central Government. Government may appoint a Judge, the Magistrate and the Public Prosecutor; but they cannot lay down their duties because they have been laid down by a Law i.e. Criminal P. C.

So the premise that a Public Prosecutor must always be a Prosecutor and can never defend is established. He may be an

Advocate holding a Sanad; but as long as his appointment as a Public Prosecutor is not cancelled or suspended he cannot act as an Advocate on behalf of any accused be he a Police Officer or another high Government Official.

This idea is reinforced in sub-r. 5 of R. 5 of the Bombay Law Officers Rules. It begins by saying that a Public Prosecutor shall not act on behalf of the accused.

But the Rule further says that with the permission of the District Magistrate or the Legal Remembrancer, he may defend an accused person.

This portion of the Rule is void as I shall presently show:—

This Rule is made under sub-s. 2 of S. 241 of the Government of India Act of 1935. Rules 1 to 27 are statutory rules and other rules are rules for the conduct of legal affairs of the Government

We, therefore, are bound by R. 5 sub-r 5; but that Rule is made by the Governor of Bombay in exercise of the powers given to him for regulating the conditions of service of all officers including Law Officers. Governor is thus a delegate and his power is only to frame rules for conditions of service. He could, therefore, lay down the period of his appointment, the fees which he may get at the station and out of the station. He can also provide that a Public Prosecutor shall take no part in the elections. He can also provide for the leave, suspension and dismissal of the Public Prosecutor. He cannot lay down the duties of the Public Prosecutor because they are laid down by a Central Act i.e. Criminal P. C.

So when the Governor says that the Public Prosecutor can defend an accused he is laying down a rule which conflicts with the Rule in the Criminal P. C. This part of sub-r. 5 is in the first place in excess of the rule-making power of the Governor and, therefore, that part of the Rule is void.

The second objection to the Rule is that this Rule is a State Legislation and again a delegated legislation. That Rule is repugnant to the Law laid down in the Criminal P. C. which is a Law laid down by the Sovereign Body i.e. the Parliament. If the Criminal P. C. lays down that the Public Prosecutor shall always act on behalf of the State then to make him defend an accused person would be violating the rules of the Criminal P. C.

When a State Law — delegated legislation—is repugnant to the Law of the Par-

liament the latter must always prevail in view of Art 254 of the Constitution. Therefore it follows that in a trial where the Public Prosecutor is allowed to defend

an accused person either as a Public Prosecutor or as a Private Advocate that trial will not be proper. It will be against the Constitution.

REFORMS IN CRIMINAL LAW

(By R DEB (Assistant Director, Law and Sociology National Police Academy, Abu (Rajasthan))

THE NEED FOR REFORM OF THE CRIMINAL LAW

In a society governed by the concept of Rule of Law it is no doubt necessary to protect the accused with a certain amount of minimum safeguards but at the same time it is also incumbent to see that justice is done to the aggrieved citizen by successfully bringing the malefactor to book. And if for achieving this end the law both substantive and procedural requires to be modified a progressive society having due regard for the larger social good should not hesitate to carry out such necessary reforms in order to make the law an effective instrument of social justice. Keeping the above background in view let us now examine what are the minimum requirements on this score.

Reform of the Criminal Law is a vast subject by itself and can hardly be treated exhaustively within the given scope of a small article. However an attempt has been made in the succeeding paragraphs to highlight some of the important aspects of this question.

REFORM OF THE SUBSTANTIVE CRIMINAL LAW

Without going into details one could perhaps say agreeing with the report of the Santhanam Committee on the prevention of corruption that the Indian Penal Code though a very comprehensive compilation does not fully meet the requirements of the Indian society after a century of its codification. It does not cover many segments of our social and economic life with which we are required to contend today (1). Though many of these hitherto uncovered fields have since been covered by piecemeal legislation after independence yet the need exists to codify them at one place in the form of one or two separate chapters in the body of the main penal law of India. Thus anti social acts which could be described

as economic offences like profiteering, black-marketing, hoarding, adulteration of food-stuffs and drugs, trafficking in licences and permits, tax evasion, usury, violation of the rules regarding foreign exchange etc. could be grouped in one chapter in the body of the Indian Penal Code under head 'Economic Offences'.

Similarly social vices like corruption, casteism, untouchability, trafficking in women and children and a host of such other things could be grouped together under a single chapter entitled 'Social Offences' in the Indian Penal Code itself. Multiplicity of laws like multiplicity of charges is highly misleading and adds to the difficulties of the common man, the accused and perhaps the advocates on either side. Deprecating such a state of things in regard to English law Lord Gardiner in his capacity as the Lord Chancellor of England once said that if a layman wanted to see his position under housing and tenant laws he needed to look through 54 Acts of Parliament then through hundreds of statutory rules and when he had done that he was left to read through the reported cases. According to a newspaper report the greatest ambition of Lord Gardiner was, therefore to be able to hold one single volume and pronounce: 'Here are the laws of England'. Addressing the Law Society of Ranchi Mr Justice S C Misra of the Patna High Court too remarked that the law was so baffling that few among the uninitiated could hope to understand or apply the law to their own affairs with a reasonable degree of certainty and yet there was the well settled legal maxim that ignorance of law was no excuse (2). So it is high time that an attempt is made to codify in simple language the bulk of the important penal laws of India at one place.

REFORM OF THE LAW OF CRIMINAL PROCEDURE

It is perhaps in the field of procedural law particularly the police procedural

1 Report of the Santhanam Committee on Prevention of Corruption, M. H. A., Government of India 1948, p 53

2 Mr Justice S C Misra, LAW & the LAYMAN AIR 1962 Jour 36 (37)

law relating to investigation and detection of offences that most of the reforms are called for. The distinction between cognizable and non-cognizable offences seems to be an outmoded one and needs to be done away with, if not completely, at least in regard to offences affecting law and order and general well-being of the community. Such a distinction does not seem to occur in the occidental countries including the United States of America, where the police give quick relief to the aggrieved citizens both in petty and serious cases. This categorisation appears to have been introduced by an alien government with a view to economise government expenditure on police.(3) Another reason behind this distinction might have been that most of the non-cognizable offences did not affect society at large and as such police intervention was not considered necessary. The aggrieved individual was, therefore, asked to seek his redress in a Court of law. These arguments are hardly tenable in a Welfare State. When the socio-economic policies of the modern state have progressively urged the state to give up its nineteenth century philosophy of "laissez-faire" and induced it to give protection to the economically backward classes against exploitation,(4) it is not understood why a citizen aggrieved by an offence, even though of a so-called relatively minor nature (but all non-cognizable offences are not so), should be asked to waste his own money, time and energy in trying to seek justice from a Court of law by employing his own lawyer, especially in days when jurists all over the world are thinking of giving free legal aid even to the accused.

Moreover, it is a matter of surprise to the layman that when he goes to the nearby police-station—the visible State machinery for maintaining law and order—with complaints of minor law violations, he is told to knock at the door of a distant Court. He naturally feels that the police are remiss in the performance of their duty or are taking the side of the accused. And such an impression further bedevils the already none-too-happy police-public relationship. From sociological point of view as well, it is difficult to appreciate the rationale behind this distinction. A person who risks the lives of hundreds of persons by disobeying the quarantine rule

(S. 271 I. P. C.) or selling noxious food (S. 273 I. P. C.) or adulterating food, drink or drug (Ss. 272, 274, and 275 I.P.C.), commits only a non-cognizable offence, while a person who causes a slight injury to a single individual with the tip of a pen-knife is guilty of a cognizable offence (5).

Maintenance of law and order through the effective administration of criminal justice ought to be entirely a State responsibility. In this view of things even in regard to the so-called minor offences involving breaches of the peace and consequently of established social order, the State must take upon itself the role of the prosecutor, for, if such minor violations of the law go unpunished, they, in the long run, produce a much greater conflagration (6). Even an eminent jurist of the stature of Salmond felt that "only when the criminal has to answer for his deed to the State itself will true criminal law be successfully established and maintained.(7) Offences worthy of punishment should thus cease to be matters between private persons and become matters between the wrong-doers and the community at large (8).

(a) *Enlargement of the scope of cognizable offences.*

In the light of the foregoing discussion it is suggested that this distinction between cognizable and non-cognizable offences be done away with completely. If that is not considered feasible at this stage, at least the non-cognizable offences which directly or indirectly affect the law and order situation or have a pernicious effect on society at large, be made cognizable by amending the Code of Criminal Procedure. In this context, without trying to be exhaustive, one could perhaps mention Ss. 153A, 155, 156, 160, 186, 188, 189, 190, 202, 264, 265, 271, 272, 273, 274, 275, 276, 278, 284, 288, 290, 295A, 298, 323, 352, 355, 370, 384-389, 434, 468, 471, 477A, 482, 484, 486, 487, 493, 498, 504, 505, 506, 507, 509, and 510 of the Indian Penal Code, by way of example,

(b) *Amendment of the Law relating to Investigation as suggested by the Law Commission of 1955 :*

The law relating to police investigation as contained in the Code of Criminal

5. Hari Singh Gour : Penal Law of India, 1963, Vol. 11, p. 1635.

6. For a case of this nature a reference is invited to *Baladin v. State of U. P.*, AIR 1956 S C 181 = 1956 Cr L J 345.

7. Salmond : On Jurisprudence, 11th Edn. 1957, p. 114.

8. Ibid.

3. *Birco v. State*, AIR 1960 All 509 : 1960 Cr L J 1059.

4. P. B. Gajendragadkar, C. J. of India : Law, Liberty and Social justice, 1965, pp 63-64.

Procedure also needs to be amended to make it more effective and foolproof. In this connection some of the weighty recommendations of the Law Commission of India as mentioned below ought to be given effect to without further delay.

(i) When a police officer records a statement under S 161 of the Criminal Procedure Code the person making the statement if he is able to read it for himself should be required to read what has been recorded and sign and date it and certify that it is a correct record of his statement.

(ii) The law should be amended so as to provide that the investigating officer should record the statement of every person whom the prosecution proposes to examine as a witness and that the statement should as far as possible be in the witness's own words.

(iii) Section 103 of the Criminal Procedure Code may be amended so as to permit the officer conducting a search to call as witnesses even persons not residing in the locality.

(iv) Section 167 of the Criminal Procedure Code should be amended to enable a Magistrate to remand an accused into custody for a period exceeding fifteen days if investigation is not completed within that period. The law should however also fix a maximum period beyond which such a remand cannot be granted.

(v) The duty of supplying copies of statements of witnesses, documents and the like to the accused should be placed upon the Court and not upon the police.

(vi) In cases where the documents to be supplied to the accused are voluminous the Court might be empowered to dispense with such supply and instead allow the accused and his counsel to inspect them in Court (9).

(c) *Suggestions for further Amendment of the Police Procedural Law*

(i) Section 161 Criminal P C

At present it is no offence in this country to make a deliberately false statement before the investigating officer, for the corresponding penal section i.e. S 193 of the Indian Penal Code punishes making of a false statement only when there is an obligation to state the truth. Section 161 (2) Criminal P C merely lays down that a person who is being examined by a police-officer in course of an investigation shall be bound to answer all questions relating to the case under investigation

other than questions the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. Since the word 'truly' does not figure in S 161 (2) Criminal P C after the word 'answer' the penal provision contained in S 179 Penal Code does not also have any application in regard to a case of refusal to answer questions put by the investigating officer in course of the investigation. This indeed is a serious lacuna in the police procedural law and it only encourages unscrupulous witnesses to lie with impunity. Moreover, such witnesses can state one thing to the investigating officer and quite a different thing to the trial Court (10). In its present form the section thus fails to curb the vice of perjury which is rather wide spread in this country and indirectly hampers the cause of investigation. If the purpose of an investigation is to find out the truth and if it is the duty of a citizen to assist in the discovery of that truth by honestly supplying the information in his possession the section needs to be amended forthwith by inserting the word 'truly' after the word 'answer' so as to make it incumbent on every witness to state the truth and thus help in the administration of justice. Certainly the State cannot tell the citizens that we have appointed a police force for the prevention and detection of offences but you have no legal duty to co-operate with it by telling the truth. It is like saying 'I have passed a statute but I do not propose to abide by it' (11). If some members of the police force are found remiss or wanting the remedy lies not in stigmatising the entire force nor in making the force ineffective but in taking stern action both against individual defaulting members and against these defaulting members. Such an amendment should not however be made operative in the case of an accused as he cannot be compelled to be a witness against himself (12).

(ii) Section 162 Criminal P C

This section as it now stands can only be used by the accused to contradict a witness for the prosecution with reference to his previous statement recorded by the investigating officer under S 161 Criminal P C. In the same manner with

10 State of Kerala v Markose AIR 1962 Ker 133 1962 (1) Cri L J 610

11 State v Keshab Chandra AIR 1962 Cal 339 1962 (3) Cri L J 33 (Per P B Mukharji J)

12 Art 20 (3) Constitution of India. State of Bombay v Kathi Kalu AIR 1961 SC 1803, 1961 (1) Cri L J 856

the permission of the Court the prosecution too can, as and when necessary, contradict its own witness with reference to such a statement. Thus, this section cannot be used either by the defence or by the prosecution to contradict a witness who though examined by the police at the stage of investigation, is not examined by the prosecution as a witness in court. This means if such a witness comes on behalf of the defence, neither party will be in a position to show by means of cross-examination that he is resiling from his original statement before the police.⁽¹³⁾ This further signifies that the veracity of such a defence witness cannot be challenged successfully as he is "not a witness for the prosecution" This argument also holds good with equal force even if such a witness comes as a Court witness under S. 540, Criminal P. C.⁽¹⁴⁾ So this glaring defect needs to be remedied.

Another grave shortcoming of this section is that it runs counter to the provisions of S. 157 of the Indian Evidence Act which permits a party to use the former statement of a witness to corroborate his latter testimony in Court. It only means that the evidence which could have shown the consistency of conduct of the witness and thus enhanced his credibility, has to be shut out completely from the Court. This is certainly not conducive to the administration of justice. How many times have we not noticed a bewildered villager pointing an accusing finger to the investigating officer and saying, "so many witnesses testified to the occurrence in your very presence and even the accused admitted his guilt and yet he has gone scot-free." But does the innocent villager know that neither the statement of the witness, nor the statement of the accused, far less his confession before the police, goes in evidence before a Court of law and the mistrust of the police though conceived more than a century ago continues as strongly as ever before even in the changed circumstances of today? It is, therefore, suggested that even though a confession to an investigating officer below the rank of a gazetted officer is not made admissible (and that is the recommendation of the Law Commission), yet it is high time that this section was amended to admit statements of witnesses before the investigating police as corro-

borative evidence on behalf of either party.

Similarly, the non-confessional statement of the accused before the investigating police which often represents the truth on first blush of events and shows his untutored line of defence, should be allowed to go in evidence for either party. Commenting on this aspect of the matter Mr. Justice Mack observed in Sitaramayya's case that the shutting out under S. 162, Criminal P. C., of what the accused tells a police-officer when first questioned, opens the way for all kinds of statements being made in the committing magistrate's Court and also at the trial in conformity with advised lines of defence, which are, of course, impossible to verify and places the prosecution (or should we say truth and justice) at a great disadvantage.⁽¹⁵⁾ In view of the existing state of the law, the learned judge, therefore, advised the police to take the accused before a Magistrate, whether he makes a confession or not, and have a statement recorded under S. 164, Criminal P. C., so that the accused person can be fixed to one explanation when placed in a position which becomes incriminating unless he can offer a satisfactory account for his behaviour.

REFORM OF THE LAW OF EVIDENCE

(a) Section 25, Evidence Act.

This section makes all confessions before a police-officer inadmissible in evidence and this would be so even if the Inspector-General of Police were to record a confession by his own hand. Apart from being a permanent blot on the police, it often shuts out valuable evidence and leads to failure of justice and undeserved acquittals to the bewilderment of the common man⁽¹⁶⁾ The position on this score is, however, entirely different in England where confession before any police-officer, even of the rank of a constable, would be perfectly admissible in evidence. It is not known why even after two decades of independence and inspite of the existence of an independent and vigilant judiciary a little more of trust cannot still be placed in the cent percent national police-forces of today. Moreover, the Indian Police is not just the same as it was a few decades ago. Its higher ranks are manned by

13. *Laxman Kalu v. State of Maharashtra*, AIR 1968 SC 1390 : 1968 Cri L J 1617.

14. *Bhupal v. Emperor*, (1940) 44 Cal W N 451; *Guruditta v. Emperor*, AIR 1927 Lah 713 : 28 Cri L J 823.

15. *In re, Sitaramayya*, AIR 1953 Mad 61 : 1953 Cri L J 245.

16. For a case of this nature see *Aghnoo Nagesia v. Bihar State*, AIR 1966 SC 119.

officers who generally have not only the benefits of the highest liberal education available in the country, but in most cases come through a stiff competitive examination. And those who go up to its gazetted ranks from the subordinate cadre would hardly go up the ladder if they were officers of the type who had been indulging in questionable methods in the investigation of cases.

Even in regard to the officers of the subordinate ranks the position has materially changed from what it used to be a few years ago. In many States of India graduates and even double graduates from respectable families are now joining the cadre of the investigating officers as sub-inspectors of police. In the circumstances it is indeed demoralising to a sophisticated person to know that the moment he joins the service of the State as one of the guardians of the public peace his reputation in the eye of the law should go down to such an extent that what a person has stated to him even absolutely voluntarily should not go in evidence at all. Perhaps this is not the best way to promote either self respect or a sense of responsibility amongst the officers of the investigating cadre. Trust begets trust and it is high time that some trust was placed in the Indian Police in this matter. In the case of *Mothai Thevar* Mr Justice Mack of the Hon'ble Madras High Court observed: "I should like to give expression for what it is worth to the view which I have had for sometime that the distrust and apprehensions of the police founded on conditions of lack of education character and integrity amongst the subordinate police in 1872 do not exist today at any rate in the same degree and that the time has come for a modification of these three sections" (i.e. Ss 25, 26 and 27 Evidence Act) and S 162 Criminal P.C. and the bringing of the law relating to confession more into line with that of the United Kingdom which permits a police-officer to say in evidence what an accused person told him at the time of his arrest but rigorously shuts out any confession which the Court has no reason to think was not made voluntarily. It is my view that the removal of these shackles from police testimony is necessary if they are to be evolved into a responsible force deserving of the confidence of the public the Bar and the Courts which can be relied upon to deal severely with any police-officer found guilty of concocting a confession or giving false evidence in this

direction' — (Italics mine here in single quotation Ed) (17)

The Law Commission of India too has recommended that confessions made to gazetted police officers in Presidency towns or in other places of like importance in cases investigated by them should be made admissible in evidence (18). It is however felt that this relaxation in favour of admissibility of confessions before gazetted police officers should be extended everywhere irrespective of the fact whether the concerned cases are investigated by them or not. There might be some reason for saying that when a gazetted officer personally investigates a case he may be interested in the outcome of it but there can be none at all if the case is not investigated by him. It is to be hoped that in view of the changed circumstances better training facilities and superior quality of personnel now progressively manning even the lower investigating cadre of the police in this country voluntary confessions to officers of and above the rank of sub-inspector of police would be made admissible in evidence in not too distant a future. And even if there is still some reluctance to give this power immediately to officers of the rank of sub-inspector of police at least confessions made before superior officers of and above the rank of Deputy Superintendent of Police should be made admissible in evidence without further delay.

(b) Section 27, Evidence Act

This section as it now stands bars the admissibility of a statement within the meaning of S 27 Evidence Act even if such a statement leads to the discovery of a fact unless the person making the statement was in fact in police custody at the time of making such statement. Though judicial decisions have given a most extended meaning to the expression "police custody" and held that whenever an accused appears before a police officer and makes an incriminating statement he is deemed to be in police custody (19) yet the legal position remains as puzzling as ever before. In *Durlav's case* Rankin

17 *In re Motthai Thevar*, AIR 1952 Mad 585 1952 Cr L J 1240

18 Report of the Law Commission of India 1968, Vol II, p 763

19 *State of U.P. v Deoman Upadhye*, AIR 1960 SC 1125=1960 Cr L J 1504 *Santokhi v Emperor*, AIR 1933 Pat 149 (SB) *Legal Remembrances v Lalit*, AIR 1922 Cal 842=22 Cr L J 562 *In re Ramchandra*, AIR 1920 Mad 181 = 1920 Cr L J 616.

J. observed, "There might be reason in saying that if a man is in custody, what he may have said cannot be admitted in evidence, but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody" (20) Though the Supreme Court has rehabilitated S. 27 of the Evidence Act by its decision in Deoman Upadhy's case, yet this paradox pointed out by Rankin, J., has not so far been resolved by appropriate legislative action (21) Without going into the long legislative history of this section, suffice it to say that the section in question should be so recast as to make all statements leading to the discovery of facts admissible in evidence whether the person making the statement is at liberty or in police custody. The class of persons giving such information to the police without surrendering themselves to custody, e.g. by means of a letter, though uncommon, is by no means rare. (22)

20. *Durlav v. Emperor*, AIR 1922 Cal 297 = 33 Cri L J 546.

21. S C Sarkar, *Law of Evidence*; 1964, Vol. I, p 287.

22. Dissenting Judgment of Subba Rao J. in *State of U P. v. Deoman Upadhy*, AIR 1960 SC 1125 = 1960 Cr L J 1504; *Baleswar Rai v. State of Bihar*, 1964 (1) Or L J 564 (SC).

CONCLUSION

It is hoped that the very limited amendments of the law, as suggested in this paper, would not be regarded as either sweeping or far too radical in their scope and amplitude. It has got to be realised that though the individual rights of the accused have to be respected even while he is facing an indictment for an offence, yet the protection of society demands that the malefactor should be successfully brought to book so that the law-abiding citizens can follow their avocations of life in an atmosphere of peace and tranquillity. Of course, criminal investigation has to be conducted with a sense of utmost fairness to the suspected criminal, but at the same time, it should not be made so ineffective as to permit "scores of guilty men" to escape punishment (23) "The difficulty of proceeding against offences is a great cause of feebleness in the executive power of justice, and of impunity to crime". (24) Therefore, a system of procedural law that unduly restricts the activity of the law enforcement agency of the State indeed defeats the very purpose for which it exists.

23. R. Deb, *Principles of Criminology, Criminal Law and Investigation*, 1968, Vol. I, p. 173.

24. Jeremy Bentham, *Theory of Legislation*, Kegan Paul, 1896, pp. 420 421.

FUDDLED CRIMINATION

(By M. MARCUS M. L., Advocate, Kottayam.)

"Men only feel the smart but not the vice . . ."

"And certain laws by sufferers thought unjust . . ."

(Imitations of Horace by Alexander Pope).

The law makes provision for the admission of confession in evidence in "Criminal Proceeding" due to its anxiety to catch at the hilt of guilt. The presumption of innocence of an accused is deep rooted in law, that is why it ordains that the proof of guilt must be established "beyond the shadow of reasonable doubt" by permitted and legal means. The whole framework of the law of evidence is designed to ensure this legal proof.

The basis of admissibility of confession in "Criminal Proceedings" is that every person is the best guard of his own interests and therefore any statement made by a person against himself must contain truth. This is the reason why Courts hold the view that a voluntary confession is best proof of guilt.

The Indian Evidence Act in S. 24 de-

clares that a confession caused by inducement, threat or promise from person in authority and having reference to the charge against the accused is irrelevant in criminal proceeding if it "appears" to the Court that the confession was precipitated in any of the aforesaid forbidden modes. The word "appears" gives the scope for judicial discretion in determining the voluntary nature of a confession. The quantum of proof evidencing inducement is lesser and it is brought forth in *Re, Ahmad*, AIR 1950 Mys 82 where their Lordships Ramayya and Mallappa observed "S. 24 does not contemplate such strict proof as required by S. 3 for holding that a confession was caused by inducement, threat or promise." The same note is struck in a Calcutta case *Emperor v. Thakurdas Mala*, AIR 1943 Cal 625 : 45

Cr L J 155 holding it is not necessary that it should be proved that the confession was brought about by improper inducement. It is quite sufficient if the circumstances are placed before the Court which would make it appear that the confession was so induced. These rulings are sufficient to indicate the caution with which a Court would admit a confession in evidence. As a correlative of this principle the burden of proving that a confession is voluntarily is saddled on the prosecution. Section 164 Clause 3 of the Code of Criminal Procedure while prescribing the mode of recording confession by a Magistrate makes it imperative that the Magistrate should have reason to believe that the accused made the confession voluntarily. This principle is expressed by saying it is only when an accused person speaks with animus confitendi that his utterance becomes a confession. —Page 152 Principles and Digest of the Law of Evidence by M. Monir. The Indian Penal Code while defining "reason to believe" says "a person is said to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise."

Various types of inducements used to elicit confessional statements are mentioned in the books but we are concerned with the specific case of inducement caused by supply of intoxicants to the accused and it is difficult to hold the view that a drunken confession could be admitted in evidence even if the liquor was administered to the accused without reference to the charge. Taylor in his 'A Treatise on the Law of Evidence' 2nd Edition at Page 595 mentions the case of *B. v. Spilshury* (1835) 7 Cland. R. 187, saying that a confession is admissible even if the prisoner is made drunk since the administration of liquor may not have any reference to the charge. In this connection it is pertinent to refer A treatise on the System of Evidence in Trials at Common Law Vol I by Prof. Wigmore at Page 922 where he observes "notice here first that a confession in the language of Lord Hale is a conviction or in Sergeant Hawkins's phrase the highest conviction that can be made."

I do not think that we can with propriety make any discrimination between cases of liquor inducement made with or without reference to the charge. The modern development in mental science has revealed that the pronounced effect of alcohol is the lifting of the curtain of

inhibition in man so much so this voluntary act of inhibiting a thing is struck at the root. In this circumstance how can we say that the confession of a drunk accused is voluntary simply because the inducement of drink was made without reference to the charge. It follows therefore that we cannot fix any hard and fast rule on the point. Roscoe's Criminal Evidence 15th Edition page 41 treating of inducement of a temporal nature reveals

on this point there are but few authorities. Sexton 1832 said if you will give me a glass of gin I will tell you all about it" and the glass of gin was given to him. He then made the confession which Best J refused to admit in evidence. Thus the pivot of a confessional statement is its voluntariness which is well illustrated by Phipson in his Work on Evidence 8th Edition page 219 explaining the principle to the effect that the voluntary act of confessing a crime is a wilful act. When we examine the wilfulness in the confession of a drunken accused we appreciate the fallacy of the strict interpretation of law on confession with the legal quibble that liquor offered to an accused without reference to the charge against him is productive of a blemishless confession. It may be mentioned that all other modes of inducement do allow the accused to use his intelligence to succumb to it or not but inducement by liquor stands on a different footing since liquor banishes the reason of the accused. Let us cast an eye on Muslim Law on this matter. Principles of Mohammedan Jurisprudence by Abdur Rahim page 362 reads.

"an admission must however be unconditional and it must be voluntary so that if obtained by coercion it is not binding, nor if made in jest." "I am more concerned with the terminal portion of the lines quoted. The drunken accused may even speak in a tone of jest and the Magistrate might not feel it as planted emotion. He may not find visible facial expression of fear in the accused but none the less the accused is incapacitated by the drink to appreciate what he speaks and its real consequence since his inhibition is wiped away by alcohol.

The General Hindu Jurisprudence" (Tagore Law Lectures) by Priyanath Sen treating of the adjectival law on page 373 observes "A decision obtained by fraud, or force is liable to be vacated on proof that it was so obtained so also a litigation against a person not in sound state of mind by reason of intoxication is void and is to be annulled."

To conclude it suffices to say that the state of law regarding inducement by liquor to confess as it exists today is liable to destroy the safety of an accused in a criminal trial. I am of the opinion that legislative interference should take place to enable the medical examination of an accused including his blood test to appraise the quantum of alcohol in him with reference to his liquor tolerance prior to the recording of his confession by a Magistrate. This will avert unknowing injustice at the hands of judicial officers, and at the same time give more moral support to a conviction by him. This will be a practical device ensuring the safety of the prisoner at the dock and

stability of judicial integrity. That is why Prof. G. D. Nokes of the University of London says "an admission must be a conscious act and if it is not it will have very little weight. The effect of anaesthetics and drugs remain to be decided in England." 'An Introduction to Evidence,' 2nd Edition, page 262.

The curt utterance of Justice Harlan Stone "The law itself is on trial in every case as well as the cause before it" (Barnes and Teetters in their "New Horizons in Criminology"), is most applicable to this state of Law of Evidence touching inducement of a temporal nature leading to confession of guilt, by the drunken accused.

THE FOREIGN MARRIAGE ACT, 1969

(Act 33 of 1969)^a

[31st August, 1969.]

An Act to make provision relating to marriages of citizens of India outside India.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title.

This Act may be called the Foreign Marriage Act, 1969.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "degrees of prohibited relationship" shall have the same meaning as in the Special Marriage Act, 1954;

(b) "district," in relation to a Marriage Officer, means the area within which the duties of his office are to be discharged;

(c) "foreign country" means a country or place outside India, and includes a ship which is for the time being in the territorial waters of such a country or place;

(d) "Marriage Officer" means a person appointed under section 8 to be a Marriage Officer,

a. Received the assent of the President on 31-8-1969. Act published in Gaz. of Ind., 31-8-1969, Pt. II-S. 1, Ext. p. 389.

For Statement of Objects and Reasons, see Gaz. of Ind., 10-5-1969, Pt. II-S. 2, Ext. p. 451; and for Joint Committee Report, see Gaz. of Ind., 12-7-1969; Pt. II-S. 2, Ext. p. 8.

(e) "official house," in relation to a Marriage Officer, means —

(i) the official house of residence of the officer;

(ii) the office in which the business of the officer is transacted;

(iii) a prescribed place, and

(f) "prescribed" means prescribed by rules made under this Act.

3. Marriage Officers.

For the purposes of this Act, the Central Government may, by notification in the Official Gazette, appoint such of its diplomatic or consular officers as it may think fit to be Marriage Officers for any foreign country.

Explanation—In this section, "diplomatic officer" means an ambassador, envoy, minister, high commissioner, commissioner, charged affairs or other diplomatic representative or a counsellor or secretary of an embassy, legation or high commission.

CHAPTER II

SOLEMNIZATION OF FOREIGN MARRIAGES

4. Conditions relating to solemnization of foreign marriages.

A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:—

(a) neither party has a spouse living,

(b) neither party is an idiot or a lunatic,

(c) the bridegroom has completed the age of twenty-one years and bride the age of eighteen years at the time of the marriage and

(d) the parties are not within the degrees of prohibited relationship:

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them such marriage may be solemnized notwithstanding that they are within the degrees of prohibited relationship

x x x x x

CHAPTER V PENALTIES

19 Punishment for bigamy

(1) Any person whose marriage is solemnized or deemed to have been solemnized under this Act and who, during the subsistence of his marriage contracts any other marriage in India shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code and the marriage so contracted shall be void

(2) The provisions of sub section (1) apply also to any such offence committed by any citizen of India without and beyond India

20 Punishment for contravention of certain other conditions for marriage

Any citizen of India who procures a marriage of himself or herself to be solemnized under this Act in contravention of the condition specified in clause (c) or clause (d) of section 4 shall be punishable—

(a) in the case of a contravention of the

condition specified in clause (c) of section 4, with simple imprisonment which may extend to fifteen days or with fine which may extend to one thousand rupees, or with both, and

(b) in the case of a contravention of the condition specified in clause (d) of section 4 with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees or with both

21 Punishment for false declaration

If any citizen of India for the purpose of procuring a marriage intentionally—

(a) where a declaration is required by this Act makes a false declaration or

(b) where a notice or certificate is required by this Act signs a false notice or certificate, he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine

22 Punishment for wrongful action of Marriage Officer

Any Marriage Officer who knowingly and wilfully solemnizes a marriage under this Act in contravention of any of the provisions of this Act shall be punishable with simple imprisonment which may extend to one year or with fine which may extend to five hundred rupees or with both

x x x x x

TO AMEND S 200 (aa), CRIMINAL P C

(By SUDHIR CHANDRA RAY, B L., Advocate Midnapore W B)

Misconception generally arises in the mind of Magistrates as to the scope of S 200 (aa) of the Criminal P C which runs as follows —

When the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a court or by a public servant acting or purporting to act in the discharge of his official duties”

The examination of a complainant” means his examination under S 200 Criminal P C when the petition of complaint has been filed and not examination of the complainant during the whole trial. No complainant can ever be exempted from examination during the course of the trial

Take for instance there is a Municipal Prosecution on the complaint of a Chair-

man, S 200 (aa) does not exempt his examination during trial. But the Chairman though a material witness is not examined.

The Magistrate wrongly conceives that the Chairman need not be examined because he is privileged under S 200 (aa) Criminal P C

On the background of such a misconception of the law an order of conviction amounts to miscarriage of justice

It is therefore suggested that after S 200 (aa) Criminal P C the following clause may be added —

but this does not exempt any public servant from examination as a P W — during the course of the trial” Unless the law is amended and made explicit unwarranted and illegal prosecution by public servants shall go unnoticed innocent men shall suffer and the cause of justice will be made a casualty

THE Criminal Law Journal REPORTS

1970

1970 Cri. L. J. 1 (Vol. 76, C. N. 1) =
AIR 1970 SUPREME COURT 7
(V 57 C 3)

(From Punjab. 1966 Cri LJ 734)

J. C. SHAH, S. M. SIKRI AND
V. RAMASWAMI, JJ.

Municipal Corporation of Delhi, Appellant v. Jagdish Lal and another, Respondents.

Criminal Appeal No. 8 of 1966, D/- 27-5-1969.

(A) Delhi Municipal Corporation Act (1957), S. 476 (1) (h) — Expression "other legal proceedings" in S. 476 (1) (h) includes power to institute complaint before Magistrate — Power can be exercised only by the Commissioner — Act contains no provision which confers the power on any one else. AIR 1960 SC 576 & AIR 1936 PC 253 (2), Rel. on.

(Para 3)

(B) Criminal P. C. (1898), S. 417 (3) — "Complainant" — Prosecution under S. 20, Prevention of Food Adulteration Act — Offence committed within the Delhi Municipal Corporation area — Complaint can be filed either by the Municipal Corporation or by a person authorised by it in that behalf by a general or special order — Municipal prosecutor authorised by resolution of Municipal Corporation to file complaint — In filing the complaint he acts only in a representative capacity and the municipal corporation is the complainant within the meaning of S. 417 (3), Criminal P. C. — *Qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to

do it himself) — Hence petition for special leave for filing appeal against acquittal of accused and the appeal petition filed by the Municipal Corporation is properly instituted: 1966 Cri LJ 734 (Punj), Reversed — (Prevention of Food Adulteration Act (1954), S. 20 (1)) — (Civil P. C. (1908), Preamble — *Maxims* — *Qui per alium facit per seipsum facere videtur*) — (Contract Act (1872), S. 226 — Complaint filed by Municipal prosecutor on authority of resolution of Municipal Corporation — Complainant is Municipal Corporation). (Para 4)

Cases Referred: Chronological Paras

(1960) AIR 1960 SC 576 (V 47) =

1960-2 SCR 739 = 1960 Cri LJ 752,

Ballabhdas Agarwala v. J. C.

Chakravarty

3

(1936) AIR 1936 PC 253 (2) (V 23) =

63 Ind App 372, Nazir Ahmad v.

King Emperor

3

Mr. Bishan Narain, Senior Advocate (M/s K. K. Razada and A. G. Ratnaparkhi, Advocates, with him), for Appellant, Mr. Sardar Bahadur and Miss Yougindra Khushalani, Advocates, for Respondent No. 1; Mr. R. N. Sachthey, Advocate, for Respondent No. 2

The following judgment of the Court was delivered by

RAMASWAMI, J.: On August 29, 1960, Shri Sham Sunder Mathur, Municipal prosecutor of the Delhi Municipal Corporation filed a complaint in the Court of Magistrate First Class against the respondent, Jagdishlal under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954 (37 of 1954) In the said complaint Shri Sham Sunder Mathur said that he was competent to file the complaint under Section 20 of the

aforesaid Act in accordance with a resolution passed by the Corporation in its meeting held on December 23, 1958. By his order dated April 30, 1962 the learned Magistrate acquitted the respondent. The Delhi Municipal Corporation made an application to the High Court asking for special leave under Section 417 of the Code of Criminal Procedure to appeal against the order of acquittal. The application was granted on September 3, 1962. When the appeal came up for hearing a preliminary objection was raised on behalf of the respondent that the only person competent to file the appeal was the complainant Shri Sham Sundar Mathur. But the leave application was not filed by him and therefore, the Municipal Corporation was not competent to prosecute the appeal. It was contended that only the complainant was competent to present an application for special leave under Section 417 (3) of the Code of Criminal Procedure. As the complainant in this case was Shri Sham Sundar Mathur the appeal could not be filed by the Delhi Municipal Corporation. The High Court upheld the preliminary objection of the respondent and dismissed the appeal by its order dated April 29, 1965. This appeal is brought by special leave on behalf of the Delhi Municipal Corporation against the judgment of the High Court dated April 29, 1965 in Cri A No 163 D of 1962.

2 Section 20 of the Prevention of Food Adulteration Act 1954 states

(1) No prosecution for an offence under this Act shall be instituted except by or with the written consent of, the Central Government or the State Government or a local authority or a person authorised in this behalf by general or special order by the Central Government or the State Government or a local authority.

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in Section 12, if he produces in Court a copy of the report of the public analyst along with the complaint.

Section 417 sub sections (1) (2) and (3) of the Code of Criminal Procedure after its amendment by Act 26 of 1953 provide

"(1) Subject to the provision of sub section (5) the State Government may in any case direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal

passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (XXXV of 1946), the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

3 The principal question to be determined is whether the complaint dated August 29, 1960 was instituted by the Delhi Municipal Corporation. It is argued on behalf of the respondent that the complaint petition was not made and signed by the person competent under the Delhi Municipal Corporation Act 1957 to exercise powers of the Corporation in the matter of institution of legal proceedings. In our opinion there is substance in this contention. The only provision under the Delhi Municipal Corporation Act, 1957, which confers powers to institute legal proceedings is Section 476 (1) (h) which states

(1) The Commissioner may—

(h) institute and prosecute any suit or other legal proceeding or with the approval of the Standing Committee withdraw from or compromise any suit or any claim for any sum not exceeding five hundred rupees which has been instituted or made in the name of the Corporation or of the Commissioner.

It is clear that the phrase "other legal proceedings" includes the power to institute a complaint before a Magistrate and hence it is the Commissioner alone who could exercise the power as there is no other provision in the Act which confers such power on anyone else. This view is supported by the decision of this Court in *Billaldas Agarwala v J C Chakravarty* 1960-2 SCR 739 = (AIR 1960 SC 576) in which it was pointed out that a complaint under the Calcutta Municipal Act 1923 as applied to the Municipality of Howrah would only be filed by the authorities mentioned therein and not by

an ordinary citizen. Section 537 of that Act provided that the Commissioners may institute, defend or withdraw from legal proceedings under the Act, under Section 12 the Commissioners can delegate their functions to the Chairman, and the Chairman may in his turn delegate the same to the Vice-Chairman or to any municipal officer. It was observed in that case that the machinery provided in the Act must be followed in enforcing its provisions, and it was against the tenor and scheme of the Act to hold that Section 537 was merely enabling in nature. The principle invoked in that case was that adopted by the Privy Council in *Nazir Ahmad v. King Emperor*, 63 Ind App 372 at p. 381=(AIR 1936 PC 253 (2) at p. 257) viz : that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. It was, therefore, held that if a legal proceeding was instituted under the Municipal Act in question, it must be done in accordance with the provisions of the Act and not otherwise.

4. But the question presented for determination in the present appeal is somewhat different. Under Section 20 of Act 37 of 1954 the prosecution for the offence may be instituted either (a) by the Central Government or the State Government or a local authority or (b) a person authorised in that behalf by general or special order by the Central Government or the State Government or a local authority. Section 2 (vii) of Act 37 of 1954 defines a "local authority" to mean "in the case of a local area which is a municipality, the municipal board or municipal corporation". A complaint under Section 20 of the Act may, therefore, be instituted either by the Municipal Corporation or by a person authorised in its behalf by general or special order by the Municipal Corporation. The Resolution of the Delhi Municipal Corporation dated December 23, 1958 reads as follows —

"SUBJECT: Authorising the Municipal Prosecutor and the Assistant Municipal Prosecutor to launch Prosecutions under Section 20 of the Prevention of Food Adulteration Act, 1954.

The area under the jurisdiction of the Delhi Municipal Corporation has been declared a 'local area' under Section 2 (vii) of the Prevention of Food Adulteration Act, vide Chief Commissioner's Notification No. F.32 (30)/58-M and PH (1), dated 13th June, 1958 published in the Delhi Gazette (Part IV) dated 26th June, 1958

and consequently the Municipal Corporation of Delhi is the Local Authority for that area within the meaning of Section 2 (vii) of the said Act.

Section 20 of the Prevention of Food Adulteration Act, 1954 contemplates the appointment of persons who shall be authorised to institute prosecutions under this Act by the Local Authority concerned.

Shri Sham Sunder Mathur, M.A., LL.B., Municipal Prosecutor and Shri Bankey Behari Tawkley, Assistant Municipal Prosecutor were authorised by the erstwhile Delhi Municipal Committee under the above section "

"Shri Vijay Kumar Malhotra moved the following resolution, which was seconded by Shri Prem Sagar Gupta

Resolved that the recommendations of the Commissioner vide letter No 139/Legal/58, dated 1st December, 1958, regarding authorising the Municipal Prosecutor and the Assistant Municipal Prosecutor to launch prosecutions under Section 20 of the Prevention of Food Adulteration Act, 1954 be approved

"The resolution was carried"

In the present case Shri Sham Sunder Mathur, Municipal Prosecutor filed the complaint under Section 20 of Act 37 of 1954 under the authority given to him by the resolution of the Municipal Corporation. Since the Municipal Corporation, Delhi is a local authority within the meaning of Section 20 of Act 37 of 1954 and since it conferred authority on the Municipal Prosecutor the complaint was properly filed by Sham Sunder Mathur. The question is whether the Delhi Municipal Corporation or Shri Mathur was the complainant within the meaning of Section 417 (3) of the Code of Criminal Procedure. It was argued on behalf of the respondent that the complainant was Shri Sham Sunder Mathur, the Municipal Prosecutor and the Delhi Municipal Corporation was not competent to make an application for special leave under Section 417 (3), Cr. P. C. We are unable to accept this argument as correct. It is true that Shri Sham Sunder Mathur filed the complaint petition on August 20, 1960. But in filing the complaint Shri Mathur was not acting on his own personal behalf but was acting as an agent authorised by the Delhi Municipal Corporation to file the complaint. It must, therefore, be deemed in the contemplation of law that the Delhi Municipal Corporation was the complainant in

the case. The maxim *qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself) illustrates the general doctrine on which the law relating to the rights and liabilities of principal and agent depends. We are therefore, of opinion that Shri Mathur was only acting in a representative capacity and that the Delhi Municipal Corporation was the complainant within the meaning of Section 417 (3) of the Code of Criminal Procedure and the petition for special leave and the appeal petition were properly instituted by the Delhi Municipal Corporation. For these reasons we allow the appeal set aside the judgment of the High Court dated April 9, 1965 and direct that the appeal should be remanded to the High Court for being heard afresh and disposed of according to law.

Appeal allowed

1970 Cri L J 4 (Vol 76, C N 2) =

AIR 1970 SUPREME COURT 20

(V 57 C 6)

(From Calcutta)*

S M SIKRI R S BACHAWAT AND
V RAMASWAMI JJ

Rash Behari Chatterjee, Appellant v
Fagu Shaw and others Respondents

Criminal Appeal No 5 of 1967 D/- 28-
4 1969

Penal Code (1860), Section 441 — In
tention to annoy — Suit by A against B
for ejectment and khas possession of dis-
puted land — Decree for ejectment pass-
ed — B's appeal against decree dismissed
— In execution of decree, A obtaining
actual physical possession of land on 3-2-
1963 with police help — B trespassed on
land on night of 16-2 1963 and on 17-2-
1963 they were found making preparations
for construction of bamboo structures —
Held that intention of B was to annoy
A who was in possession of land —
Though the land was lying vacant after
A obtained possession the actual posses-
sion must be held to be of A — Law did
not require that intention must be to an-
noy person who is actually present at time
of trespass — Cri Rev No 183 of 1966,
D/- 11-5-1966 (Cal), Reversed, AIR 1964
SC 956, Applied (Paras 4, 5)

*(Cri Revn No 183 of 1966 D/ 11-5-
1966—Cal)

JM/JM/D299/69/SSG/D

Cases Referred Chronological Paras
(1964) AIR 1964 SC 986 (V 51) =
1964-5 SCR 916=1964 (2) Cri LJ
57, Mathuri v State of Punjab 2

Mr Sukumar Ghose Advocate, for Ap-
pellant, Mr D N Mukherjee, Advocate,
for Respondents (Nos 1 to 8) Mr P K
Chakravarti, Advocate for Respondent
(No 9)

The following Judgment of the Court
was delivered by

SIKRI, J This appeal by special leave
is directed against the judgment of the
High Court at Calcutta allowing the cri-
minal revision and acquitting the res-
pondents of the charge under S 447,
I P C

2 The only question which arises
in the present appeal is whether
on the facts and circumstances of
the case the intent to annoy the appel-
lant has been established. The law on
the point is now settled by this Court in
Mathuri v State of Punjab 1964 5 SCR
916 at p 927=(AIR 1964 SC 986 at p 991)
Das Gupta, J speaking for the Court
after reviewing the authorities, stated the
law thus

"The correct position in law may, in our
opinion be stated thus. In order to es-
tablish that the entry on the property was
with the intent to annoy, intimidate or
insult, it is necessary for the Court to be
satisfied that causing such annoyance in-
timidation or insult was the aim of the
entry, that it is not sufficient for that pur-
pose to show merely that the natural
consequence of the entry was likely to
be annoyance, intimidation or insult, and
that this likely consequence was known
to the person entering that in deciding
whether the aim of the entry was the
causing of such annoyance, intimidation
or insult the Court has to consider all
the relevant circumstances including the
presence of knowledge that its natural
consequences would be such annoyance,
intimidation or insult and including also
the probability of something also than the
causing of such intimidation, insult or
annoyance, being the dominant intention
which prompted the entry."

This judgment was not brought to the
notice of the High Court in this case.
In view of this judgment it is not neces-
sary to review the earlier High Court
cases

3 The appellant gave the history of
the dispute between himself and the res-
pondents in his evidence. He stated that
he and his three brothers filed title suit

No. 404 of 1951 in the first Court of Munsiff at Serampur against the respondent Fagu Shaw praying for ejectment and khas possession of the land in dispute: the respondent Fagu Shaw contested the suit; on May 23, 1954, a decree of ejectment was passed; against the judgment and decree the respondent Fagu Shaw preferred an appeal before the District Judge and the appeal was dismissed; the respondent Fagu Shaw preferred a second appeal to the Calcutta High Court which was dismissed summarily; the appellant executed the decree and in September 1962 when the Nazir of Serampur Civil Court with process servers went to take delivery of possession of the case land the respondent resisted and refused to give possession, however on February 3, 1963, the Nazir with police help went to the spot for delivery of possession and the appellant obtained actual physical possession. The appellant further stated that the land was in their possession from February 3, 1963 upto February 17, 1963, when the present occurrence took place. It appears that the respondent trespassed on the land on the night of February 16, 1963, and on February 17, 1963, they were found making preparations for construction of bamboo structures on the same land and some bamboo pegs had already been posted.

4. Now the question arises whether the intention of the respondents was to annoy the appellant or not within the meaning of Section 441, I. P. C. It seems to us that on the facts of this case there cannot be any doubt that the intention of the respondents was to annoy the appellant who was in possession of the case land. There could have been no hope on the part of the respondents that they would be able to stay in possession of the land. The litigation started in 1951 and it was on February 3, 1963 that the appellant was able to obtain possession. It is only after two weeks after that day that the respondents chose to trespass and start construction. In this case we cannot find any other dominant intention which prompted the trespass.

5. The High Court seems to have proceeded on the footing that the appellant was not in actual possession of the property and further that the law requires that the complainant must not only be in actual possession but also be present at the time of trespass so as to bring the offence within the provisions of S. 441/447, I. P. C. In our view the High Court was in error in holding that the appellant

was not in actual possession of the property. The land in dispute was lying vacant after the appellant obtained possession and the actual possession must be of the appellant. Further the law does not require that the intention must be to annoy a person who is actually present at the time of the trespass.

6. In the result the appeal is allowed, the judgment of the High Court set aside and the judgment and order of the Magistrate 1st Class, Serampur, which was affirmed by the learned Additional Sessions Judge, Hoogly, restored.

7. We may mention that the Magistrate sentenced the respondents to pay a fine of Rs. 100 each and in default to suffer rigorous imprisonment for one month. We are of the view that the Magistrate was rather lenient to the respondent Fagu Shaw who seems to be an inveterate trespasser, and in the circumstances of this case the Magistrate should have sentenced him to imprisonment however short.

Appeal allowed.

1970 Cri. L. J. 5 (Vol. 76, C. N. 3) =
AIR 1970 SUPREME COURT 27
(V 57 C 8)

(From Patna AIR 1966 Pat 464)
S. M. SIKRI, R S BACHAWAT AND
V. RAMASWAMI, JJ.

State of Bihar, Appellant v. Nathu Pandey and others, Respondents.

Criminal Appeal No. 203 of 1966, D/- 23-4-1969.

(A) Constitution of India, Art. 136 — Findings recorded by High Court on appeal against conviction based on adequate evidence and not shown to be perverse — Supreme Court on appeal by special leave refused to interfere with findings.

(Para 6)

(B) Penal Code (1860), S. 149 — To attract provisions of S. 149 prosecution must establish that there was unlawful assembly and crime was committed in prosecution of its common object.

(Para 8)

(C) Penal Code (1860), Ss. 141, fourth clause and 96 — Expression "to enforce any right or supposed right" in S. 141 fourth clause — Assertion of a right of private defence within limits prescribed by law cannot fall within the expression — S. 141 must be read with Ss. 96 to 106

JM/JM/C87/69/KSB/D

dealing with right of private defence — Assembly whose common object is to defend property by use of force within limits prescribed by law cannot be designated as unlawful assembly — AIR 1950 FC 80, Rel on (Para 8)

(D) Penal Code (1860), Ss 34, 149 and 302 — Assembly with common object of preventing theft of their property exercising right of private defence — Some exceeding right of private defence and causing death but who exceeded right not known — No one accused could be held guilty either under S 302 or under S 302/149 or under S 302/34 — (Penal Code (1860), S 103)

C who was in possession of a plot and mahua trees standing thereon went to the plot along with his party with the object of preventing the commission of theft of the mahua fruits by the prosecution party in exercise of their right of private defence of property. In the altercation that followed two persons from prosecution party received fatal bhala injuries resulting in their death. Some of the accused party were armed with bhalas but it was not possible to say who were so armed and which of them inflicted the fatal wounds on the deceased. It was found that persons who caused the two deaths exceeded the right of private defence as they inflicted more harm than was necessary for the purpose of defence.

Held (1) that none of the accused could be convicted under S 302 I P C

(Para 7)

(2) that none of the accused could be convicted under S 302 read with S 149 or S 34 I P C. The object of the assembly was not unlawful. There was no common object or common intention to kill the two deceased persons. The murders were not committed in prosecution of the common object of the assembly or were not such as the members of the assembly knew to be likely to be committed. AIR 1968 Pat 464 Affirmed 1969 Pat LJR 17A (SC), Rel on AIR 1965 SC 257, Dist (Paras 9 10 11)

Cases Referred Chronological Paras

(1968) Cri Appeal No 191 of 1966

D/- 5-12-1968=1969 Pat LJR 17A

(SC) Kishori Prasad v State of Bihar

10

(1965) AIR 1965 SC 257 (V 52)=

1965 (1) Cri LJ 242 Gurdittamal

v State of U P

11

(1950) AIR 1950 FC 80 (V 37)=

1949 FCR 834=51 Cri LJ 1037,

Kapildeo Singh v The King

8

Mr D P Singh, Advocate, for Appel
Int M/s Nur Ud din Ahmed and D
Goburdhan, Advocate for Respondents

The following Judgment of the Court was delivered by

BACHAWAT J The prosecution case was that Bhaya Ramanuj Pratap Deo was the proprietor of village Phatpani and owned and possessed bakasht and garma zura lands therein including plot No 1311 and the mahua trees standing thereon. On April 10, 1962 at 3 P M his employee PW 33 Bindeshwari Singh was in charge of collection of mahua fruits in plot No 1311 and the victims Ram Swarup Singh and Ramdhari Singh were supervising the collection. PW 1 Dhaneshwari, PW 2 Deokahri, PW 3 Dewal, PW 4 Rajmatia, PW 5 Udai Singh, PW 6 Border Singh, PW 7 Moghan Chamar, PW 8 Ram Dihal Kharwar, PW 9 Ram Torai Kharwar, PW 10 Manan Singh and PW 11 Bhagur Kharwar were collecting mahua fruits when suddenly accused Mathu Pandey, Kundal Pandey and Muneshwardhar Dubey armed with garassas, Chandradeo Pandey, Dayanand Pandey and Nasir Mian armed with bhalas and Bife Bhogta, Thegu Bhogta, Nageshwardhar Dubey and Uma Shankar Dubey armed with lathis surrounded Ramswarup and Ramdhari and assaulted them with their weapons. Dewal also was assaulted by Bife and Thegu and suffered minor injuries. Ramdhari died on the spot. Ramswarup died while preparations were being made to carry him to the hospital.

2 Bindeshwari lodged the first information report at 8 P M on the same date. On April 14, 1962 accused Mathu gave a report at Nagarjun hospital. He said that on April 10, 1962 at 3 P M while he was returning home he was assaulted with lathis, garassas and bhalas by the employees of the Bhaya Sahab.

3 The following injuries were found on the dead body of Ramswarup Singh: (1) abrasion 1 1/2 x 1 1/4 with ecchymosis on anterior aspect of right knee joint, (2) another abrasion 1 1/2 x 1 1/4 with ecchymosis on anterior aspect of right leg, (3) a small abrasion with ecchymosis on anterior aspect of left knee joint, (4) an incised wound 4 x 1 1/4 x scalp on anterior aspect of the left side of the head, (5) a lacerated wound 3 1/2 x 1 1/3 x scalp with ecchymosis on right side of head and (6) a penetrating wound with clean cut margins 2' x 1' x abdominal cavity placed transversely on right hypochondrium.

drium just right to mid line with stomach and loop of large bowel bulging out of it" On opening the abdominal wall it was found that the peritoneum was congested and the stomach was perforated on its anterior wall. Injuries 1, 2, 3 and 5 were caused by hard and blunt substance such as lathi Injury No. 4 was caused by sharp cutting weapon such as garassa. Injury No 6 on the abdominal cavity was caused by some sharp pointed weapon with sharp cutting margin such as bhala. The death was due to shock and internal haemorrhage caused by the abdominal wounds.

4. The following injuries were found on the dead body of Ramdhari Singh "(1) the helix of left ear was cut, (2) a lacerated wound $\frac{1}{2}'' \times 1\frac{1}{10}'' \times 1\frac{1}{10}''$ with ecchymosis on the outer part of the left eye brow, (3) a punctured wound with clean cut margins $2\frac{1}{2}'' \times 1'' \times 1\frac{1}{2}''$ on left thigh below its middle, (4) a punctured wound with clean cut margin $1'' \times \frac{1}{4}'' \times 1''$ on posterior aspect of the left thigh in its middle, and (5) a penetrating wound with clean cut margins $2\frac{1}{4}'' \times \frac{3}{4}'' \times$ abdominal cavity on right side of the abdomen The loops of intestines were bulging out of this opening Injury No. 2 was caused by hard and blunt substance such as lathi. The other injuries were caused by a sharp pointed weapon with sharp cutting edge such as bhala Death was due to shock and internal haemorrhage caused by injury No. 5 the abdominal wound.

5. The trial Court convicted the accused-respondents Mathu, Chandradeo, Kundal, Dayanand, Bife, Thegu, Nasir, Muneshwardhar, Nageshwardhar, Umashankardhar under Section 302 read with Section 149 of the Indian Penal Code for the murders of Ramdhari and Ramswarup and sentenced them to rigorous imprisonment for life each. Bife, Thegu, Nageshwardhar and Umashankardhar were convicted under Section 147 of the Indian Penal Code and sentenced to rigorous imprisonment for six months each The remaining respondents were convicted under Section 148 of the Indian Penal Code and sentenced to rigorous imprisonment for one year each Bife and Thegu were convicted under Section 323 of the Indian Penal Code for causing hurt to Dewal and sentenced to rigorous imprisonment for six months each The sentences of each respondent were to run concurrently. The trial Court held that (1) Bhayya Saheb was in possession of plot No 1311; (2) while Ramswarup and Ramdhari were

collecting mahua on the plot, the respondents armed with bhalas, garassas and lathis inflicted fatal injuries on them with a view to forcibly prevent them from collecting the mahua, (3) Thegu and Bife assaulted Dewal with lathis, (4) the accused persons knew that there was likelihood of murders being committed in prosecution of the common object, and (5) the assailants inflicted the injuries on Ramswarup and Ramdhari with the intention of murdering them.

6. The respondents filed an appeal in the High Court of Patna The High Court allowed the appeal and set aside all the convictions and sentences The High Court found that (1) respondent Chandradeo was the thikadar of plot No 1311 and was in possession of the mahua trees standing thereon, (2) on the date of the occurrence, the members of the prosecution party including Ramdhari and Ramswarup committed theft of the fruits of the mahua trees, and the respondents had the right of private defence of property against the theft, (3) Ramswarup carrying a tangi and Ramdhari carrying a danta caused severe injuries to respondent Mathu on his head, leg and that while doing so they were not defending themselves, Mathu became unconscious. He regained consciousness on April 14, 1962, (4) the theft of mahua fruits was committed under such circumstances as might reasonably cause apprehension that death or grievous hurt would be the consequence if the right of private defence was not exercised. Accordingly, the respondents' right of private defence of property extended under Section 103 of the Indian Penal Code to voluntarily causing death to Ramdhari and Ramswarup subject to the restrictions mentioned in Section 99 (5) the person or persons who caused the two deaths exceeded the right of private defence as they inflicted more harm than was necessary for the purpose of defence These findings are based on adequate evidence and are not shown to be perverse In this appeal under Article 136 of the Constitution from an order of acquittal passed by the High Court, we are not inclined to interfere with the above findings. The question is whether in these circumstances the High Court rightly acquitted the appellants

7. The fatal wounds on the abdominal cavities of Ramdhari and Ramswarup were caused by bhalas The prosecution case was that Chandradeo, Dayanand and Nasir were armed with bhalas. The High

Court rightly held that the prosecution failed to establish that Chandradeo was armed with a bhalā. The prosecution witnesses said generally that all the respondents surrounded Ramdhari and Ramswarup and assaulted them. The prosecution case has been found to be false in material respects. It is not possible to record the finding that Chandradeo, Dayanand and Nasir were armed with bhalās. Some of the respondents were armed with bhalās but it is not possible to say which of them were so armed and which of them inflicted the fatal wounds on Ramdhari and Ramswarup. Accordingly we cannot convict any of the respondents under Section 302. The only question is whether they can be convicted under Section 302 read with either Section 149 or Section 34.

8 In order to attract the provisions of Section 149 the prosecution must establish that there was an unlawful assembly and that the crime was committed in prosecution of the common object of the assembly. Under the fourth clause of Section 141 an assembly of five or more persons is an unlawful assembly if the common object of its members is to enforce any right or supposed right by means of criminal force or show of criminal force to any person. Section 141 must be read with Sections 96 to 106 dealing with the right of private defence. Under Sec 96 nothing is an offence which is done in the exercise of right of private defence. The assertion of a right of private defence within the limits prescribed by law can not fall within the expression "to enforce any right or supposed right" in the fourth clause of Section 141. In *Kapildeo Singh v The King* 1949 FCR 834=(AIR 1950 FC 80) the High Court had affirmed the appellants' conviction and sentence under Section 147 and Section 304 read with Section 149, without considering the question as to who was actually in possession of the plot at the time of the occurrence. The High Court observed that the question of possession was immaterial and that the appellants party were members of an unlawful assembly as "both sides were determined to vindicate their rights by show of force or use of force". The Federal Court set aside the conviction and sentence. It held that the High Court Judge stated the law too loosely "if by the use of the word vindicate he meant to include even cases in which a party is forced to maintain or defend his rights". The assembly could not be designated as

an unlawful assembly if its object was to defend property by the use of force within the limit prescribed by law.

9 The charges against the respondents were that they were members of an unlawful assembly in prosecution of the common object of which, viz in forcibly preventing Ramdhari Singh and Ramswarup Singh from collecting Mahua from *Baramania field of village Phatpani and if necessary in causing the murder of the said two persons, for the purpose "that some of them caused the murders of Ramdhari and Ramswarup and that thereby all of them committed offences under Section 302 read with Section 149. We have found that respondent Chandradeo was in possession of plot No 1311 and the mahua trees standing thereon. The object of the respondents party was to prevent the commission of theft of the mahua fruits in exercise of their right of private defence of property. This object was not unlawful. Nor is it possible to say that their common object was to kill Ramdhari and Ramswarup. Those who killed them exceeded the right of private defence and may be individually held responsible for the murders. But the murders were not committed in prosecution of the common object of the assembly or were not such as the members of the assembly knew to be likely to be committed in prosecution of the common object. The accused respondents cannot be made constructively responsible for the murders under Section 302 read with Section 149.*

10 In *Kishori Prasad v State of Bihar*, Cr App No 191 of 1966, D/- 5 12-1966 (SC) the High Court convicted the appellants under Section 326/149 of the Indian Penal Code though the appellant Hirdaynaram was in lawful possession of the western portion of plot No 67 and the attempt by the prosecution party to cultivate the same was high handed. This Court set aside the conviction and sentence. Ramaswami J, observed—

In a case where the accused person could invoke the right of private defence it is manifest that no charge of rioting under Section 147 or Section 148 Indian Penal Code can be established for the common object to commit an offence attributed in the charge under Section 147 or Section 148, Indian Penal Code is not made out. If any accused person had exceeded the right of private defence in causing the death of Chitanu Rai or in injuring Gorakh Prasad it is open to the prosecution to prove the individual assault

and the particular accused person concerned may be convicted for the individual assault either under Section 304, Indian Penal Code or of the lesser offence under Section 326, Indian Penal Code. The difficulty in the present case is that the High Court has not analysed the evidence given by the parties and given a finding whether any or which of the appellants are guilty of causing the death of Chitanu Rai or of assaulting Gorakh Prasad. As we have already said, none of the appellants can be convicted of the charge of rioting under Section 148 or of the constructive offence under Section 326/149, Indian Penal Code."

We accordingly hold that the respondents cannot be convicted under Section 302 read with Section 149, Indian Penal Code. Nor is it possible to convict them under Section 302 read with Section 34. The High Court rightly found that the respondents wanted to prevent the collection of mahua fruits and that a common intention of all of them to murder Ramdhari and Ramswarup was not established.

11. The case of Gurdittamal v. State of U. P., AIR 1965 SC 257 is distinguishable. In that case the court found that (1) the accused persons who were in possession of a field had exceeded the right of private defence of property by murdering four persons who were peacefully harvesting the crops standing on the field, and (2) each of the four appellants killed one member of the prosecution party and each of them individually committed an offence under Section 302 (see paragraph 6 and end of paragraph 14). In these circumstances, the Court upheld their conviction and sentence under Section 302. The Court also found that the appellants had the common intention to kill the victims and could be convicted under Section 302 read with Section 34 (see paragraphs 12 and 9). In the present case, none of the respondents can be convicted under Section 302. As a common intention to murder Ramdhari or Ramswarup is not established, they cannot be convicted under Section 302 read with Section 34.

12. In the result, the appeal is dismissed.

Appeal dismissed.

1970 Cri. L. J. 9 (Vol. 76, C. N. 4) =
AIR 1970 SUPREME COURT 45
(V 57 C 13)

(From Bombay: AIR 1968 Bom 400)
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Mohd. Hussain Umar Kochra etc., Appellants v. K. S. Dalipsinghji and another etc., Respondents.

Criminal Appeals Nos. 139 to 144 of 1966, D/- 31-3-1969.

(A) Sea Customs Act (1878), S. 167 (81) — Import of gold by air — Fraudulent evasion of restrictions imposed under Foreign Exchange Regulation Act — Offence punishable under section — Conspiracy to evade restriction — Punishable under Section 120B, Penal Code — (Foreign Exchange Regulation Act (1947), Sections 8 and 23A) — (Penal Code (1860), Section 120B).

A fraudulent evasion of the restriction imposed by the notification dated 25-8-1948 under Section 8 (1), Foreign Exchange Regulation Act, 1948 on the import of gold by air is punishable under Section 167 (81), Sea Customs Act, 1878 and the criminal conspiracy to evade the restriction is punishable under S. 120B, Penal Code. (Para 13)

Section 23A of the Foreign Exchange Regulation Act provided that the restrictions imposed by Section 8 (1) shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly. The effect of S. 23A was that the contravention of the notification under Section 8 (1) attracted to it each and every provision of the Sea Customs Act, 1878 in force for the time being including Section 167 (81) of the Sea Customs Act 1878 which was inserted by the Amending Act XXI of 1955.

(Para 11)

The notification dated the 25th August 1948 issued under Section 8 (1) of the Foreign Exchange Regulation Act, 1947 restricted the bringing into India of gold from any place outside India by air as well and the statutory fiction created by Section 23A of Foreign Exchange Regulation Act does not cut down the wide ambit of the notification or limit its application to imports by sea and land only because of the fact that Section 19 of the Sea Customs Act authorised the imposition of prohibitions and restrictions on the imports and exports of goods by

land and sea only. An import of gold by air without the permission of the Reserve Bank is a breach of the notification and the breach attracts to it the provisions of Section 167 (81) of the Sea Customs Act 1878. (Para 12)

Further it can also be said that the import or export by air is a species of import or export by land, inasmuch as the aircraft carrying goods lands or takes off from land and the prohibition or restriction on the import or export of goods by land is a prohibition or restriction on the import or export by aircraft landing or taking off from land. (Para 13)

(B) Penal Code (1860) Section 120A — Agreement is gist of offence — General and separate unrelated conspiracies — Distinction — Essentials of single general conspiracy

Criminal conspiracy, as defined in Section 120 A is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privy with each other each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. AIR 1967 SC 450 and AIR 1957 SC 340 and 1965-2 All ER 449 Ref to (Para 15)

Held that in the instant case there was only one single general conspiracy to smuggle gold into India from foreign countries in contravention of the restriction imposed by notification under Section 8 of the Foreign Exchange Regulation Act 1948. (Para 16)

(C) Evidence Act (1872), Section 124 — Communications to public officer in official confidence — Cable addresses and cables sent to those addresses are not communications to public officer in official confidence — Court acts wrongly in allowing the claim of privilege from production made by the Telegraph Check Office. (Para 17)

(D) Criminal P C (1898), Section 503 — May issue a commission — Application for issue of a commission for examination of witness either in Switzerland or U K or in Pakistan — No particulars indicating willingness of witness to be examined on commission given — Even address of the witness not given — Court cannot issue a roving commission to a Court or authority in any of those countries — Application is liable to be rejected on the ground of want of good faith alone. (Para 18)

(E) Criminal P C (1898), Section 540 — Recalling witness — Court has inherent power to recall a witness, if satisfied that he is prepared to give evidence which is materially different from what he had given at the trial — Party asking for the recall of witness not placing material before court on which it could be so satisfied — Court acts rightly in rejecting the prayer. (Para 19)

(F) Criminal P C (1898), Section 411A — Supreme Court appeals — Practice — New point — Point not taken either at trial court or High Court — Point ought not to be allowed to be raised for the first time in the Supreme Court. (Para 20)

(G) Constitution of India, Article 136 — Supreme Court appeals — Practice — Normally Supreme Court does not reappraise evidence unless the findings are perverse or are vitiated by any error of law or there is a grave miscarriage of justice. (Para 21)

(H) Evidence Act (1872), Sections 133 and 114, Illustr (b) — Accomplices evidence — Court will not accept it unless corroborated in material particulars.

The combined effect of Sections 133 and 114 illustration (b) is that though a conviction based upon accomplice evidence is legal the court will not accept

such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another. AIR 1963 SC 599 and (1916) 2 KB 658, Rel. on. (Para 21)

(I) Evidence Act (1872), Sections 133 and 114, Illus. (b) — Accomplice — Participes criminis in respect of actual crime charged is an accomplice — Though witness concerned may not confess to his participation, court has to decide on a consideration of the entire evidence whether he is an accomplice. 1954 AC 378, Rel. on. (Para 28)

(J) Evidence Act (1872), Sections 133 and 114, Illus. (b) — Several accomplices simultaneously and without previous concert giving consistent account of the crime implicating accused — Court may accept the several statements as corroborating each other. AIR 1968 SC 832 and AIR 1949 PC 257, Rel. on. (Para 33)

(K) Evidence Act (1872), Section 30 — Retracted confession of co-accused — Though it can be taken into consideration against the other accused it can be used only in support of other evidence — It cannot be made the foundation of a conviction. AIR 1949 PC 257, Rel. on. (Para 34)

(L) Penal Code (1860), Sections 71 and 120B — Separate sentences for offence under Section 167 (81), Sea Customs Act and under Section 120B, Penal Code — Not illegal — (Criminal P. C. (1898), Section 35).

The offence under Section 167 (81) of the Sea Customs Act, 1878, is punishable with imprisonment for a term not exceeding two years or to fine or to both. A party to a criminal conspiracy to commit this offence is punishable under S 120B(1) of the Penal Code in the same manner as if he had abetted the offence. A criminal conspiracy is a separate offence, punishable separately from the main offence. (Para 42)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 832 (V 55) =
70 Bom LR 540 = 1968 Cri LJ
1017, Haroon Haji Abdulla v.
State of Maharashtra 33
(1967) AIR 1967 SC 450 (V 54) =
1967-1 SCR 595 = 1967 Cri LJ

414, S. K. Khetwani v. State of
Maharashtra 15
(1965) 1965-2 All ER 448 = 1965-3
WLR 405, R. v Griffiths 15
(1963) AIR 1963 SC 599 (V 50) =
1963-3 SCR 830 = 1963-1 Cri LJ
489, Bhiva Doulu Patil v. State of
Maharashtra 21
(1957) AIR 1957 SC 340 (V 44) =
1957 Cri LJ 422, S. Swaminathan
v. State of Madras 15
(1954) 1954 AC 378 = 1954-2 WLR
343, Davis v. Director of Public
Prosecution 28
(1949) AIR 1949 PC 257 (V 36) =
76 Ind App 147 = 50 Cri LJ
872, Bhuboni Sahu v. The King 33, 34
(1916) 1916-2 KB 658 = 86 LJ (KB)
28. R v. Baskerville 21
In Cr. A. No. 139 of 1966.

M/s Porus A Mehta, B. M Parikh and
Janendra Lal, Advocates and M/s. J. R.
Gagrat and B R Agarwala, Advocates of
M/s. Gagrat and Co, for Appellant,
In Cr. A. No. 140 of 1966

Mr. A K Sen, Senior Advocate, (M/s.
Porus A. Mehta, B M Parikh, M. V Rao
and Janendra Lal, Advocates and M/s.
J R Gagrat and B. R. Agarwala, Advoca-
tes of M/s Gagrat and Co. with him),
for Appellant,

In Cr As. Nos 141 and 142 of 1966

M/s R Jethmalani, M V. Rao and
Janendra Lal, Advocates, and M/s. J. R.
Gagrat and B R. Agarwala, Advocates of
M/s Gagrat and Co., for Appellant,

In Cr. As. Nos 143 and 144 of 1966

M/s. R. Jethmalani and Janendra Lal,
Advocates and M/s J R. Gagrat and
B R Agarwala, Advocates of M/s Gagrat
and Co, for Appellant, M/s. H. G.
Khandelawala, A B Pandya, H R.
Khanna and R. N Sachthey, Advocates,
for Respondents (In all appeals).

The following Judgment of the Court
was delivered by

BACHAWAT, J.: The six appellants are
A-8, Mohamed Hussam Omer Kochra alias
Mr. Buick alias Naznen, A-12 Maganlal
Naranji Patel, A-16, N B Mukherji, A-15,
N. S. Rao, A-14, Parasuram T. Kanel, A-6,
Lakshmandas Chaganlal Bhatia alias
Sham. In this Judgment "A" means ac-
cused. Forty persons including the ap-
pellants were jointly prosecuted for crimi-
nal conspiracy to import and deal in gold
punishable under Section 120B of the
Indian Penal Code read with S. 167 (81)
of the Sea Customs Act, 1878 and for

substantive offences punishable under Section 167 (81)

2 A-1 to 5, A 18 to 35 and A-37 are absconding or being foreigners are not amenable to the processes of the Court A-1 Jamal Shuhaibar, A 2 George Shuhaibar and A 3 Jawadat Shuhaibar of Beirut and A 4 Yusuf Mohamed Lori alias Abdulla of Bahrein sent gold from the Middle East A 5 Juan Castaner Casinovas and A 18 Bernardo Sas of Geneva are foreign collaborators A 19 Hamad Sultan and A 37 Chunilal alias Professor Kamal alias Dwarkadas of Bombay were concerned in the smuggling of gold A 20 to A 35 Mrs Gisele Minot, B J Lupi, J P Hoffman Jacques Minot Geoffire Allan M Torrens Mrs Mora Margaret Armand Yaverowaski, Gran Powell C J Flamant Mrs A Ramel Mrs S B Taylor J C Catino E D Gill A J Mascardo and A A. Grant are foreigners and are said to have carried gold from foreign countries to India by air

3 The trial proceeded against A 6 to 17, A-36 A 38, A 39 and A-40 A 6 Lakshmandas is a financier A 14 Parasuram is his brother in law A 7 Rabi-yabi Usman alias Grandma is the mother of A 9 Rukayyabi Mohamed Hussain Kochra A 10 Abidabai Usman and A 38 Hassan Usman A 8 Kochra is the husband of A 9 A-11 Murad Asharnoff remitted funds to foreign countries A-12 Maganlal Naranji Patel and A-13 Mafatal Mohanlal Parekh are bullion merchants of Bombay A-15 N S Rao A-16 N B Mukherji A-17 Timothy Miranda, A-39 D K. Deshmukh and A-40 Jacob Miranda alias Tambaku were mechanics in the employ of the Air India International A-36 Francis Bello was a co-conspirator The Additional Chief Presidency Magistrate 3rd Court Esplanade, Bombay, acquitted A 9 10, 13 39 and 40 of all the charges He convicted A-6 7, 8, 11 12 14 15, 16 17 36 and 38 of criminal conspiracy and substantive offences under Section 167 (81) and passed sentences of imprisonment and fine

4 All the convicted persons filed appeals in the High Court During the pendency of the appeal A 11 absconded The High Court upheld the convictions of A-30 and A 7 but directed that A-36 be released on probation and that A-7 do pay a fine of Rs 1000 and undergo simple imprisonment for a day only The High Court dismissed the appeals of A-6, 8 11 12, 14 15 16 and 17 The present appeals have been filed by A-6 8 12 14 15 and 16 after obtaining special leave

5 The first count charged that all the 40 accused persons along with Mohamed Yusuf Merchant, Pedro Fernandez and other persons at Bombay and other places from 1st November, 1956 to 2nd February 1959 were parties to a continuing criminal conspiracy to acquire possession of carry remove deposit harbour keep conceal and deal in gold and knowingly to be concerned in fraudulent evasion of duty chargeable on gold and of the prohibition and restriction applicable thereto and committed an offence punishable under Section 120 B I P C read with Section 167 (81) of the Sea Customs Act, 1878 The other counts charged the accused persons individually with offences punishable under Section 167 (81)

6 In broad outline the prosecution case is as follows Before November 1, 1956 some of the accused persons along with others were concerned in the illegal importation of gold In or about November 1956 Pedro Fernandez and Yusuf Merchant hatched the present conspiracy to which A 11 Murad Ahahamoff was a party The scheme was that necessary finances would be arranged, remittances to foreign countries would be made through Murad gold would be sent by air from foreign countries to Bombay, Delhi, Calcutta and other air ports and the smuggled gold would be sold in India A-6 Lakshmandas A 8 Kochra and A 7 Rabi-yabi were approached for the necessary finances Between February 3 and July 8 1957 eleven carriers brought gold by air from Switzerland Lakshmandas financed the first four transactions and his telegraphic address "Subhat" was used for receipt and despatch of cables On February 3 1957 the first carrier Gisele Minot came to Bombay On February 25, 1957 the second carrier B J Lupi and on March 9, 1957 the third carrier J P Hoffman came to Delhi The fourth carrier Jacques Minot went to Colombo Kochra and Rabi-yabi financed the subsequent transactions and allowed the use of his telegraphic address "Nazneen" Cables used to be sent in codes known as the "Private Dictionary" "the new Geneva Code" and "the Beirut Code", and "the Behrein Code" Lakshmandas ceased to be a financier but he continued to participate in the disposal of gold On April 8 1957 the fifth carrier Mora Margaret went to Colombo On April 19 1957 the sixth carrier Geoffire Allan and on May 3 1957 the seventh carrier came to Bombay At about this time A 12 is said to have joined the conspiracy On May 21

1957 the eighth carrier Grant Powell came to Delhi. On June 9, 1957 the ninth carrier Mora Margaret and on June 24, 1957 the tenth Carrier Armand Yaverco-waski came to Bombay. On July 8, 1957 the 11th carrier Grant Powell came to Calcutta. A-37 Chunilal who was despatched to contact the carrier disappeared with the gold. Thereafter the smuggling of gold stopped for sometime.

7. In August 1957 Yusuf and A-38 Hassan representing Kochra and Rabiya-bai went to Beirut and induced A-1 to A-3 Jamal Shuhaibar and his two brothers to join the conspiracy. The scheme was that the Shuhaibar brothers would send gold from the Middle East, Kochra and Rabiya-bai would remit the necessary funds and that A-19 Hamad Sultan would have an interest in the venture. Pedro also came to Beirut. Accounts between him and Yusuf were settled. It was decided that Pedro would continue to send gold from Switzerland, that Kochra and Rabiya-bai would supply the necessary finances and that Pedro would receive a half share of Yusuf's profits in the smuggling of gold from the Middle East. Between November 7, 1957 and February 13, 1958 eleven carriers of gold sent by Pedro came to Bombay. On February 24, 1958 the twelfth carrier A. J. Mascardo was arrested in Delhi. Simultaneously gold was sent from the Middle East. On November 3, 1957 Grant Powell carrying gold sent by the Shuhaibar brothers came to Calcutta, but he was arrested. In November 1957 A-4 Yusuf Mohamed Lori of Bahrein acting for Shuhaibar brothers came to India and it was decided that gold would be hidden in the body of Air India International planes by a mechanic at Beirut or Bahrein and would be removed in Bombay by another mechanic and that Kochra and Rabiya-bai would supply funds on the guarantee of Murad. From time to time the services of the mechanics, A-15 N. S. Rao, A-39 D. K. Deshmukh, A-40 Jacob Miranda, A-17 Timothy Miranda and other mechanics were requisitioned. Between December 12, 1957 and January 15, 1958, 4 or 5 consignments of gold concealed inside the belly of aircrafts were sent by Lori to India. From February 1958, 7 or 8 consignments of gold concealed in the rear left bathroom of the aircrafts were sent to Lori to Bombay. Due to disturbances in the Middle East the smuggling of gold stopped for some time. Since October 1958 eleven consignments of gold were sent to Bombay. On February 1, 1959

the Rani of Jhansi carrying the 11th consignment of gold was searched by the customs officers at the Santacruz Airport Bombay and the gold was seized.

8. On February 2, 1959 the residence of Yusuf Merchant was searched and many incriminating articles were seized. From time to time Yusuf was interrogated, and his statements were recorded. On October 24, 1959 the investigation was completed. The trial started in July 1960. The prosecution examined PW 2 Yusuf Merchant and other accomplices, and witnesses and exhibited numerous documents. Yusuf Merchant, the main witness on behalf of the prosecution implicated all the appellants in the crime. The Courts below accepted his testimony found that it was corroborated in material particulars, and convicted the appellants.

9. All the appeals were heard together. We shall note only those arguments which were raised in this Court by Counsel. Having regard to those arguments the following general questions affecting all the appellants arise for decision.—

(1) was the import of gold in contravention of Section 8 (1) of the Foreign Exchange Regulation Act, 1947 punishable under Section 167 (81) of the Sea Customs Act, 1878.

(2) did the prosecution establish the general conspiracy laid in charge No. 1;

(3) did the learned Magistrate wrongly allow a claim of privilege in respect of the disclosure of certain addresses and cables and if so, with what effect;

(4) did he wrongly refuse to issue commission for the examination of Pedro Fernandez, and

(5) did he wrongly refuse to recall PW 50 Ali for cross-examination?

10. As to the first question, the law since the passing of the Customs Act, 1962 admits of no doubt. The import and export of goods by sea, land and air may be prohibited absolutely or subject to conditions under Section 11. Customs duties are leviable under Section 12 on all goods so imported or exported. The fraudulent evasions of duties and of prohibitions are punishable under S. 135.

11. In the present case we are concerned with the law in force before 1962. The Sea Customs Act 1878 contained a number of prohibitions on imports by land or sea (S. 18) and authorised the imposition of further prohibitions and restrictions on import or export by sea or by land (S. 19). The Act also provided the machinery for the enforcement

of prohibitions and restrictions by means of search, seizure, confiscation and penalties. Several other statutes contained further prohibitions and restrictions on the import or export of goods. Section 8 of the Foreign Exchange Regulation Act, 1947 is one such enactment. A notification dated August 25 1948 as amended upto date issued under Section 8 (1) of this Act directed that except with the general or special permission of the Reserve Bank no person shall bring or send into India (a) any gold coin gold bullion, gold sheets or gold ingot whether refined or not.

Section 23A of the Act provided that the restrictions imposed by Section 8 (1) shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly. The effect of S 23A was that the contravention of the notification under Section 8 (1) attracted to it each and every provision of the Sea Customs Act 1878 in force for the time being including Section 167 (81) of the Sea Customs Act 1878 which was inserted by the Amending Act XXI of 1935.

12 It is to be noticed that Section 19 of the Sea Customs Act 1878 authorised the imposition of prohibitions and restrictions on the import or export of goods by sea and land only. But the notification dated the 25th August 1948 issued under Section 8 (1) of the Foreign Exchange Regulation Act, 1947 restricted the bringing into India of gold from any place outside India by land sea and air. Section 23A of the Foreign Exchange Regulation Act 1947 created the fiction that the restriction had been imposed under Section 19 of the Sea Customs Act, 1878 so that all the provisions of that Act would be attracted to a breach of the notification. But the statutory fiction did not cut down the wide ambit of the notification or limit its application to imports and exports by sea and land only. An import of gold by air without the permission of the Reserve Bank was a breach of the notification and the breach attracted to it the provisions of Section 167 (81) of the Sea Customs Act 1878.

13 The matter may be looked at from another point of view. When the Sea Customs Act 1878 was passed goods could be imported or exported by sea and land only. Transport by air was unknown. After the Second World War traffic by air began. There is force in the contention that the import or export

by air is a species of import or export by land. The aircraft carrying goods lands or takes off from land. The prohibition or restriction on the import or export of goods by land is a prohibition or restriction on the import or export by aircraft, landing or taking off from land. A fraudulent evasion of the restriction imposed by the notification under Section 8 (1) of the Foreign Exchange Regulation Act, 1947 was punishable under Section 167(81) of the Sea Customs Act, 1878 and criminal conspiracy to evade the restriction was punishable under Section 120B of the Indian Penal Code.

14 In this connection a question arose whether customs duty was leviable on imports and exports whether a fraudulent evasion of the duty was punishable under Section 167 (81). The Sea Customs Act 1878 and the rules and notifications made thereunder set up a complete machinery for the levy of sea customs duties. Section 20 provided for a levy of customs duties on goods imported or exported by sea. Payment of the duty was enforced by compelling all foreign trade to pass through certain ports. Drastic powers were given for detection prevention and punishment of evasions of duty. The Land Customs Act, 1924 set up the machinery for the levy of land customs duties, and Section 9 of the Act applied for the purpose of this levy several provisions of the Sea Customs Act 1878 with suitable modifications and adaptations. Rules 53 to 64 contained in Part IX of the Indian Aircraft Rules 1920 framed under Sections 3 and 6 of the Indian Aircraft Act, 1911 provided for the levy of air customs duties. The duty was leviable under Rules 58 and 59 on goods imported or exported by air as if such goods were chargeable to duties under the Sea Customs Act 1878. Rule 63 provided that all persons importing or exporting goods into and from India "shall so far as may be observed comply with and be bound by the provisions of the Sea Customs Act 1878", with certain adaptations. The Indian Aircraft Act 1934 repealed the Indian Aircraft Act 1911 but the Indian Aircraft Rules 1920 continued in force in view of Section 24 of the General Clauses Act 1897. The Indian Aircraft Rules 1937 framed under Secs 5 and 8 of the Indian Aircraft Act 1934 preserved and continued Part IX of the Indian Aircraft Rules 1920. Until the passing of the Customs Act 1962 Part IX of the Indian Aircraft Rules 1920 continued to be the basic law for the levy of air

customs duties. On behalf of the appellants it was argued that (1) Rules could not authorise the levy of a tax, (2) Rules could not create a new offence punishable under Section 167 (81) of the Sea Customs Act 1878, (3) a contravention of the Rules was punishable under Section 10 of the Indian Aircraft Act, 1934 and not under Section 167 (81). On behalf of the respondent our attention was drawn to Section 16 of the Indian Aircraft Act 1934 which provided —

“The Central Government may, by notification in the official gazette, declare that any or all of the provisions of the Sea Customs Act, 1878, shall with such modifications and adaptations as may be specified in the notifications apply to the import and export of goods by air.”

Counsel for the respondent argued that (1) the notification dated March 23, 1937 continuing Part IX of the Aircraft Rules 1920 was a sufficient declaration under Section 16, (2) Section 16 was a piece of conditional legislation, and by force of Section 16 and on the declaration being made the duty became leviable on goods imported and exported by air, and a fraudulent evasion of duty became punishable under Section 167 (81) of the Sea Customs Act, 1878. We do not think it necessary to express any opinion on these questions having regard to our conclusion that a fraudulent evasion of the restriction imposed by Section 8 (1) of the Foreign Exchange Regulation Act, 1947 was punishable under Section 167 (81).

15. As to the second question the contention was that the evidence disclosed a number of separate conspiracies and that the charge of general conspiracy was not proved. Criminal conspiracy as defined in Section 120A of the I. P. C. is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but

the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. The cases illustrate the distinction between a single general conspiracy and a number of unrelated conspiracies. In *S K Khetwani v State of Maharashtra*, 1967-1 SCR 595 = (AIR 1967 SC 450) *S Swaminatham v. State of Madras*, AIR 1957 SC 340 the court found a single general conspiracy while in *R v. Griffiths*, 1965-2 All ER 448 the Court found a number of unrelated and separate conspiracies.

16. In the present case, there was a single general conspiracy to smuggle gold into India from foreign countries. The scheme was operated by a gang of international crooks. The net was spread over Bombay, Geneva, Beirut and Bahrein. Yusuf Merchant and Pedro Fernandez supplied the brain power, Murad Aaharanoff remitted the funds, Lakshmandas Kochra and Rabiabai supplied the finances, Pedro Fernandez and the Shuhaibar brothers sent the gold from Geneva and the Middle East, carriers brought the gold hidden in jackets, mechanics concealed and removed gold from aircrafts and others helped in contacting the carriers and disposing of the gold. Yusuf, Pedro and Murad and Lakshmandas were permanent members of the conspiracy. They were joined later by Kochra, the Shuhaibar brothers and Lori and other associates. The original scheme was to bring the gold from Geneva. The nefarious design was extended to smuggling of gold from the Middle East. There can be no doubt that the continuous smuggling of gold sent by Pedro from Geneva during February 1956 to February 1958 formed part of a single conspiracy. The settlement of accounts between Yusuf and Pedro at Beirut did not end the original conspiracy. There can also be no doubt that the smuggling of gold from Beirut

by the Shuhaibar brothers and from Bahrain by their agent Lori were different phases of the same conspiracy. The main argument was that the despatch of gold from Geneva was the result of one conspiracy and that the despatch of gold from the Middle East was the result of another separate and unrelated conspiracy. The Courts below held, and in our opinion rightly, that there was a single general conspiracy embracing all the activities. Pedro had a share in the profits of the smuggling from Geneva. He got also a share of Yusuf's profits from the smuggling of the Middle East gold. Apparently Shuhaibar brothers and Lori had no share in the profits from the smuggling of the Geneva gold but they attached themselves to the general conspiracy originally devised by Yusuf and Pedro with knowledge of its scheme and purpose and took advantage of its existing organization for obtaining finances from Kochra and Rabiya Bai and for remittances of funds by Yusuf. Each conspirator profited from the general scheme and each one of them played his own part in the general conspiracy. The second contention is rejected.

17 As to the third question we find that on or about February 22, 1962 the prosecution took out a summons to the Deputy Accountant General Telegraphs Check Office Calcutta for the production of all records pertaining to 15 cable addresses including "Subhat" and "Nazneen" together with the summons under Section 171A previously issued by the customs officers to the Telegraphs Check Office for the production of the cables and the receipts given by the customs officers to the Telegraphs Check Office for the cables so produced. Pursuant to the summons issued on February 22, 1962 Mr. Madhavan Superintendent of the Telegraphs Check Office Calcutta produced in court the cables summons and receipts. All the cables relating to the aforesaid 15 cable addresses and two more addresses with which the appellants were concerned were exhibited at the trial. The summons under Section 171A was a consolidated summons issued by the customs officer to the Telegraphs Check Office for the production of the cables relating to the investigations in the present case and several other cases. The receipt was a consolidated receipt for the cables produced under the summons. Affidavits were filed by Mr. P. C. Kalla Senior Deputy Accountant Post and Telegraphs and Mr. S. K. Srivastava, an Ad-

ditional Collector of Customs, Calcutta claiming privilege under Section 124 of the Evidence Act in respect of the disclosure of the other cable addresses mentioned in the summons and receipts and the cables sent to those addresses. The learned Magistrate upheld this claim of privilege. In our opinion, the privilege was not properly claimed under Sec. 124. It is difficult to say that the other cable addresses and cables were communications to a public officer in official confidence. However, we find that the other addresses and cables were required in connection with investigations unconnected with the present case and did not relate to any person or persons concerned in the offences for which the appellants were being tried. The other cables and cable addresses were not relevant to the defence and their non-disclosure has not occasioned any failure of justice.

18 As to the fourth question it appears that Pedro Fernandez was a material witness. In 1959 he wrote a letter to Yusuf stating that he was willing to come to India and to be examined as a witness. The prosecution tried to contact him but his whereabouts could not be traced. On April 18, 1962 the defence applied for the issue of a commission "to the appropriate authority or court either in Switzerland or in United Kingdom or in Pakistan for examination of Pedro Fernandez and Guinness as witnesses for the defence." Except stating that the defence undertook to pay all expenses and supply all relevant information the application did not give any other particulars. The learned Magistrate rejected the application. He held and in our opinion rightly that the application was misconceived and proper grounds for the issue of the commission under Section 503 of the Code of Criminal Procedure had not been made out. The defence did not produce any letter from Pedro or any other material indicating that he was willing to be examined on commission. Even his address was not given. The Court could not issue a roving commission to a court or authority either in Switzerland or in United Kingdom or in Pakistan. The application was not made in good faith and was liable to be rejected on this ground alone.

19 As to the last question we find that examination in chief of P.W. 50 Ali commenced on October 7, 1960 and was concluded on October 10, 1960. His cross examination commenced on August 21, 1961 and was concluded on September

ber 4, 1961. On March 6, 1962 and again on June 21, 1962 the defence applied for recalling Ali for cross-examination. The learned Magistrate rejected the two applications. According to the defence Ali was repentant and wanted to say that he had given false evidence. In our opinion, no ground was made out for recalling Ali. There was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case there was no material upon which the Court could be so satisfied. The learned Magistrate rightly disallowed the prayer for recalling Ali.

20. Mr. Jethmalani argued that the rough notes of statements given by Yusuf to the customs officers had been destroyed and that the defence was thereby prejudiced. This point was not taken either in the trial court or in the High Court. In our opinion, Counsel ought not to be allowed to raise this new point for the first time in this Court.

21. On the merits, we find that the two courts have recorded concurrent findings of fact. Normally this Court does not re-appraise the evidence unless the findings are perverse or are vitiated by any error of law or there is a grave miscarriage of justice. The Courts below accepted the testimony of the accomplice Yusuf Merchant. Section 133 of the Evidence Act says —

“An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

Illustration (b) to Section 114 says that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The combined effect of Sections 133 and 114 Illustration (b) is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One

accomplice cannot corroborate another, See Bhiva Doulu Patil v. State of Maharashtra, 1963-3 SCR 830 = (AIR 1963 SC 599), R. v Baskerville, 1916-2 KB 658. In this light we shall examine the case of each appellant separately.

Case of Accused No. 8 Mohamed
Hussain Umar Kochra
(Cr. A. No. 139 of 1966)

22. Yusuf Merchant deposed that Kochra and his mother-in-law, A-7 Rabiya-bai acted as financiers after the fourth transaction, that Kochra's cable address “Nazneen” at 19 Erskine Road and his telephone was used in connection with the gold smuggling activities. The arrangement was that cables addressed to “Nazneen” would be received at No 19, Erskine Road and would then be forwarded to the Warden Road residence of Rabiya-bai or the Napean Sea Road residence of Kochra and that on receiving phone messages Yusuf would collect the cables. Yusuf's testimony has been corroborated in material particulars.

23. Kochra's mother resided at 10, Erskine Road, 4th floor, Esmail Building, Bombay-3. Exhibit Z70 dated February 19, 1957 is the application for the registration of “Nazneen”. This document purports to have been signed by Ismail Kader, a domestic servant of Kochra's mother. It was proved that the signature “Ismail Kader” and the address 19, Erskine Road, 4th floor, Esmail Building, Bombay-3 on Ex. Z-70 were in the handwriting of Rajabali Karmalli, another servant of Kochra's mother. Rajabali Karmalli lived in Kochra's garage in Napean Sea Road. Kochra's mother was invalid and Kochra held a power-of-attorney from her for management of the family property. Rajabali Karmalli was under Kochra's control and was his trusted servant. Kochra had his office in the ground floor of the building at 19, Erskine Road and his denial that he had no office there is false. Both Rajabali Karmalli and Ismail Kader have now disappeared and cannot be traced. Several cables sent to Nazneen in connection with the gold smuggling have been exhibited. The other cables could not be traced. Kochra registered “Nazneen” because he desired to join the conspiracy and received the cables sent to this address. The registration of Nazneen was not procured by Yusuf in collusion with Rajabali Karmalli or Ismail Kader. Though Yusuf surreptitiously used other addresses for the receipt of his cables, Nazneen was used

with the full knowledge and approval of Kochra

24 On or about August 13 1957 Yusuf and Hassan went to Beirut for inducing the Shuhriar brothers to join the conspiracy. About August 15 Kochra's wife Rukaiyabai and Hassan's wife reached Beirut. A cable (Z-745) dated August 16 1957 was sent from Beirut informing Nazneen that Rukaiyabai had arrived safely. On a consideration of the materials on the record including the written statements of Kochra and Rukaiyabai the courts below have found that this cable was received by Kochra. The cable Z 745 was produced by PW 207 on April 4, 1962 after the examination of Yusuf Merchant had been concluded. An application for recalling Yusuf filed on the same date was rejected. A point was made that Kochra was prejudiced by the rejection of this application. Counsel suggested that Yusuf sent the cable Z-745 from Beirut and that this fact could be established if Yusuf was recalled for cross examination. We shall assume that Yusuf despatched the cable. But the fact remains that the cable was received at "Nazneen". It was an intimation of the safe arrival of Rukaiyabai at Beirut and was obviously meant for her husband. The Courts below rightly held that the cable was received by Kochra and that there was no substance in the defence case that he was not aware of the existence of Nazneen. The rejection of the application for recalling Yusuf did not prejudice Kochra.

25 The carrier Grant Powell arrived in Calcutta on November 3 1957 and was arrested. PW 127 Chandiwala and Jagbandhudas were sent to Calcutta to contact the carrier. Yusuf's brother PW 50 Ali also went to Calcutta. On November 6 Ali sent a telephone message to Kochra informing him of a message from Chandiwala that there was a raid in his room by the customs officials and that the carrier had not come. Kochra received the message on his telephone No 72328 at his residence. Exhibit Z-459 dated November 7 1957 is a copy of the bill for this telephone call. Thereafter Kochra contacted Chandiwala on the telephone and assured him that nothing would happen and asked him to return to Bombay immediately. On November 7 1958 Ali sent a phone message to Kochra at his telephone No 72328 informing him that Chandiwala was returning to Bombay. Exhibit Z459 dated November 7 1957 is

the copy of the bill for this telephone call. Taking into account Kochra's statement, Ex Z-703 para 6 and his written statement paragraph 72 the Courts below rightly held that Kochra received the two telephone messages from Ali relating to matters connected with the gold smuggling. Even after the receipt of these messages Kochra allowed the use of Nazneen for receipt of cables from Pedro and acceptance of cables by Yusuf. PW 31 Mastakar, proved that Kochra did not send any complaint to the telegraphic office that Nazneen was registered or was used without his authority.

26 Mr Mehta suggested that (a) Nazneen was used before Kochra joined the conspiracy and that (b) Kochra did not join the conspiracy on or about April 8 1957 when the fifth carrier came and in this connection read to us several documents. The Courts below rejected this contention and we find no reason for reappraising the evidence. It may be pointed out that by the cable Ex Z 69 dated March 14 1957 and the letter Ex Z-71 dated March 17 1957 Yusuf informed Pedro of the registration of Nazneen and by the cable Ex Z 77 dated March 17 1957 Yusuf asked him to send the cables to the new address. The materials on the record show that Kochra had then joined the conspiracy and the address Nazneen was used for despatch and receipt of cables after March 17 1957. Mr Mehta commented on the fact that Yusuf implicated Kochra for the first time in his statement given on April 30 1957 and that Yusuf had not referred to Kochra in his earlier statements. Yusuf at first wanted to shield his friend Kochra. The customs officers discovered the existence of Nazneen on or about April 20 1959. On being then questioned with regard to Nazneen Yusuf was compelled to disclose his connection with Kochra and the circumstances under which Nazneen came to be registered.

27 The material on the record clearly establishes the connection of Kochra with the conspiracy and materially corroborates the testimony of Yusuf Merchant. The Courts below rightly convicted Kochra.

Case of Accused No 12
Maganlal Narayni Patel
(Cr A No 140 of 1966)

28 The prosecution case is that since May 3 1957 Maganlal was buying the smuggled gold from Yusuf Merchant and that when consignments of gold bearing

the mark "Chaisso" and having the fineness of about 99.99 came from Beirut, Yusuf Merchant and Maganlal had the gold melted in the silver refinery of P.W. 127 Chandiwala at Bandra by his employees Bahadulla and Shankar in December 1957 and Ram Naresh and Mohamed Rafique in February 1958, with a view to remove the mark "Chaisso" and to reduce the fineness of the gold. The mark "Chaisso" and the 99.99 fineness indicated that the gold was of foreign origin. The object of melting the gold and reducing the fineness was to destroy the tell-tale evidence of its origin. For the purpose of implicating Maganlal the prosecution relied on the testimony of P.W. 2 Yusuf Merchant, P.W. 127 Mohamed Chandiwala and P.W. 68 Mohamed Rafique. It is common case that Yusuf and Chandiwala are accomplices. The question in issue is whether P.W. 69 Mohamed Rafique was also an accomplice. The two Courts held that Rafique was not an accomplice but we are unable to agree with this finding. The melting was done late in the night after normal working hours. The melting of gold in the silver refinery was unusual. On no other occasion gold was melted in the refinery. Rafique was asked to keep the matter secret. For two hours' secret work, he got about Rs. 10 though his daily wage was Rs. 3 only. Once, the gold was brought in a jacket usually worn for carrying smuggled gold. In his statement Ex. 25-K Yusuf admitted that of the two workmen Rafique had more intimate knowledge of the reason for the secret handling of the gold. The secrecy of the job, the unusual hours, the special remuneration, the carriage of gold in jackets, the user of silver refinery for the melting of gold, the inside knowledge of Rafique of the purpose of the melting, lead to the irresistible conclusion that Rafique was knowingly a party to melting of smuggled gold with intent to destroy the evidence of its foreign origin and to evade the restrictions on its import. He was clearly a *particeps criminis* in respect of the offences with which Maganlal was charged and was liable to be tried jointly with him for those offences. As pointed out by Lord Simonds in *Davis v. Director of Public Prosecution*, 1954 AC 378 at pp. 400-402 a *particeps criminis* in respect of the actual crime charged is an accomplice. The witness concerned may not confess to his participation in the crime, but it is for the Court to decide on a consideration of the entire evidence whether he is an accom-

plice. Rafique was an accomplice, and his evidence cannot be used to corroborate the evidence of Yusuf and Chandiwala, the other accomplices. There is no corroboration of the evidence of the accomplices from an independent source. On the materials on the record it is not safe to convict Maganlal of the offences with which he is charged.

29. We may also point out that the positive case of Yusuf and Chandiwala was that Rafique melted the gold in February 1958. The books of Chandiwala show that in February 1958 Rafique did not work in the refinery. In his place one Kedar worked there. Chandiwala suggested that Kedar was another name of Rafique. This is an impossible story. Rafique himself did not say that his other name was Kedar. Thumb impressions of the workers used to be taken on the muster roll of the refinery but that document was not produced and the identity of Rafique with Kedar was not established. The High Court rightly held that Kedar and Rafique were different persons. The High Court made a new case for the prosecution and held that Rafique might have melted the gold towards the latter part of December 1958. Mr. Khandelwala frankly stated that he could not support this finding. In this Court Mr. Khandelwala maintained that the gold was melted by Rafique in February 1958 and that Rafique was also known as Kedar. For the reasons given above, we are unable to accept this case. In our opinion, Criminal Appeal No. 140 of 1966 should be allowed and accused No. 12 Maganlal Naranji Patel must be acquitted of all the charges.

Case of Accused No. 16 N. B. Mukherjee (Cr. A. No. 141 of 1966)

30. Mukherjee was the engineer-in-charge of Group A base maintenance. According to the prosecution Mukherjee was responsible for removing gold from aircrafts bringing gold from the Middle East. P.W. 2 Yusuf Merchant, P.W. 49 Maxie Miranda, P.W. 129 C. B. D'Souza, P.W. 143 Bhide and P.W. 148 Zahur, implicated Mukherjee. All these witnesses are accomplices. The High Court found that their evidence has been corroborated in material particulars from independent sources. We are unable to accept this finding. Mr. Khandelwala argued that the following circumstances corroborated the evidence of the accomplices —

(1) the reference to Mukherjee in Ex. Z-209, a letter dated July 8, 1958 from

Lori to Yusuf and Ex Z 226, a letter dated August 16, 1958 from Bello to Yusuf,

(2) Mukherjee's leave application Ex Z 558 dated December 13 1958 and Z 313 dated January 18, 1959, a cable from Yusuf to Jamal,

(3) simultaneous statements of a number of accomplices and

(4) Ex Z 697 the retracted confession of Bello. Mr Khandelwala did not rely on any other circumstances.

31 In Ex Z 209 Lori referred to Bello's friend Ex Z 226 is a letter of Bello to Yusuf referring to our friend. These two letters do not refer to Mukherjee by name. There is no corroboration from any independent source that Mukherjee was one of the co-conspirators referred to in these letters. The two letters cannot be regarded as a corroboration of Yusuf's evidence.

32 On December 13 1958 Mukherjee applied for leave from January 19 to February 2 1959. The leave application Ex Z 558 was allowed on December 14 1958. This document is innocuous and does not implicate Mukherjee in the crime. Maxie Miranda now says that Mukherjee asked Maxie not to remove the gold during his absence on leave that Maxie desired to remove the gold surreptitiously without Mukherjee's knowledge and arranged for the change in the place of concealment of gold in aircrafts and that accordingly Z 213 a cable dated January 18 1959 was sent by Yusuf to Jamal informing the latter that a new place of concealment had been airmailed. Ex Z 313 on the face of it does not implicate Mukherjee. The prosecution had to rely entirely on the evidence of Maxie Miranda and other accomplices for the purpose of implicating Mukherjee. Ex Z 558 and Ex Z 313 do not connect Mukherjee with the crime.

33 Section 114 of the Evidence Act says thus as to Illustration (b) "A crime is committed by several persons A B and C three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D and the accounts corroborate each other in such a manner as to render previous concert highly improbable." If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating the accused the Court may accept the several statements as corroborating each other see Haroon Haji Abdulla v State of Maharashtra 70 Bom LR 540 at p 545=(AIR

1968 SC 832 at p 837). But it must be established that the several statements of accomplices were given independently and without any previous concert, see Bhuboni Sahu v The King, 76 Ind App 147 at pp 156 157=(AIR 1949 PC 257 at pp 260 261). In the present case the Rani of Jhansi was searched on February 2, 1959. Yusuf gave his first statement on February 3 1959. He did not then implicate Mukherjee. Maxie Miranda gave his statement on February 4, 1959 implicating Mukherjee. No other accomplice made a statement on that date. There was ample opportunity thereafter for the accomplices meeting together and conspiring to implicate Mukherjee. On February 8 1959 C B D Souza, Bhide and Yusuf made separate statements implicating Mukherjee. On June 27, 1959 Zahur made a similar statement. These statements cannot be regarded as having been made independently and without any previous concert and do not amount to sufficient corroboration of the accomplice evidence.

34 On February 11, 1959 Bello made a confession implicating Mukherjee. At the trial he retracted the confession. Under Section 30 the Court can take into consideration this retracted confession against Mukherjee. But this confession can be used only in support of other evidence and cannot be made the foundation of a conviction see Bhuboni Sahu's case 70 Ind App 147 at p 156=(AIR 1949 PC 257 at p 260). It cannot be used to support the evidence of the other accomplices.

35 In our view Criminal Appeal No 141 of 1966 should be allowed and Mukherjee should be acquitted of all the charges.

Case of Accused No 15 N S Rao (Cr A No 142 of 1966)

36 In this case there is sufficient independent corroboration of Yusuf's testimony implicating Rao. Counsel for the appellant did not dispute the finding of the High Court that Rao is guilty of the offences with which he had been charged. The High Court rightly convicted N S Rao.

Case of Accused No 14 Parasuram T Kanel (Cr A No 143 of 1966)

37 Counsel did not dispute the finding of the High Court that there is sufficient independent corroboration of accomplice evidence implicating Kanel. We have perused the records and we find that the High Court rightly convicted Kanel of the charges against him.

Case of Accused No. 6 Lakshmandas Chhaganlal Bhatia (Cr. A. No. 144 of 1966)

38. The Courts below accepted the testimony of Yusuf Merchant implicating Lakshmandas in the conspiracy and other specific charges against him. Lakshmandas acted as the financier in the first four transactions and subsequently participated in the disposal of gold. Yusuf's testimony has been corroborated in material particulars. It is sufficient to mention two circumstances which connect Lakshmandas with the criminal conspiracy and other charges against him.

39. Exhibit Z-20 shows that on November 26, 1956 Lakshmandas had the telegraphic address "Subhat" registered. The application for registration of "subhat" was signed by Lakshmandas. The address for the delivery of the cables was Lakshmandas Chhaganlal Bhatia, 8, Little Gibbs Road, Alimanor Building, 1st Floor, Bombay 6. Numerous cables with regard to the smuggling of gold were received by Lakshmandas at the telegraphic address "Subhat". The evidence shows that the address "Subhat" was registered for the purpose of the smuggling activities only. It does not appear that any cable relating to any legitimate business was received by Lakshmandas at this telegraphic address.

40. The third carrier J. P. Hoffman arrived in Delhi. The contact of Lakshmandas with this carrier is clearly established. Ex. Z-64 is a cable dated March 6, 1957 from Yusuf to Pedro stating that he was awaiting the party at Hotel Marina in Delhi and that the code name was 'captain'. The passenger manifest of the Indian Airlines Corporation (Ex. Z-566) shows that A-14 P. T. Kanel the brother-in-law of Lakshmandas travelled from Bombay to Delhi by flight No. 125/66 on March 7, 1957. The reservation chart Z-566A shows that the reservation for Kanel was made from telephone No 70545 of Lakshmandas. The register of Hotel Marina, New Delhi, Ex. Z-65 shows that Kanel arrived at the Hotel on March 8, 1957 at 7-30 A.M. and occupied room No. 22. At the Hotel Kanel declared that Thamba Chetty Street, Madras, was his permanent address, though in fact he had no such address at Madras. The telephone register of Marina Hotel Ex. Z-65C shows that on March 8, Kanel attempted to contact telephone No 70545 but the call was cancelled. The passenger list of Indian Airlines Corporation Ex. Z-567A shows that a seat

was booked for Bhatia by plane from Bombay to Delhi and the manifest shows that he travelled by the plane on March 9, 1957. The manifest of K.L.M. Airways Ex. Z-489 shows that Hoffman travelled by plane from Geneva and arrived at Palam Airport, New Delhi, on March 9. The register of Hotel Marina Ex. Z-66 shows that Hoffman arrived at the Marina Hotel on March 8, at 1-40 A.M. and occupied room No. 39. The bill of Hotel Marina Ex. Z-65B shows that Kanel was charged Rs. 3/8/- extra for a guest and that he left the Hotel on March 10. The passenger manifest Ex. Z-537 shows that on March 10, 1957 Kanel and Lakshmandas travelled by the same plane from Delhi to Bombay and their ticket Nos. were 194885 and 194886. There is nothing to show that Kanel and Lakshmandas came to Delhi for any legitimate business. The documentary evidence completely corroborates Yusuf's testimony that Kanel came to Delhi, and later he was joined by Lakshmandas and that the object of their visit was to contact the carrier Hoffman and to receive from him the smuggled gold. The Courts below rightly convicted Lakshmandas of the charges against him.

41. Counsel for the appellants pleaded for a mitigation of the sentences. The Courts below passed on them sentences of rigorous imprisonment on the charge of conspiracy and on the individual charges for which they were convicted and directed that the sentences on all the charges except the charge of criminal conspiracy would run concurrently. Counsel argued that a separate punishment on the conspiracy charge was not justified and referred us to the following passage in Ghanville William's Criminal Law, 2nd Ed., (General Part), Article 220, page 685 —

"Conspiracy is a useful feature on which to seize for punishing inchoate crime, it is not, in general, an aggravating factor when crime has been committed. Where there is a prosecution for a consummated crime and for conspiracy to commit it, no separate punishment would be justifiable on the conspiracy count. However, the fact that criminals are organized professionally for crime may be taken into consideration in determining the punishment for the crime."

42. We find that the offence under Section 167 (81) of the Sea Customs Act, 1878 was punishable with imprisonment for a term not exceeding two years or to fine or to both. A party to a criminal

conspiracy to commit this offence was punishable under S 120B (1) of the Indian Penal Code in the same manner as if he had abetted the offence. A criminal conspiracy is a separate offence, punishable separately from the main offence. The sentences passed by the Courts below can not be said to be illegal. However, in the present case, Yusuf and Pedro, the ring leaders of the conspiracy have escaped punishment. There has been a prolonged trial commencing in July 1960 and ending in conviction on September 30, 1963. Considering all the circumstances, we think that the sentences on all the charges should run concurrently.

43 In the result Criminal Appeal No 140 of 1966 is allowed and Maganlal Naranji Patel is acquitted of all the charges. Criminal Appeal No 141 of 1966 is also allowed and N B Mukherjee is acquitted of all the charges.

44 Criminal Appeals Nos 139 of 1966 142 of 1966 143 of 1966 and 144 of 1966 are allowed in part and we direct that all the sentences passed on the appellants will run concurrently. In other respects the appeals are dismissed.

Order accordingly

1970 Cri L J 22 (Vol 76, C N 5) =

AIR 1970 SUPREME COURT 66
(V 57 C 16)

(From Andhra Pradesh)*

S M SIKRI, R S BACHAWAT AND
K S HEGDE, JJ

V P Gopala Rao, Appellant v Public
Prosecutor, Andhra Pradesh Respondent
Criminal Appeal No 271 of 1968 D/
73-1969

(A) Factories Act (1948), Sections 2 (m), 2 (k) (i) and 2 (l) — "Factory", meaning of — Sun cured tobacco leaves subjected to processes of moistening, stripping and packing in a company's premises with a view to their use and transport to company's main factory for manufacturing cigarettes — More than 20 persons under supervision of management working in premises — Held that the manufacturing process was carried on in premises and the persons employed were workers and premises a factory.

In a company's premises at E sun cured tobacco leaves bought from the growers

* (Cri Appeal No 883 of 1966, D/- 37
1968 — Andh Pra)

were subjected to the processes of moistening stripping and packing. The stalks were stripped from the leaves. The Thuklu (wholly spoilt) and Pagu (partly spoilt) leaves were separated. The leaves were tied up in bundles and stored in the premises. From time to time they were packed in gunny bags and exported to the company's factory at B where they were used for manufacturing cigarettes. More than 20 persons were working on the premises regularly every day under the supervision of the management. On a question whether the premises were factory.

Held that the "manufacturing processes" as defined in Section 2 (k) (i) were carried on in the premises and the persons employed were not employed by independent contractors but were "workers" as defined in Section 2 (l) and hence the company's premises at E were a factory. (Paras 5-14)

The definition of "manufacturing process" is widely worded. The moistening was an adaptation of the tobacco leaves. The stalks were stripped by breaking them up. The leaves were packed by bundling them up and putting them into gunny bags. The breaking up, the adaptation and the packing of the tobacco leaves were done with a view to their use and transport. All these processes were "manufacturing processes" within S 2 (k). (i) Case law discussed. (Para 5)

A "worker" within meaning of S 2 (l) is a person employed by the management and there must be a contract of service and a relationship of master and servant between them. It is a question of fact in each case whether the relationship of master and servant exists between the management and the workman. The critical test of the relationship of master and servant is the master's right of superintendence and control of the method of doing the work. In the instant case there was prima facie evidence showing that the relationship of master and servant existed between the workman and the management. AIR 1958 SC 388 and 1946 SC (HL) 24 and AIR 1957 SC 204. Foll Case law discussed. (Paras 8-9-10-14)

Inasmuch as the returns filed under the provisions of the Employees Provident Fund Scheme 1952 were in respect of all persons employed in the establishment either by the management or by or through a contractor they were not of much help in determining whether the employees were employed by the manage-

ment or were employed by the contractors (Para 12)

(B) Factories Act (1948), Section 6 (1) read with Section 92 — Prosecution under — Onus lies on prosecution to prove that workmen were employed by the management. (Para 14)

Cases Referred: Chronological Paras

{1966} AIR 1966 SC 370 (V 53) =

1964-2 Lab LJ 633, D. C. Dewan

Mohideen Sahib and Sons v.

Secy United Bidi Workers' Union,

Salem

10

{1965} AIR 1965 Raj 65 (V 52) =

ILR (1965) 15 Raj 117, Col Sardar

C. C. Angre v. The State

6

{1962} AIR 1962 SC 517 (V 49) =

1962-1 Lab LJ 119 = 1962 (1) Cri

LJ 497, Shankar Balaji Waje v.

State of Maharashtra

10

{1961} AIR 1961 SC 644 (V 48) =

1961-2 Lab LJ 86, Birdhichand

Sharma v First Civil Judge,

Nagpur

10, 11

{1961} 1961-1 Lab LJ 549 = (1960-

61) 19 FJR 207, State of Kerala

v. V. M. Patel

6

{1958} AIR 1958 SC 388 (V 45) =

1958 SCR 1340 = 1958 Cri LJ

803 (2), Chintaman Rao v. State of

Madhya Pradesh

8

{1957} AIR 1957 SC 264 (V 44) =

1957 SCR 152, Dharangadhra

Chemical Works Ltd. v. State of

Saurashtra

10

{1953} 1953-1 All ER 226 = 1953-1

WLR 187, Pauley v. Kenaldo Ltd.

9

{1951} 1951-1 KB 731 = 1951-1 All

ER 368, Gould v. Minister of

National Insurance

9

{1946} 1946 SC (HL) 24, Short v.

J. W. Henderson Ltd.

9, 11

Mr. M. C. Setalvad, Senior Advocate

(M/s J. M. Mukhi and G. S. Rama Rao,

Advocates with him), for Appellant; Mr

R. Ram Reddy, Senior Advocate (Mr. A

V. V. Nair, Advocate, with him), for Res-

pondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: M/s. Golden Tobacco Co. Private Ltd, have their head office and main factory at Bombay where they manufacture cigarettes. The appellant is the occupier-cum-manager of the company's premises at Eluru in Andhra Pradesh where sun-cured country tobacco purchased from the local producers is collected, processed and stored and then transported to the company's factory at Bombay. The prosecution case is that

the aforesaid premises are a factory. The appellant was prosecuted and tried for contravention of Section 6 (1) of the Factories Act 1948 and Rules 3 and 5 (3) of the Andhra Pradesh Factory Rules 1950 for operating the factory without obtaining a licence from the Chief Inspector of Factories and his previous permission approving the plans of the building. The appellant's defence was that the premises did not constitute a factory and it was not necessary for him to obtain the licence or permission. The 2nd Addl. Munsif Magistrate, Eluru, accepted the defence contention and acquitted the appellant. According to the Magistrate the prosecution failed to establish that the premises were a factory or that any manufacturing process was carried on or that any worker was working therein. The Public Prosecutor filed an appeal against the order. The Andhra Pradesh High Court allowed the appeal, convicted the appellant under Section 92 for contravention of S. 6 (1) and rules 3 and 5 (3) and sentenced him to pay a fine of Rs 50 under each count. The present appeal has been filed by the appellant after obtaining special leave.

2. The question in this appeal is whether the company's premises at Eluru constitute a factory. Section 2 (m) defines factory. Under Section 2 (m) factory means any premises including the precincts thereof "whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on." It is not disputed that more than 20 persons were working on the premises. The points in issue are. (1) whether those persons were "workers"; and (2) whether any manufacturing process was being carried on thereon.

3. For the purpose of proving the prosecution case the respondent relied upon the following materials. (1) the testimony of PW 1A, Subbarao the Assistant Inspector of Factories, (2) his report of inspection of the premises on December 20, 1965, (Ex P1), (3) the show cause notice Ex. P3, and the appellant's reply dated January 15, 1966, (Ex P5), (4) the testimony of PW 2, B. P. Chandrareddi, the Provident Fund Inspector, and (5) six returns (Exs. P7 to P12) submitted by the Eluru establishment, to the Regional Provident Fund Commissioner.

4. The materials on the record show that in the company's Eluru premises, sun-cured tobacco leaves bought from

the growers were subjected to the processes of moistening, stripping and packing. The tobacco leaves were moistened so that they may be handled without breakage. The moistening was done for 10 to 14 days by sprinkling water on stacks of tobacco and shifting the top and bottom layers. The stalks were stripped from the leaves. The Thukku (wholly spoilt) and Pagu (partly spoilt) leaves were separated. The leaves were tied up in bundles and stored in the premises. From time to time they were packed in gunny bags and exported to the company's factory at Bombay where they were used for manufacturing cigarettes. All these processes are carried on in the tobacco industry. In Encyclopaedia Britannica 1965 edition vol 22 page 265 under the heading "tobacco industry" it is stated "After curing only during humid periods or in special moistening cellars can the leaf be handled without breakage. It is removed from the stalks or sticks and graded according to colour, size, soundness and other recognizable elements of quality. It is tied into hands, or bundles of 15 to 30 leaves by means of a tobacco leaf wrapped securely around the stem end of the leaves. After grading the leaf is ready for the market."

5 In our opinion manufacturing processes as defined in Section 2 (k) (i) were carried on in the premises. Under Section 2 (k) (i) manufacturing process means any process for "making altering repairing ornamenting finishing packing oiling washing cleaning breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use sale transport delivery or disposal." The definition is widely worded. The moistening was an adaptation of the tobacco leaves. The stalks were stripped by breaking them up. The leaves were packed by bundling them up and putting them into gunny bags. The breaking up, the adaptation and the packing of the tobacco leaves were done with a view to their use and transport. All these processes are manufacturing processes within Section 2 (k) (i).

6 The reported cases are of little help in deciding whether a particular process is a manufacturing process as defined in Section 2 (k) (i). In *State of Kerala v V M Patel* 1961 1 Lab LJ 549 (SC) the Court held that the work of garbling pepper by winnowing cleaning washing and drying it on concrete floor and a similar process of curing ginger dipped in lime and laid out to dry in a warehouse were

manufacturing processes. With regard to the decision in *Col Sardar C S Angre v The State*, ILR (1965) 15 Raj 117 = (AIR 1965 Raj 65) it is sufficient to say that the work of sorting and drying potatoes and packing and re packing them into bags was held not to be a manufacturing process as the work was done for the purpose of cold storage only and not for any of the purposes mentioned in S 2 (k) (i).

7 The next question is whether 20 or more persons worked on the premises. On behalf of the appellant it is admitted that more than 20 persons work there, but his contention is that they are employed by independent contractors and are not workers as defined in Section 2 (l). Section 2 (l) reads — "worker" means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to or connected with the manufacturing process, or the subject of the manufacturing process."

8 In *Chintaman Rao v State of Madhya Pradesh* 1958 SCR 1340 at p 1349 = (AIR 1958 SC 388 at pp 392 393) the Court gave a restricted meaning to the words "directly or through an agency" in Section 2 (l) and held that a worker was a person employed by the management and that there must be a contract of service and a relationship of master and servant between them. On the facts of that case the Court held that certain Sattedars were independent contractors and that they and the coolies engaged by them for rolling bidis were not "workers".

9 It is a question of fact in each case whether the relationship of master and servant exists between the management and the workmen. The relationship is characterized by contract of service between them. In *Short v J W Henderson Ltd*, 1946 SC (HL) 24 at pp 33 34 Lord Thankerton recapitulated four indicia of a contract of service. As stated in Halsbury's Laws of England, 3rd Ed Vol 25 p 448 Article 872

"The following have been stated to be the indicia of a contract of service, namely (1) the masters power of selection of his servant (2) the payment of wages or other remuneration (3) the masters right to control the method of doing the work and (4) the masters right of suspension or dismissal [(1946) SC (HL) 24 at pp 33 34, *Gould v Minis-*

ter of National Insurance, (1951) 1 KB 731 at p. 734, (1951) All ER 368 at p. 371, *Pauley v. Kenaldo Ltd.*, (1953) 1 All ER 226, (C A), at p. 228, but modern industrial conditions have so affected the freedom of the master that it may be necessary at some future time to restate the indicia, e.g., heads (1), (2) and (4) and properly also head (3), are affected by statutory provisions (*Short v. J. W. Henderson Ltd.*, 1946 SC (HL) 24, *supra* at p. 34.)

10. In *Dharangadhra Chemical Works v. State of Saurashtra*, 1957 SCR 152= (AIR 1957 SC 264) the Court held that the critical test of the relationship of master and servant is the master's right of superintendence and control of the method of doing the work. Applying this test workmen rolling bidis were found to be employees of independent contractors and not workers within Section 2 (1), in *State of Kerala v. Patel V. M.* (*supra*) and *Shankar Balaji Waje v. State of Maharashtra*, 1962-1 Lab LJ 119=(AIR 1962 SC 517) while they were found to be workers within Section 2 (1) in *Birdhichand Sharma v. First Civil Judge, Nagpur*, 1961-2 Lab LJ 86=(AIR 1961 SC 644) and workmen within the meaning of Section 2 (s) of the Industrial Disputes Act in *D. C. Dewan Mohideen Saheb & Sons v. Secy United Bidi Workers' Union*, 1964-2 Lab LJ 633=(AIR 1966 SC 370).

11. There is no abstract a priori test of the work control required for establishing a contract of service. In 1946 SC (HL) 24 (*supra*) Lord Thankerton quoting Lord Justice Clerk's dicta in an earlier case said that the principal requirement of a contract of service was the right of the master "in some reasonable sense" to control the method of doing the work. As pointed out in *Birdhichand's case*, 1961-2 Lab LJ 86=(AIR 1961 SC 644) (*supra*) the fact that the workmen have to work in the factory imply a certain amount of supervision by the management. The Court held that the nature and extent of control varied in different industries and that when the operation was of a simple nature the control could be exercised at the end of the day by the method of rejecting the bidis which did not come up to the proper standard.

12. In the present case, the prosecution relied on (1) Exs. P-7 to P-12, (2) the testimony of P.W. 1 and (3) Exs. P-1 and P-5 to prove that the persons working at the company's premises at Eluru were

employed by the management. Exhibits P-7 to P-12 are monthly returns for July to December 1966 submitted by the company's Eluru establishment to the Regional Provident Fund Commissioner under paragraph 38 (2) of the Employees' Provident Fund Scheme, 1952. The returns disclosed the number and names of about 200 persons employed every month and the recoveries from the wages and the company's contributions on account of the provident fund of each employee. At the top of each return it was stated that the employees were contract employees. Section 2 (f) of the Employees' Provident Funds Act 1952 defines "employee" as including any person employed by or through a contractor. Paragraphs 29 and 30 of the Employees' Provident Fund Scheme 1952 show that the employer is required to pay contributions in respect of all such employees. Paragraph 26 of the Scheme shows that employees who have actually worked for not less than 12 months or less in the factory or establishment are entitled and required to become a member of the Fund. In view of the fact that the returns are in respect of all persons employed in the establishment either by the management or by or through a contractor they are not of much help in determining whether the employees were employed by the management or were employed by the contractors. They only show that in the months of July to December 1966, 200 workers had been working in the establishment for not less than 240 days.

13. The testimony of P.W. 1, A Subbarao, the Assistant Inspector of Factories shows that on December 20, 1965 he found 120 workmen working in the premises. He is corroborated by his inspection report Ex P-1. In his reply Ex P-5 the appellant did not dispute the fact that 120 persons were working there. P.W. 1 found workmen doing the work of stripping stalks from the tobacco leaves. The work of stripping was being done under the supervision of the management's clerk J. Satyanarain Rao. At the end of the day the clerk collected the stripped tobacco and noted the quantity of work done in the work sheet allotted to the worker. P.W. 1 found some workmen doing other work.

14. The onus of proving that the workmen were employed by the management was on the prosecution. We think that the prosecution has discharged this onus. It is not disputed that more than 20 persons worked in the premises regularly

every day. There is the positive evidence of PW 1 that the work of stripping stalks from the tobacco leaves was done under the supervision of the management. There is no evidence to show that the other work in the premises was not done under the like supervision. The prosecution adduced *prima facie* evidence showing that the relationship of master and servant existed between the workmen and the management. The appellant did not produce any rebutting evidence. In the cross examination of PW 1 it was suggested that the workmen were employed by independent contractors, but the suggestion is not borne out by the materials on the record. We hold that the persons employed are workers as defined in Section 2 (1). The High Court rightly held that the company's premises at Eluru were a factory.

15 In the Courts below the appellant produced (1) an order of the Chief Inspector of Factories, Madras and (2) a letter of Superintendent of Central Excise I D O Vijaywada. Mr Setalvad conceded and in our opinion rightly, that these documents throw no light on the question whether in 1966 the premises were a factory within the meaning of Section 2 (m). We therefore say nothing more with regard to these documents.

16 In the result, the appeal is dismissed.
Appeal dismissed

1970 Cri L J 23 (Vol 76, C N 6) =

AIR 1970 ANDHRA PRADESH 13
(V 57 C 2)

MOHAMED MIRZA AND
CHINNAPPA REDDY JJ

Syed Jaferuklah Jaferi, Petitioner v
Abdul Aziz and others, Respondents

Criminal Revn Case No 903 of 1967
and Criminal Revn Petn No 786 of 1967
D/- 3-4-1969

Criminal P C (1898) S 197 — Wakfs Act (1954) S 65 — Relative scope of two provisions — Complaint against 8 accused under Ss 448 454 341 295-A and 426 I P C for invading premises housing private library in possession of complainant — Accused 1 Secretary of Wakfs Board and 2 to 4 employees thereof — S 65 of Wakfs Act is no bar to prosecution — Sanction under S 197 Cr P C is not necessary. Cri Pevn Case No 441 of 1964 D/- 12-8-1964 (A P) Overruled.

The object of Section 197 Cr P C and similar provisions in other statutes is to

protect public servants and persons acting under statutory powers against unnecessary harassment. Similar provisions in other Acts offer two kinds of protection to persons exercising statutory or official powers absolute or limited. In the case of some enactments the protection is absolute that is to say no proceeding can at all be instituted against persons exercising powers under some statutes but in such cases the Legislature has invariably taken care to insist that the protected act should have been done in good faith. The protection given by Section 65 of the Wakfs Act is of this category. In some statutes the protection is not absolute but limited in some it is limited in the sense that a short period of limitation is prescribed so that an officer need be in perpetual dread of some ghost rising from the distant past and in others it is limited by making the sanction of a prescribed authority a condition precedent to the launching of a prosecution. The protection given by Section 197 of Cr P C is of the last category.

(Para 7)

The phraseology used in Section 197 of the Cr P C and Section 65 of the Wakfs Act is different. The difference in phraseology of the expressions any offence alleged to have been committed while acting or purporting to act in the discharge of his official duty and anything done or intended to be done under the Act is not of any great significance. A temporal meaning should not be given to such expressions and if such a meaning is not given the expressions have precisely the same connotation at least in so far as acts done by persons appointed under the provisions of the Wakfs Act (Para 8).

Section 197 of the Criminal Procedure Code and provisions like Section 65 of the Wakfs Act protect two classes of acts. (1) Where the act complained of is the very act which he is expected or authorised to do under the statute or the law but which becomes reprehensible because it is alleged to be done fraudulently or dishonestly i.e. where the machinery of the Act is employed to do an authorised act in an unauthorised manner or for an unauthorised purpose. (2) where the act complained of though not itself sanctioned by statute or enjoined by his official duty is however so intimately and integrally connected with his official or statutory duty that it can be said to have been done in furtherance of the duty prescribed by statute or for achieving the object enjoined by his duty. There must be a reasonable nexus between the act and the duty. Case law disc.

(Para 14)

A filed complaint before City Magistrate against 8 accused persons under Sections 448 454 341 295-A and 426 I P C for invading premises housing private library in possession of complainant.

belonging to his ward Accused 1 is Secretary of Wakf Board. Accused 2 to 5 are employees of Wakf Board while accused 6 to 8 do not have official status. Question is whether accused persons 1 to 5 are entitled to protection under Section 197 Cr. P. C., and under Section 65 of Wakfs Act.

Held, that the Wakf Board is not invested under the Wakfs Act with power to take possession of property in the possession of another by direct action without recourse to legal process. There is no reasonable nexus between the duty to take measures to recover lost properties and the alleged acts of the accused complained of. (Para 16)

Thus, Section 65 of the Wakfs Act is not a bar to the prosecution of any of the accused nor is sanction under Section 197 of the Criminal Procedure Code necessary for their prosecution. Cr. Rev Case No 441 of 1964 D/- 12-8-1964 (AP) Overruled. (Para 17)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 33 (V 51)=	
1964 (1) Cri LJ 16, State of Andhra Pradesh v. Venugopal	12
(1964) Cri R C No 441 of 1964, D/ 12-8-1964 (AP)	1, 17
(1963) AIR 1963 SC 349 (V 50)=	
1963 (1) Cri LJ 814, Virupaxappa Veerappa v State of Mysore	11
(1956) AIR 1956 SC 44 (V 43)=	
1966 Cri LJ 140, Matajog Dobey v H C Bhari	9, 10
(1955) AIR 1955 SC 287 (V 42)=	
1955 Cri LJ 857, S Ramayya Munipalli v State of Bombay	9, 10
(1955) AIR 1955 SC 309 (V 42)=	
1955 Cri LJ 865, Amrik Singh v. State of Pepsu	9, 10
(1948) AIR 1948 PC 128 (V 35)=	
49 Cri LJ 503, H H B Gill v The King	8, 9, 10
(1947) AIR 1947 PC 78 (V 34)=	
1947-2 Mad LJ 16, Raleigh Investment Co. Ltd v. Governor General in Council	13
(1939) AIR 1939 FC 43 (V 26)=	
40 Cri LJ 468=1939 FCR 159, Hori Ram Singh v Emperor	9, 10
Peri Subbarao, for Petitioner, Public Prosecutor, for the State, Mohammed Rasheed Ahmed, for Respondents (Nos 1 to 7)	

CHINNAPPA REDDY, J.:— This case has been placed before us to consider whether Cri R C No 441 of 1964 (AP) was rightly decided by a learned Single Judge of this Court.

2. The facts of the present case are as follows:—

The petitioner filed a complaint before the 8th City Magistrate against respondents 2 to 8 for alleged offences under Sections 448, 454, 341, 295-A and 426, I P C and against respondent No 1 for abetment of those offences. The first respon-

dent is the Secretary of the Wakf Board, appointed by the State Government under the provisions of Section 21 of the Wakfs Act, 1954. The Wakf Board is a body corporate having perpetual succession and a common seal, established by the State Government under Section 9 of the Wakfs Act. Respondents 2 to 5 are stated to be employees of the Wakf Board while respondents 6 to 8 are not stated to have any official status. It is alleged in the complaint that under the instructions of respondent 1, respondents 2 to 8 invaded premises No 17-2-940, Rain Bazar Hyderabad in the possession of the complainant and belonging to this ward M. Zaman Mohammed. The premises houses the private library of late Hanamuz Zaman Mohamed ancestor of M Zaman Mohamad in one of its rooms. The library contains many ancient and valuable manuscripts and books. It is the property of M Zaman Mohammed.

On 30-7-1966, when the complainant was absent from the premises, respondents 2 to 8 despite the protests and in violation of the privacy of the pardanashin women folk in the premises, entered the premises, broke open the locks on the doors of the library, put their own locks and departed. The complainant arrived on the scene towards the end but was helpless.

He reported to the police but without avail. It is stated in the complaint that the Wakf Board has no executive powers and cannot evict persons from any premises without the due process of law. It is also alleged in the complaint that the Wakf Board is inimically disposed towards the complainant because he has filed a suit O P No 97/1966 in the Court of the 1st Additional Chief Judge, City Civil Court, Hyderabad, in respect of this very property against the first respondent and others. It is further alleged in the complaint that the actions of the first respondent are actuated by malice against the complainant.

3. The respondents after appearing before the learned Magistrate raised a preliminary objection that the complaint was not maintainable for want of requisite sanction under Section 197 Cri P C and also because Section 65 of the Wakfs Act, 1954 barred the prosecution. Upholding the objection the learned Magistrate purported to dismiss the complaint and on revision petition filed by the complainant, the Principal Sessions Judge confirmed the order. Both the learned Magistrate and the learned Sessions Judge followed an unreported judgment of a learned single Judge of this Court in Cri R C No 441 of 1964 decided on 12-8-1964. The complainant has filed the present revision against the orders of the learned Magistrate and the learned Sessions Judge and it is contended on his behalf that Cri. R. C 441 of 1964 was wrongly decided.

4 Section 197(1) Criminal Procedure Code is as follows—

197(1) When any person who is a Judge within the meaning of Section 19 of the Indian Penal Code (45 of 1860) or when any Magistrate or when any public servant who is not removable from his office save by or with the sanction of a State Government or the Central Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty no Court shall take cognizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Union of the Central Government and

(b) in the case of a person employed in connection with the affairs of a State of the State Government

5 Section 65 of the Wakfs Act is as follows—

65 No suit or other legal proceeding shall lie against the Board or the commissioner or any other person duly appointed under this Act in respect of anything which is in good faith done or intended to be done under this Act

6 It may be mentioned at the outset that respondents 6 to 8 are not public servants or persons appointed under the Wakfs Act and they cannot therefore claim the protection of either Section 197 Cr P C or Section 65 of the Wakfs Act. Again respondents 2 to 5 are not public servants not removable from office save with the sanction of the Government and hence Section 197 Cr P C is not applicable to them. The question therefore is whether respondents 1 to 5 are protected by Section 65 of the Wakfs Act and whether in the case of respondent 1 sanction of the State Government is necessary.

7 The object of Section 197 Cr P C and similar provisions in other statutes is to protect public servants and persons acting under statutory powers against unnecessary harassment. A reference to the provisions of various enactments such as Section 197 of the Criminal Procedure Code Section 293 of the Indian Income-Tax Act 1961 Section 34 of the Drugs Act 1940 Section 117 of the Factories Act Section 82(i) of the Indian Railways Act Section 14 of the Mines and Minerals (Regulation and Development) Act 1948 Section 15 of the Preventive Detention Act 1950 Section 37 of the Industrial Disputes Act, 1947 Section 193 of the Sea Customs Act of 1878 Section 33 of the Arms Act Section 42 of the Police Act Section 53 of the Madras District Police Act Section 22 of the Prevention of Food Adulteration Act etc. shows that these provisions offer two kinds of protection to persons exercising statutory or official powers absolute or limited.

In the case of some enactments the protection is absolute that is to say no proceeding can at all be instituted against persons exercising powers under some statutes but in such cases the Legislature has invariably taken care to insist that the protected act should have been done in good faith. The protection given by Section 65 of the Wakfs Act is of this category. In some statutes the protection is not absolute but limited in some it is limited in the sense that a short period of limitation is prescribed so that no officer need be in perpetual dread of some ghost rising from the distant past in others it is limited by making the sanction of a prescribed authority a condition precedent to the launching of a prosecution. The protection given by Section 197 of Cr P C is of the last category.

8 It may be noticed that the phraseology used in Section 197 of the Cr P C and Section 65 of the Wakfs Act is different. Under Section 197 of the Cr P C sanction of the Government is necessary if a public servant not removable from office save by the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. Under Section 65 of the Wakfs Act a person appointed under the Act is protected in respect of anything which is in good faith done or intended to be done under the Act. The difference in phraseology of the expressions any offence alleged to have been committed while acting or purporting to act in the discharge of his official duty and anything done or intended to be done under the Act is not of any great significance. As pointed out by the Privy Council in *H B Gill v The King* AIR 1948 PC 128 a temporal meaning should not be given to such expressions and if such a meaning is not given the expressions have precisely the same connotation at least in so far as acts done by persons appointed under the provisions of the Wakfs Act.

9 Cases under Section 197 of the Criminal Procedure Code are legion. To mention a few leading cases they are *Hori Ram Singh v Emperor* AIR 1939 FC 43 AIR 1948 PC 128 *S Ramayya Munnipalli v State of Bombay* AIR 1955 SC 287 *Amrit Singh v State of Pepsu* AIR 1955 SC 309 and *Matajog Dobey v H C Bhari* AIR 1956 SC 44.

10 In *Hori Ram Singh's* case AIR 1939 FC 43 *Varadachariar J* with whom *Sir Morris Gwyer C J* observed as follows—

It does not seem to me necessary to review in detail the decisions given under Section 197 Cr P C which may roughly be classified as falling into three groups, so far as they attempted to state something in the nature of a test. In one group of cases it is insisted that there

must be something in the nature of the act complained of that attaches it to the official character of the person doing it. In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed. The use of the expression "while acting" in Section 197 Cr P C. has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test."

Referring to Hori Ram Singh's case, AIR 1939 FC 43 the Privy Council in, AIR 1948 PC 128 observed

"In the consideration of Section 197 much assistance is to be derived from the Judgment of the Federal Court in 1939 FCR 159. AIR 1939 FC 43, and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar J. Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the Judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that what he does he does in virtue of his office."

In the case of AIR 1955 SC 287 their Lordships of the Supreme Court did not lay down any principle though Section 197 was discussed at length with reference to the facts of that case, Bose J, finally observing

"There are cases and cases and each must be decided on its own facts."

In AIR 1955 SC 309 Venkatarama Ayyar J summed up the authorities in the following words—

"It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1), Cr P C nor even every act done by him while he is actually engaged in the performance of

his official duties, but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office then sanction would be necessary; and that would be so irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence of the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution." Later he again observed—

"If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required"

In AIR 1956 SC 44, Chandrasekhara Aiyar J laid down the following test.

"There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds that is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation. There must be a reasonable connection between the act and the discharge of official duty, the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

In order, therefore, to insist upon sanction under Section 197 of the Criminal Procedure Code in the words of Varadachariar J "there must be something in the nature of the act complained of that attaches it to official character of the person doing it," in the words of Lords Simonds, "the act must be such as to lie within the scope of his official duty", in the words of Venkatarama Ayyar J, "the act complained of must be integrally concerned with his official duties", and in the words of Chandrasekhara Aiyar, J. there must be a reasonable connection between the act and the official duty

11. In Virupaxappa Veerappa v State of Mysore, AIR 1963 SC 849 the Supreme Court considered Section 161 of the Bombay Police Act which prescribed a period of six months as the period within which a prosecution may be launched against a Police Officer for an act done under colour or in excess of his duty or autho-

ity Construing the words colour of office, their Lordships observed as follows

the expression under colour of something or under colour of duty' or under colour of office" is not infrequently used in law as well as in common parlance. Thus in common parlance when a person is entrusted with the duty of collecting funds for say some charity and he uses that opportunity to get money for himself we say of him that he is collecting money for himself under colour of making collection for a charity. Whether or not when the act bears the true colour of the office or duty or right the act may be said to be done under colour of that right office or duty it is clear that when the colour is assumed as a cover or a cloak for something which cannot properly be done in performance of the duty or in exercise of the right or office the act is said to be done under colour of the office or duty or right. It is reasonable to think that the Legislature used the words under colour in Section 161(1) to include this sense. It appears to us that the words under colour of duty have been used in Section 161(1) to include acts done under the cloak of duty even though not by virtue of the duty.

12 In *State of Andhra Pradesh v Venugopal* AIR 1964 SC 33 the Supreme Court had occasion to consider Section 53 of the Madras District Police Act which provided that all actions and prosecutions against any persons which may be lawfully brought for having done or intended to be done under the provisions of that Act or under the provision of any other law conferring powers on the police should be brought within three months of the act complained of. They observed

'It is easy to see that if the act complained of is wholly justified by law it would not amount to an offence at all in view of the provisions of Section 79 of the Indian Penal Code. Many cases may however arise where in acting under the provisions of the Police Act or other law conferring powers on the Police the police officer or some other persons may go beyond what is strictly justified in law. Though Section 79 of the Indian Penal Code will have no application to such cases Section 53 of the Police Act will apply. But Section 53 applies to only a limited class of persons. So it becomes the task of the Court whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the Police under which it may be said to have been done or intended to be done. The Court has to remember in

this connection that an act is not "under" a provision of law merely because the point of time at which it is done coincides with the point of time when some act is done in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done under" a provision of law one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done under the particular provision of law.

13 In addition to these cases there is one other decision of the Privy Council to which I would like to refer though it is not in point. Construing the word 'assessment made under the Act' occurring in Section 67 of the Indian Income-Tax Act 1922 in *Raleigh Investment Co Ltd v Governor General in Council* (1947) 2 Mad LJ 16 = (AIR 1947 PC 78) their Lordships observed—

The obvious meaning and in their Lordships opinion the correct meaning of the phrase assessment made under the Act is an assessment finding its origin in an activity of the assessing Officer acting as such. The phrase describes the provenance of the assessment it does not relate to its accuracy in point of law. The use of the machinery provided by the Act not the result of that use is the test.

14 A study of decided cases shows that Sec 197 of the Criminal Procedure Code and provisions like Section 65 of the Wakfs Act protect two classes of acts: (1) Where the act complained of is the very act which he is expected or authorised to do under the statute or the law but which becomes reprehensible because it is alleged to be done fraudulently or dishonestly i.e. where the machinery of the Act is employed to do an authorised act in an unauthorised manner or for an unauthorised purpose (2) where the act complained of though not itself sanctioned by statute or enjoined by his official duty is however so intimately and integrally connected with his official or statutory duty that it can be said to have been done in furtherance of the duty prescribed by statute or for achieving the object enjoined by his duty. There must be a reasonable nexus between the act and the duty.

15 A few illustrations will help to understand the position clearly. The delivery of an alleged dishonest judgment by a Judge the making of alleged false entries in accounts by an accountant are instances of the first category of acts because the writing of a judgment is itself the official duty of a judge and the writing of accounts is the official duty of an accountant. The use of reasonable force by a police officer effecting an arrest the re-

removal of an obstruction to a lawful search etc., are illustrations of the second category of acts because the use of reasonable force is reasonably connected with the effecting of an arrest and the removal of an obstruction with a lawful search. The receipt of a bribe by a Judge for delivering a dishonest judgment does not come within either of the categories because, while writing a judgment is his official duty, receipt of a bribe is not; nor is there any reasonable connection between the receipt of the bribe and the writing of the judgment. His position as a judge and his official duty to write a judgment merely provide him with the opportunity to commit the offence of receiving a bribe.

Again, a police officer causing injuries to an accused person with a view to extort a confession from him does not come within either of the categories. While it is the duty of a police officer to investigate into an offence it is not part of his duty to extort a confession, nor can it be said that the extortion of a confession is reasonably connected with the duty of a police officer to investigate. Similarly, while an Income-tax Officer has the right to make orders of assessment, issue demand notices, and to initiate recovery proceedings by issuing certificates under Section 222 of the Income-Tax Act of 1961, he cannot claim the protection of Section 197 if he trespasses into the premises of an assessee and seizes the cash from the till in order to appropriate it towards arrears of tax due from the assessee. He cannot claim protection notwithstanding the fact that the act is done by him in his official capacity only. That is because his act is neither authorised by the Income-Tax Act nor is there any nexus between his act and his statutory duties.

15A. In the light of the foregoing discussion we will now proceed to examine whether the acts of the respondents are protected by Section 65 of the Wakfs Act and whether sanction under Section 197 of the Criminal Procedure Code is necessary in the case of the 1st respondent. The Wakfs Act is an Act intended to provide for the better administration and supervision of Wakfs. Section 4 casts a duty on the Commissioner of Wakfs to make a survey of wakf properties in the State and to submit a report to the Government and to the Wakf Board. The Board after examining the report is authorised to publish a list of Wakfs existing in the State. Section 6 provides for the institution of a suit in a Civil Court by the Wakf Board, a mutawalli of a Wakf or any person interested in the Wakf, if any question arises whether particular property is Wakf property or not. Section 15 enumerates the functions of the Wakf Board among which clauses (h) and (i) relate to taking mea-

sures for the recovery of lost properties of any wakf and institution and defence of suits and proceedings in a court of law relating to Wakfs.

Section 27 authorises the Wakf Board to collect information regarding any property which it has reason to believe to be Wakf property and if any question arises whether it is wakf property or not to decide such question after making enquiry. The decision of the Board is subject to the decision of a Civil Court of competent jurisdiction. Section 36 prescribes the duties of a mutawalli and Section 36-A prohibits transfer of immovable property of a Wakf without the previous sanction of the Board. Where Wakf property is transferred without the sanction of the Board, Sec 36-B enables the Board to send a requisition to the Collector to obtain and deliver possession of the property to the Board. The Collector may do so by making an order calling upon the party in possession to deliver possession. Such a party is given a right to prefer an appeal to the District Court against the order of the Collector directing delivery of possession.

16. Apart from Section 36-B which deals with wakf property alienated by a mutawalli without sanction of the Board, there is no provision in the Wakfs Act which enables the Wakf Board to recover possession of alleged wakf property in some other's possession without recourse to legal process. Even Section 36-B does not enable the Board to get such possession itself but enables it to move the Collector to obtain and deliver possession to it. Section 36-B prescribes how the Collector may obtain possession and deliver it to the Board. What is of importance is that the party in possession is given a right to appeal to the District Court against the order of the Collector directing delivery of possession. In the case of properties not covered by Section 36-B, the Board, like all other persons must seek the aid of legal process to recover possession. The learned counsel for respondents urges that clause (h) of Section 15 enables the Board to recover possession of Wakf properties directly without recourse to legal process.

The function of the Board under clause (h) is to take measures for the recovery of lost properties of a wakf that is, by legal process and not by taking the law into its hands. We are unable to conceive of any statutory body-corporate being vested with a power directly to take possession of property in the possession of strangers on the bare allegation that the property is one which ought to be in the custody of that body, without even the issue of a prior notice. Such a power would be a drastic curtailment of a citizen's rights. Even under the Land Encroachment Act and Public Premises (Eviction of Un-

authorised Occupants) Act persons in unlawful possession cannot be ejected summarily. Notice has to be given and the prescribed procedure has to be followed. We have no hesitation to hold that the Wakf Board is not invested under the Wakfs Act with power to take possession of property in the possession of another by direct action without recourse to legal process. We are further unable to hold that there is any reasonable nexus between the duty to take measures to recover lost properties and the alleged acts of the respondents of which complaint is made.

17 Both the lower Courts have followed the Judgment of a learned single Judge of this Court in Criminal Revn. Case No 441 of 1964 (AP). In that case the allegation was that the accused the Secretary and Inspector of the Wakf Board conspired to have the hut of the complainant dismantled with the help of the Municipality. They were alleged to have done that because the complainant who had taken the plot on which the hut stood on lease from the Wakf Board failed to vacate the land when asked to do so by the Wakf Board. The learned single Judge held

Having regard to the nature of the complaint and the allegations contained therein it is obvious that the petitioners had committed the offence if any while acting or purporting to act in the discharge of their official duties.

We think the learned Judge was not right in his conclusion. The learned Judge appears to have thought the fact that the accused were acting in their official capacity when they were alleged to have committed the offences was sufficient to attract Section 197 of the Criminal Procedure Code. We have explained that it is not so. The acts complained of should themselves be authorised by statute or there should be a reasonable nexus between the acts and the duties enjoined by statute. This aspect was not considered by the learned Judge. We think that Criminal Revn Case No 441 of 1964 (AP) was wrongly decided. We therefore hold that in the present case Section 65 of the Wakfs Act is not a bar to the prosecution of any of the respondents nor is sanction under Section 197 of the Criminal Procedure Code necessary for the prosecution of any of the respondents.

18 Before parting with the case we would like to emphasise that Courts should not be too ready to throw out complaints in limine and without any enquiry on the ground of want of sanction etc. Often times the question whether sanction is necessary or not dependent as it is on the nature of the act and the nature of the accused's official duty is not a pure question of law but a mixed question of law and fact which can only be decided

after the adduction of some evidence. Further we do not see how questions of good faith can possibly be decided without evidence being adduced.

19 In the result the orders of the learned Magistrate and the Sessions Judge are set aside. The Magistrate is directed to entertain the complaint against all the accused and proceed in accordance with law.

Petition allowed

1970 Cri L J 32 (Vol 76, C N 7) =
AIR 1970 CALCUTTA 12 (V 57 C 3)

R N DUTT

AND T P MUKHERJI JJ

Kalyanmal Agarwalla Petitioner v
District Magistrate Midnapore and others,
Respondents

Criminal Misc Case No 369 of 1968
D/ 26 6-1968 and Application for leave
to appeal to Supreme Court D/- 21 11-1968

(A) Public Safety — Preventive Detention Act (1950) Ss 7 3 A 3 (1) (a) and (b) and 3 (2) — Order of detention need not be served on the detenu at the time of arrest — S 3-A too does not require it — Service of a copy of the grounds for detention need alone be served—The grounds to accompany a preamble complying with Sec 3 (1)

An order of detention under S 3 (2) of the Preventive Detention Act does not become invalid for non service of a copy of the order of detention on the detenu at the time of his arrest. There is no specific provision in the Preventive Detention Act requiring service of the copy of the order of detention on the detenu. Section 7 requires service of copy of the grounds for which the detenu has been detained. Even S 3 A of the above Act which provides that the detention order is to be executed in the manner provided for execution of warrant of arrest under Criminal P C can be of no help because under the Code no warrant of arrest need be served on the person to be arrested. (Para 3)

Therefore it is enough if a copy of the grounds for detention accompanied by a preamble containing recitals in the terms of one or more of sub-clauses (a) and (b) of section 3 (1) is served on the detenu. Where the preamble to the grounds which were furnished to the detenu stated that he had been acting in a manner prejudicial to the maintenance of supplies and services essential to the community held as sufficient compliance of the requirement AIF 1959 SC 1335 Rel on (Para 3)

EM/HM/C148/69/TVN/B

(B) Public Safety — Preventive Detention Act (1950), Ss. 7 and 3 (1) (a) and (b) — On facts, held, that the grounds had proximate connection with the purpose of detention — Grounds also held to be not vague or misleading.

The grounds for detention of the petitioner were (a) that on 28-7-66 he was found carrying 40 bags of rice concealed under gravels in a truck from Midnapore Town to Calcutta and that he was tried and convicted for that on 7-10-66, (b) that on 30-10-67 he transported 20 bags of rice covered by tarpaulin by a truck from his grocery shop at Station road, Midnapore, without licence to deal in rice or any movement permit and (c) that on 30-10-67 his grocery shop was searched and it was found to contain 27 bags of rice stored for sale. The preamble accompanying the grounds stated that he was being detained because he was acting in a manner prejudicial to the maintenance of supplies and services essential to the community. The detenu contended (i) that ground (a) had no proximate connection with the purpose for which he was being detained and (ii) that grounds (b) and (c) were vague and misleading, in that he was not the owner thereof. The substance of the allegation investigated into by the Police on the basis of which the charge-sheet was filed was that it was the detenu who was indulging in unlawful deals in rice from that shop though he had no licence to deal in rice.

Held (1) that allegations in ground (a) as also those in grounds (b) and (c) related to acts prejudicial to the maintenance of supplies essential to the community. Thus, considering ground (a) in the context of grounds (b) and (c), ground (a) should be held to have proximate connection with the purpose for which the detenu was being detained; namely, maintenance of supplies essential to the community. (Para 4)

and (2) that in view of the positive allegation that it was the detenu who was indulging in such unlawful activities, the grounds in (b) and (c) could not be said to be vague or misleading. (Para 5)

(C) Public Safety — Preventive Detention Act (1950), Ss. 3 (2) and 10 (3) — Dealing in rice and movement thereof without licence — Accused charge-sheeted before a Magistrate — Accused discharged at the request of Police who said that he was already detained under the Act — Order of detention held, was not mala fide — (Constitution of India, Art. 22).

The accused was chargesheeted before a Magistrate for his unlawful dealings and movement of rice without any licence therefor. The Police, after filing the charge-sheet, recommended discharge

on the ground that he had, in the meantime been detained under the Preventive Detention Act. The Magistrate discharged him accordingly. The detenu urged that the order of detention under the circumstances was mala fide in that the Police did not allow him to prove his innocence making the order of detention on the self-same allegations. It was further argued that if the Magistrate had not in fact discharged the detenu, which he was not sure about, the order of detention would adversely affect his right under Art. 22 of the Constitution, since his defence disclosed before the Advisory Board might come to be used by the Police against him at the trial.

Held, (1) that the Magistrate was competent to take those allegations into his consideration for arriving at his subjective satisfaction, even if the case continued against the detenu. Merely because the detenu was discharged from the criminal case the order of detention would not become mala fide. The trial was for what the detenu is alleged to have done: The detention was with a view to prevent him from acting in similar manner. (Para 6)

and (2) that though the specific case was continued against a detenu even after he was detained, that would not adversely affect his constitutional right under Art. 22 because the representation which he might make to the Advisory Board as part of the proceedings of the Board is confidential under section 10 (3) of the Preventive Detention Act and could not be used against him at his trial. Thus whether the accused had been discharged or not was immaterial in the sense that in either view of the matter the order could not be quashed. (Para 7)

(D) Constitution of India, Art. 133 (1) (c) — Order of detention under Preventive Detention Act — Application under S. 491 of Criminal P. C. challenging order dismissed — Application for leave to appeal to Supreme Court on same points and further materials — Further materials, held, could not be considered for issue of a certificate of fitness under Art. 133 (1) (c) of the Constitution—(Civil P. C. (1908)), S. 110). (Para 12)

Cases Referred: Chronological Paras (1959) AIR 1959 SC 1335 (V 46) =

1959 Cri LJ 1501, Naresh Chandra v State of West Bengal

S S Mukherji, S C Majumdar, Prafulla Kumar Kundu and Ananga Kumar Dhar (in Appln for leave to SC), for Petitioner; Dilip Kumar Dutta, for Respondents

R. N. DUTT, J.: This is an application under section 491 of the Code of Criminal Procedure for a writ in the nature of Habeas Corpus against the detention of Kalyanmal Agarwalla under sub-sec-

tion (2) of section 3 of the Preventive Detention Act 1950

2 It appears that the detenu Kalyanmal Agarwalla is being detained on the basis of an order of detention made by the District Magistrate Midnapore on February 29 1968 under section 3 (2) of the Preventive Detention Act 1950

3 Mr Mukherji first argues that no copy of the detention order was served on the detenu and as such the detention order should be struck down. It has been stated in the application that no copy of the detention order was served on the detenu when the detenu was taken into custody. The District Magistrate has in his affidavit said that copy of the detention order was served on the detenu when he was taken into custody. The District Magistrate has said this in his affidavit from information derived from the records in respect of this detenu. We do not however find any affidavit from the Officer who actually served the copy on the detenu. Be that as it may even if we assume that the copy of the order was not served on the detenu that in our opinion is no ground for striking down the order of detention. There is no specific provision in the Preventive Detention Act requiring service of copy of the order of detention on the detenu. Section 7 requires service of copy of the grounds for which the detenu has been detained. Mr Mukherji refers to section 3A of the Act and submits that the detention order is to be executed in the manner provided for execution of warrant of arrest under the Code of Criminal Procedure. True but the Code of Criminal Procedure does not require that copy of the warrant of arrest has to be served on the person to be arrested and so we are not prepared to strike down the order of detention on the ground that copy of the detention order was not served on the detenu at the time when he was taken into custody. We read the decision of the Supreme Court in *Narsh v State of West Bengal* reported in AIR 1959 Supreme Court 1335 as requiring that the grounds should be accompanied by a preamble containing recitals in terms of one or more of the Sub-clauses (a) and (b) of section 3 (1). In the instant case there is such a preamble to the grounds which were furnished to the detenu and that preamble recites that the detenu has been acting in a manner prejudicial to the maintenance of supplies and services essential to the community.

4 The grounds for the detention are as follows:

"(a) That on 28-7-66 at about 06.30 hrs you were found carrying 40 bags of rice weighing 30 qtls concealed under gravels in truck No W G C 1373 from Midnapore Town to Calcutta by the

Checkpoint staff of Sreerampore Checkpost on Bombay Road within Debra P S area. In this connection you were sent up in charge sheet in Debra P S Case No 20 dt 27-7-66 u/s 7 (1) (a) (ii) of Act V/55 and you were convicted and sentenced to pay a fine of Rs 500/- to suffer R I for 15 days by Shri A Mukhopadhyaya Magistrate 1st Class Midnapore on 7-10-66.

(b) That on 30-10-67 morning you transported 22 bags of rice weighing 16.15 kgs covered by a tarpaulin by truck No W G B 1369 from your grocery shop at Station Road Midnapore without having any licence to deal in rice or any movement permit.

(c) That on 30-10-67 at 17-00 hrs in pursuance of certain statement S I M L Majhi of Kotwali P S Midnapore searched your grocery shop at Station Road Midnapore and seized 27 bags of rice weighing 15 qtls 23 kgs 700 mgs which you stored for sale in your said grocery shop without having any licence. Mr Mukherji submits that ground (a) has no proximate connection with the purpose for which the detenu is being detained. The detention order was made as we have seen in February 1968 but the conviction recited in ground (a) took place in October 1966. The allegations in ground (a) related to acts prejudicial to the maintenance of supplies essential to the community. Grounds (b) and (c) which relate to some incident on October 30 1967 are again related to acts prejudicial to the maintenance of supplies essential to the community. When we consider ground (a) in the context of grounds (b) and (c) we have no hesitation in holding that ground (a) has proximate connection with the purpose for which the detenu is being detained namely maintenance of supplies essential to the community.

5 Mr Mukherji then argues that grounds (b) and (c) are firstly vague and misleading. These grounds state that the detenu transported 22 bags of rice from his grocery shop and that 27 bags of rice were seized from his grocery shop. From annexure C to the affidavit in reply filed on behalf of the detenu Mr Mukherji argues that the grocery shop was not the grocery shop of the detenu. The shop was owned by one Mohanlal Gupta and the business is carried on in the name of Mohanlal & Co. Furthermore from this annexure Mr Mukherji also submits that there is no allegation that the detenu had transported 22 bags of rice in the lorry which was seized. Annexure C is the charge sheet submitted by the police after investigation of the allegations contained in grounds (b) and (c). The substance of the allegation is that though Mohanlal Gupta is the owner of the business carried on in the

name of 'Mohanlal & Co', and though 'Mohanlal & Co' has a municipal trade licence for the shop, it was the detenu who was indulging in unlawful deals in rice from that shop though he or 'Mohanlal & Co.' had no licence to deal in rice. The positive allegation is that it was the detenu who was indulging in these activities from this shop. True it has not been said that the detenu was present in the lorry when the lorry which contained 22 bags of rice was seized but the allegation is that these were being despatched by the detenu and so far as ground No (c) is concerned, the allegation is that it was the detenu who had stored 27 bags of rice in the grocery shop without a licence. We are, therefore, not prepared to say that these grounds are either vague or misleading.

6. Mr. Mukherji then argues that the order was mala fide inasmuch as when a specific case was started against the detenu in respect of the allegations contained in grounds (b) and (c) the State did not allow the detenu to prove his innocence but made the order of detention on the self-same allegations. From annexure 'c' it appears that after investigation when the police submitted charge sheet, the police recommended discharge of the detenu on the ground that he had, in the meantime, been detained under the Preventive Detention Act. The District Magistrate was competent to take these allegations into his consideration for arriving at his subjective satisfaction, even if the case continued against the detenu. We do not therefore, think that merely because the detenu was discharged from the criminal case the order of detention becomes mala fide. The trial was for what the detenu is alleged to have done. The detention is with a view to prevent him from acting in similar manner. The District Magistrate cannot therefore be said to have made the detention order mala fide because after he made the detention order, the investigating officer has prayed for his discharge on the ground that he has already been detained under the Preventive Detention Act.

7. Mr. Mukherji finally submits that though the Police prayed for discharge of the detenu from the criminal case, we have no material before us to show that he was in fact discharged. Mr. Mukherji submits that if the detenu has not been discharged then this order of detention should be struck down as it adversely affects his constitutional right under Article 22 of the Constitution, inasmuch as he will be forced to disclose his defence before the Advisory Board and the prosecution will be able to use the same against him at the trial. We have considered this point in some other cases also and we have held that though the

specific case is continued against a detenu even after he is detained, that does not adversely affect his constitutional right under Art 22 of the Constitution because the representation which he may make to the Advisory Board as part of the proceedings of the Board is confidential under section 10 (3) of the Preventive Detention Act and cannot be used against him at his trial. Thus whether the accused has been discharged or not appears to us to be immaterial in the sense that in either view of the matter we find no reason to strike down the order of detention.

8. No other point is taken. We find that the detenu is being detained under lawful authority and in that view of the matter the Rule is discharged.

9. T. P. MUKHERJI, J.: I agree (Application for leave to appeal to Supreme Court)

10. R. N. DUTT, J.: This is an application under Art 134 (1) (c) of the Constitution for a certificate of fitness to appeal to the Supreme Court.

11. The petitioner was detained without trial on the basis of an order of detention made by the District Magistrate, Midnapore, on February 29, 1968, under sub-section (2) of section 3 of the Preventive Detention Act, 1950. An application under section 491 of the Code of Criminal Procedure for a writ in the nature of habeas corpus was filed by the petitioner but was dismissed by us as we found that the detenu was being detained under lawful custody.

12. Various points were taken before us. The self-same points have again been raised. Mr. Dhar submits that he has in the meantime produced certain further materials and these should be taken into consideration for a decision about the legality or otherwise of the detention order. But this can never be a ground for a certificate of fitness to appeal to the Supreme Court.

13. The points raised before us and the points now raised by Mr. Dhar do not involve a substantial question of law requiring an authoritative decision from the Supreme Court and we do not think that it is a fit case for a certificate of fitness to appeal to the Supreme Court.

14. The application is, therefore, dismissed.

15. Let the certified copy of the judgment of this Court be returned to the learned Advocate for the petitioner.

16. T. P. MUKHERJI, J.: I agree

Petitions dismissed

1970 Cri L J 35 (Vol 76, C N 8) =

AIR 1970 GOA DAMAN AND

DIU 1 (V 57 C 1)

V S JETLEY J C

State Appellant v Emerciano Lemos
RespondentCriminal Appeal No 3 of 1969 D/
13-3-1969(A) Penal Code (1860) S 84 — Evi-
dence Act (1872) S 105 — Accused plead-
ing insanity at time of act — Nature of
burden of proof indicated (Para 6)

The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. There is a rebuttable presumption that the accused was not insane when he committed the crime in the sense laid down by Section 84 of the Penal Code. The accused may rebut it by placing before the court all the relevant evidence—oral documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. AIR 1964 SC 1563 Relied on (Paras 6 & 8)

Held that the prosecution evidence — oral and circumstantial — helped the accused in this case and he had been able to rebut the presumption that he was not insane at the time of the assaults on the particular day. AIR 1969 SC 15 & AIR 1961 SC 998 & AIR 1964 SC 1563 Distinguished (Para 8)

(B) Penal Code (1860) S 84 — Schizo-
phrenia — Characteristics of

A patient suffering from schizophrenia has delusions which are bizarre in nature. There is often impulsive and senseless conduct on his part as a result of hallucinations or delusions. The whole personality completely disintegrates. The patient often is in a state of wild excitement is destructive violent and abusive. He may impulsively assault anyone with out the slightest provocation. The delusions are of a persecutory nature. When a patient is having an attack of schizophrenia not infrequently he attacks those against whom he has grievances real or imaginary (Paras 6 & 7)

DM/EM/B724/69/RGD/B

(C) Penal Code (1860) S 84 — Pre-
sumption — Test of responsibility stated

Every man is presumed to be sane. This presumption does not apply to a man whose case is governed by Section 84. Section 84 mentions the legal test of responsibility in case of alleged unsoundness of mind. It is by this test as distinguished from medical test that the criminality of the act is to be determined. This section in substance is the same as the McNaghten Rules. These Rules in spite of long passage of time are still regarded as the authoritative statement of the law as to criminal responsibility. (Para 10)

(D) Criminal P C (1898) S 286 —
Duty of Prosecutor where he is satisfied
that case is covered by S 84 Penal Code
— (Penal Code (1860), S 84)

Where the Public Prosecutor was satisfied that the case of the accused was covered by Section 84 he should make a bold statement that he cannot support the prosecution. Government Pleaders and Public Prosecutors owe a duty to the courts and that duty is that when they are convinced that the prosecution case cannot be supported they should state so fearlessly and boldly regardless of instructions to the contrary. (Para 11)

Cases Referred Chronologically Paras

(1969) AIR 1969 SC 15 (V 56) =

1969 Cri LJ 259 Jai Lal v Delhi
Administration 8

(1964) AIR 1964 SC 1563 (V 51) =

1964 (2) Cri LJ 472 Dahyabhai
v State of Gujarat 8

(1961) AIR 1961 SC 998 (V 48) =

(1961) 2 Cri LJ 43 State of M P
v Ahmadulla 8

(1949) AIR 1949 Cal 182 (V 36) =

50 Cri LJ 255 Ashiruddin Ahmed
v King 8 9

(1947) AIR 1947 Pat 222 (V 34) =

48 Cri LJ 143 Narain Sahu
v Emperor 9

(1928) AIR 1928 Cal 233 (V 15) =

30 Cri LJ 247 Karma Urang
v Emperor 8 9S Tamba Govt Pleader for State
B F D Souza for Respondent

JUDGMENT — This is an appeal under Section 417 of the Code of Criminal Procedure filed on behalf of the State praying for the reasons mentioned therein that the acquittal of the respondent-accused be set aside. The accused in this case was charged with offences under Section 302 and some other sections of the Indian Penal Code. The learned Additional Sessions Judge Panaji after considering the prosecution evidence came to the conclusion that the accused was of an unsound state of mind at the time of the commission of the offences charged with and therefore he directed his acquittal. He also passed an order under Section 471 of

the Code of Criminal Procedure in pursuance of which the accused was detained in safe custody. The State felt that this acquittal was not justified and consequently moved this Court in appeal.

2. The prosecution case is that the accused and his family and also the brother of the accused and his family were occupying two parts of the common family house. The two brothers were not on talking terms for the last ten or twelve years. Gabriel Lemos was their neighbour and also a distant relation. He was involved in a law suit with the wife of the accused, wherein a prohibitory order was passed against his wife. This order was obtained about four months before the incident on 16th October, 1967, when the accused killed the wife of Gabriel Lemos, and injured others. The accused was employed as a seaman and had returned about 8 days prior to 16th October, 1967.

On 15th October, 1967, at about 6 p.m. the accused visited the house of Delicosa Mazarello, his brother's wife, and smashed one of the windows. He also threw stones at the house of Gabriel Lemos. On 16th October, 1967, at about 7 p.m. when Delicosa Mazarello had gone to a neighbour's house with a view to requesting her to sleep with her and her daughters during the night the accused started banging the windows of her house which were closed, her children ran out of the house through the front door out of fear when the accused, without any provocation or warning, assaulted all of them with the stick, stones and bottles that he had with him. They sustained injuries and were taken to Hospicio Hospital at Margao for treatment. The accused, soon after this assault, started throwing stones at the house of Gabriel Lemos, and when Gabriel Lemos came out he attacked him with a stick. He also attacked Gabriel Lemos' wife, by name Ramira, with a stick, resulting in severe injuries on her head and other parts of her body. She was removed to this hospital where she died after about five days.

The police were in the vicinity and when they heard the noise they came there and saw the accused in a violent state throwing stones at the people who had gathered there. The police warned the accused not to behave in that manner but notwithstanding the warning he started throwing stones even at the police. He was later caught from behind by constable Agapito Almeida, but he escaped from his grip and thereafter hit this constable with a knife he had in his hands. The constable received injuries on his left arm. The accused even attempted to pick up another knife from the ground in order to give further knife blows to the constable but the latter ran away. In the meanwhile the accused was overpowered and

arrested by other policemen. He was tied with ropes and taken to this hospital and, from there, on 18th November, 1967, he was taken to the Mental Hospital. He was discharged therefrom on 11th June, 1968. The police, after necessary investigation, charged the accused under Section 302 and other sections of the Indian Penal Code. The learned Committing Magistrate committed the case to the Court of Session. The learned Additional Sessions Judge, after considering the prosecution evidence, came to the conclusion that the accused caused the death of Ramira Lemos and assaulted his own nieces and the police constable but as he was suffering from schizophrenia and as he was of unsound state of mind he did not know the nature of his act or what he was doing was wrong or contrary to law. In this view of the matter relying on the provisions of Section 84 of the Indian Penal Code, he directed his acquittal.

3. In the statement recorded by the learned Additional Sessions Judge under Section 342 of the Criminal Procedure Code, the accused pleaded that he was unaware of what had taken place on 15th or 16th October, 1967. The accused led no defence on his behalf.

4. The prosecution evidence may be briefly discussed.

Sebastiao Mazarello (P.W. 1) is a panch witness of the scene of the offence. He is M.B.B.S. having graduated from the Grant Medical College, Bombay. He is a neighbour of the accused and according to him the accused was suffering from mental disorder for the last 5 or 6 years. The accused is about 65 years old and this witness is about 66 years old and, being his neighbour, he knows him from his childhood.

Agapito Almeida (P.W. 2) is a constable who went to the scene of the offence on hearing the noise. He saw a number of people at the scene of the offence and he found the accused pelting stones at them. This was about 7.30 p.m. According to him, he and other constables told the accused that they were police officers and that he should stop throwing stones, but he continued to throw stones at them. The Police then decided to arrest him but before that the accused assaulted him with a knife on his arm. In cross-examination he stated that the accused was in "a furious state". He lodged the first information report (Exh. 4) and, in that report, there is a statement by him that the police were informed by some people that one mad person by name Emericiano Lemos had attacked Gabriel Lemos, his wife Ramira Lemos and some others. This report also mentions that when he visited the scene of the offence he found the accused standing in front of his house armed with a knife and a big stick challenging

the public that he would kill if any one went forward to stop him. It is further mentioned that Head Constable Antonio Barracho and Police Constable Madeurao Rane remained at the scene of the offence with a view to preventing the accused from further violent action. In the column Brief facts of offence in this report it is stated that the accused person in a fit of madness went amuck and attacked the villagers and also attacked the complainant with knife.

Delicosa Mazarello (P W 3) is the sister-in-law of the accused. According to her the accused and her husband who are brothers were not on good terms. She deposed to the incident which took place on 15th October 1967 when the accused smashed a window of her house. She also deposed to the incident on 16th October 1967 when she saw her daughters Nora Sensi and Blandina injured and bleeding. They told her that they had been assaulted by the accused in their house. She found the accused standing in front of his house threatening the people and throwing stones at them.

Nora Lemos (P W 4) is a niece of the accused. She deposed that the accused without any warning assaulted her and her two other sisters with a stick and she saw a pile of stones sticks and bottles near the steps of their house. Her sister Sensi, according to her was hit by the accused with a bottle. She also deposed that the accused had returned to the village about a week prior to the incident on 16th October 1967 and that during the last two years before the incident she had met the accused a number of times in his house but the accused never assaulted her or any other family member. She saw the Police encircling the accused and firing rounds in the air before the accused was caught from behind and tied with ropes.

Dr Jose Sarto Menezes (P W 5) performed post-mortem of the deceased Ramura and according to him the cause of the death was the head injury resulting in the fracture of the skull. She had also received other injuries on her body.

5 The evidence of Dr Guiri Carnotim (P W 6) is particularly important on the question of the mental state of the accused. He was medical superintendent, Mental Hospital, Panaji in October 1967 when the accused was admitted in that hospital on 18th October 1967 at about 11 p.m. The record relating to admission of the accused shows that he was brought by the Police and that his hands and feet were tied by iron chains. This witness examined the accused and according to him he was suffering from schizophrenia for about 6 months prior to his admission in this hospital. He found him overtalkative and incoherent upto 31st October 1967. He was discharged on 11th June,

1968 after necessary medical treatment. In cross-examination he deposed that schizophrenia sometimes makes a patient to act violently and in an uncontrollable manner. He gathered from enquiries that from 1963 the accused had suffered from schizophrenia and that he had been treated in UK. According to him the duration of schizophrenia is normally for weeks months or even years together and on some occasions during this period the patient becomes violent. He also stated that there are lucid periods but when a patient has an attack of schizophrenia he is guided by hallucinations and delusions; he is not then in a position to distinguish right from wrong and is incapable of knowing the nature of his acts. This witness also added that after the attacks cease the patient can recollect what he had done.

Ramesh Malkarnekar (P W 8) is a Junior Medical Officer at Hospicio Hospital at Margao. He found certain injuries on the accused after the incident on 16th October 1967. He also found that he was violent.

Gabriel Lemos (P W 10) is a neighbour of the accused. According to him the accused and he are not on good terms for a number of years. It is in his evidence that for about four months before the incident he had obtained a prohibitory order restraining the wife of the accused from extending the boundaries of her house and that the accused after his arrival from abroad about 8 days before the incident used to insult and threaten his wife that she would be killed. He referred to the incident on 16th October 1967 when he found the accused throwing stones at his house and later assaulting him and his wife with a stick. This is the substance of the prosecution evidence.

6 It is necessary in the first place to consider the provisions of Section 84 of the Indian Penal Code and also Section 105 of the Evidence Act. Under Section 84 nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. Section 105 of the Evidence Act, to the extent it is material for the present purpose, provides that when a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code or within any special exceptions is upon him, and the court shall presume the absence of such circumstances. Section 84 relates to a general exception. Illustration (a) of Section 115 reads— A, accused of murder alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A. It follows from

this illustration and also the said Section 105 that it is for the accused to discharge the burden of proof that he did not know the nature of the criminal acts committed by him. In Modi's 'Medical Jurisprudence and Toxicology' different kinds of schizophrenia have been described. As will appear therefrom, a patient suffering from schizophrenia has delusions which are bizarre in nature. There is often impulsive and senseless conduct on his part as a result of hallucinations or delusions. The whole personality completely disintegrates. The patient often is in a state of wild excitement, is destructive, violent and abusive. He may impulsively assault anyone without the slightest provocation. The delusions are of a persecutory nature.

7. The facts gathered from the prosecution evidence are:— (1) that the accused was suffering from schizophrenia for the last 5 or 6 months before the two incidents on 15th and 16th October, 1967, (2) that in the past during the last two years before the incidents on these dates, he did not assault his nieces or any other family member, (3) that on 15th October, 1967, without any provocation, he smashed one of the windows of the house of his brother and threw stones at the house of Gabriel Lemos, (4) that on 16th October, 1967, he assaulted his nieces, Gabriel Lemos and his wife with sticks and bottles without any provocation from them; (5) that immediately after the assault on 16th October, 1967, he was seen with a knife and stick in his hands indiscriminately throwing stones and challenging and threatening the people who had collected there that he would kill them, (6) that he hit constable Agapto Almeida with a knife on his arm when the latter tried to overpower him; (7) that he was regarded by the people who had collected there and also by the Police as a mad person who had run amuck; (8) that the Police had to encircle the accused and fire rounds in the air before he was caught from behind and tied with ropes and iron chains, (9) that schizophrenia sometimes makes a patient act violently and in an uncontrollable manner; (10) that a prohibitory order had been obtained by the deceased Ramira Lemos wife of Gabriel Lemos about four months before the incidents on 15th and 16th October, 1967; and (11) that the accused had returned from abroad a week before the incidents. Mr. S. Tamba, learned Government Pleader, relies mainly on the evidence of Gabriel Lemos that after returning from abroad the accused used to insult and threaten that he would kill the wife of Gabriel Lemos. Gabriel Lemos and the accused admittedly are not on good terms and beyond the uncorroborated testimony of Gabriel Lemos there is no other evidence to show that before these incidents, the accused threatened to kill the wife of Gabriel Lemos. Gabriel

Lemos cannot be regarded as a disinterested witness. The niece of the accused by name Nora Lemos (P. W. 4), has not deposed to these insults and threats. The prosecution have also not examined any other neighbour on this point.

Barring the evidence of Gabriel Lemos there is no other evidence to rebut the argument of Mr. Bernard D'Souza, learned counsel for the accused, that the provisions of Section 84 of the Indian Penal Code are attracted in this case. According to Mr. S. Tamba, the accused had a motive to assault the wife of Gabriel Lemos because of the prohibitory order obtained against the wife of the accused. This may or may not be so but when a patient is having an attack of schizophrenia not infrequently he attacks those against whom he has grievances, real or imaginary. He considers that he is persecuted, when in fact he is not. It is a case of impulsive insanity. He was at that time a man at his worst, little above animals. Mr. B. D' Souza argues that if the accused were in a sound state of mind, he would not attack constable Agapito Almeida with a knife. He would not be challenging and threatening the people who had collected there and throwing stones at them indiscriminately. He would have remained content with assaulting the deceased Ramira and her husband who had given him some cause, but would not assault his young nieces who had given him no cause. He had never assaulted them in the past. He would have concealed the stick, knife, stones and bottles used in attacking the deceased Ramira and others, but all these weapons of attack were found at the scene of the offence. He stood in front of his house like a mad man with a knife in his hand threatening the people who had collected there. He was regarded as a mad man by the people who had collected there and the police. He did not tell anyone that he had attacked the deceased Ramira and her husband Gabriel Lemos because of the prohibitory order obtained against his wife. He would not have been tied with ropes and chains. He did not run away. He was treated of schizophrenia at London before he returned to his village. The antecedent and subsequent conduct of the accused, according to Mr. B. D'Souza, shows that the accused was incapable of knowing the nature of his criminal acts or that he was doing what is either wrong or contrary to law. The medical evidence also supports the statement of the accused.

8. Mr. Tamba relies on 'Jai Lal v. Delhi Administration' AIR 1969 SC 15, 'State of Madhya Pradesh v. Ahmadulla', AIR 1961 SC 998, and 'Dahyabhai v. State of Gujarat', AIR 1964 SC 1563, in support of his contention that the accused did not discharge the burden of proof imposed

upon him in terms of illustration (a) to Section 105 of the Evidence Act

Mr B D Souza relies on 'Karma Urang v Emperor AIR 1928 Cal 238 Ashrudin Ahmed v King AIR 1949 Cal 182 and 'Narain Sahi v Emperor AIR 1947 Pat 222 in support of his contention that the facts established prove that the burden of proof was discharged by the accused

The decisions cited may be briefly reviewed. The facts of AIR 1969 SC 15 are clearly distinguishable and Mr B D Souza is right when he submits that this decision is not helpful. The appellant in the special appeal before the Supreme Court entered the house of his neighbour Somawati on November 25th 1961 at about 145 pm and stabbed her daughter Leela aged 1 and half years with a knife. He inflicted five stab wounds on different parts of her body. The injury on her back proved fatal. Leela died in the hospital at about 4 pm. The appellant then returned to his house and bolted the front door. A crowd collected near the front door and raised an alarm. After sometime the appellant went out by the back door and stabbed another neighbour Parabati and then Raghurib who tried to intervene on her behalf. Raghurib and others tried to apprehend him. He then ran back to his house bolted the door and started throwing brickbats from the roof. He was later arrested by the police. The appellant in this case had a long standing grudge against Baburam uncle of the child Leela. This enmity was said to be the motive of the attack by the appellant on Leela. The defence plea in this case was of insanity. According to the evidence noticed by their Lordships of the Supreme Court on the morning of November 25th 1961 the mind of the appellant was normal. He went to and from his office all alone. He wrote a sensible application asking for casual leave for one day. Nobody noticed any symptoms of mental disorder at that time. He left the office at about 11 30 a.m. and returned home alone. At 145 pm he stabbed Leela Parabati and Raghurib with a knife. He concealed the knife and a search for it proved fruitless. At 245 pm the investigating officer came arrested the appellant and interrogated him. He was then found normal and gave intelligent answers. On the same day he was produced before the Magistrate. His brother was then present but the Magistrate was not informed that he was insane. The state of his mind before and after the crucial time when the stabbing took place was that of a normal man and therefore the provisions of Section 84 were not attracted. He did not lack the requisite mens rea. Mr B D Souza is right when he states that the general burden is on the prosecution to prove beyond doubt not only the actus reus but also the mens rea

The conduct of the appellant in the case at the bar on 15th and 16th October 1967 and thereafter was not that of a sane man

In AIR 1961 SC 998 the established facts were that the accused bore ill will to the deceased and the murder was committed at dead of night when he could not be seen. He took a torch with him and then stealthily entered the house of the deceased by scaling over a wall. There was further the mood of exaltation which the accused exhibited after he had put the deceased out of her life. The Supreme Court held that it was a crime not committed in a sudden mood of insanity but one that was preceded by careful planning and exhibiting cool calculation in execution and directed against a person who was considered to be the enemy. There was no mood of exaltation on the part of the accused after the assault on 16th October 1967. There was no careful planning as in the case dealt with by the Supreme Court. The obtaining of the prohibitory order was not an act which should have made him act like a mad man. The motive seemed to be trivial and inadequate. This decision also does not help the State.

In AIR 1964 SC 1563 the entire conduct of the appellant from the time he killed his wife up to the time the Sessions proceedings commenced was inconsistent with the fact that he had a fit of insanity when he killed his wife. He did not like his wife. He wrote a letter to his father-in-law to the effect that he did not like her and that he should take her away to his house. The father-in-law promised to come. He expected him to come on April 9th 1959 and tolerated the presence of his wife in his house till then. The father-in-law did not turn up on or before April 9th 1959 and therefore the accused in anger and frustration killed his wife. The existence of the weapons in the room the closing of the door from inside his reluctance to come out of the room till the Mukhi came seemed to indicate that it was a premeditated murder and that he knew that if he came out of the room before the Mukhi came he might be man-handled.

The Supreme Court summed up the doctrine of burden of proof in the context of plea of insanity in the following propositions— (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane when he committed the crime in the sense laid down by Section 84 of the Penal Code. The accused may rebut it by placing before the court all the relevant evidence

—oral, documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings; and (3) even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. The prosecution evidence — oral and circumstantial — helps the accused in this case and, I think, he has been able to rebut the presumption that he was not insane at the time of the assaults on 16th October, 1967. The aforesaid decisions of the Supreme Court do not help the State in establishing that the case of the accused is not covered by Section 84 of the Indian Penal Code.

9. It is not necessary to deal with the facts in AIR 1928 Cal 239, except that it may be sufficient for the present purpose to apply one of the common tests laid down by the learned Judges of the Calcutta High Court. That test is to ask, in the circumstances, whether he would have committed the act if a policeman would have been at his elbow. This authority is cited by Mr B D'Souza in order to show that the accused did not even spare constable Agapito Almeida when he hit him with a knife on his arm and that even if Police were present, he would have assaulted the deceased Ramira and others.

In AIR 1949 Cal 182, the accused was clearly of unsound mind and acting under the delusion of his dream, he made a sacrifice of his son believing it to be right. He was therefore entitled to the benefit of Section 84, in spite of the confession made by him which was later retracted. In AIR 1947 Pat 222 a distinction is made between legal insanity and medical insanity and a standard to be applied in determining legal insanity is indicated. According to this decision, where a plea of insanity is raised under Section 84, the Court has to consider two issues.—

(1) Whether the accused has established that at the time of committing the act he was of unsound mind; and (2) If he was of unsound mind, whether he has established that the unsoundness of mind was of a degree and nature to satisfy one of the knowledge tests laid down by the section. I agree with Mr B D'Souza that these requirements are satisfied in this case. Unsoundness of mind is a matter of inference from his previous act, subsequent act and behaviour.

10. I agree with Mr. B. D'Souza that the presumption that the accused was in-

sane at the crucial time has been rebutted. Every man is presumed to be sane. This presumption does not apply to a man whose case is governed by Section 84. The learned Additional Sessions Judge was satisfied that the case of the accused was governed by this section, and this conclusion of his receives support from the prosecution evidence. It may be stated in this case that the prosecution did not examine the investigating officer. He might have further supported the case of insanity in view of what is stated in the first information report. This omission is serious. Section 84 mentions the legal test of responsibility in case of alleged unsoundness of mind. It is by this test, as distinguished from medical test, that the criminality of the act is to be determined. This section, in substance, is the same as the McNaghten Rules. These Rules in spite of long passage of time are still regarded as the authoritative statement of the law as to criminal responsibility. It is not the case of the prosecution that the accused was drunk at the crucial time. He seemed to be under delusion and hallucination when he assaulted the deceased Ramira and others. A person labouring under delusion and hallucination is to be in the same position as an insane man. This is not a case of a morbid man thirsting for human blood. This is a case of sudden impulsive insanity which had its roots in schizophrenia. He seemed to have an attack of schizophrenia on 15th October when he started smashing a window and throwing stones. It is a pity that he was insane at the crucial time. It is a greater pity that Ramira was killed, but though this be an act of madness, yet the evidence does not show that there was method in his madness. The presumption of innocence of the accused is further reinforced by his acquittal by the trial court. This presumption also applies to a man whose case is governed by Section 84. He should be given the benefit of this section. In the view taken of this matter the appeal against acquittal fails and is accordingly rejected. The decision of the learned Additional Sessions Judge is maintained.

11. I would like to make some general observations before closing this case. In the notes on arguments maintained by the learned Additional Sessions Judge, the learned Public Prosecutor stated.—

"If the court feels that the accused was unsound of mind at the time he committed this offence, he should be taken in safe custody so as not to put in risk the lives of others."

It may be that the learned Public Prosecutor was satisfied that the case of the accused was covered by Section 84, in that case he should have made a bold statement that he should not support the prosecution. Government Pleaders and

Public Prosecutors owe a duty to the courts and that duty is that when they are convinced that the prosecution case cannot be supported they should state so fearlessly and boldly regardless of instructions to the contrary. In this connection I may cite the classic observation of Crompton J when he dealt with the suggested doctrine at the bar that counsel was the mere mouthpiece of his client —

Such I do conceive is not the office of an advocate. His office is a higher one. He gives to his client the benefit of his learning, his talents and his judgment. He has a prior and perpetual retainer on behalf of truth and justice.

Appeal dismissed

1970 Cri L J 42 (Vol 76, C N 9) =

AIP 1970 GOA, DAMAN AND —

DIU 7 (V 57 C 2)

V S JETLEY J C

State Appellant v Socorro Jesus Dias Respondent

Criminal Appeal No 6 of 1968 D/ 24-4 1969

Criminal P C (1898) Ss 403 (1) 530 (q) and 423 — Charge under S 52 Post Office Act (1898) and S 409 Penal Code — Order of acquittal by Magistrate — Trial by Magistrate in respect of offence under S 52 is void under S 530(q) — Retrial for charge under S 52 not barred

Where an accused is charged under S 52 of Post Office Act and S 409 IPC and the Magistrate without committing the accused to the Court of Session to stand his trial for offence under S 52 or without discharging him under S 207 A (6) Cr P C proceeds with the trial and acquits the accused a retrial in respect of the offence under Section 52 is legal the trial in respect of that offence being void by virtue of S 530 (q) Cr P C as it is exclusively triable by Court of Session. Offences under S 52 Post Office Act and S 409 Penal Code are distinct offences and though S 403 (1) Cr P C will bar the second trial of offence under S 409 IPC it will not bar the retrial in respect of offence under S 52 Post Office Act, the emphasis in S 403 Cr P C being on a Court of competent jurisdiction and a Magistrate when he tries the offence under S 52 is certainly not a Court of competent jurisdiction. Case law discussed (Para 8)

Cases Referred Chronological Paras

(1968) AIR 1968 Orissa 33 (V 55) =
1968 Cri LJ 333 Nand Kishore v
Mayadhar 6 7

(1966) AIR 1966 SC 911 (V 53) =
1966 Cri LJ 700 Thakur Ram v
State of Bihar 6

(1966) AIR 1966 All 349 (V 53) = -1

1966 Cri LJ 737 State of U P v
Prabhat Kumar 6 7

(1964) AIR 1964 SC 1673 (V 51) =
1964 (2) Cri LJ 606 State of U P
v Sabir Ali 5

(1963) AIR 1963 SC 1531 (V 50) =
1963 (2) Cri LJ 418 Ukha Kolhe
v State of Maharashtra 9

(1960) AIR 1960 Mys 86 (V 47) =
1960 Cri LJ 496 State of Mysore
v Dattatraya 5

(1957) AIR 1957 SC 592 (V 44) =
1957 Cri LJ 892 M. P State v
Veereshwar Rao 5

(1955) AIR 1955 Mad 129 (V 42) =
1955 Cri LJ 514 In re Subramania
Achari 5

(1954) AIR 1954 Madh Bha 129
(V 41) = 1954 Cri LJ 1169 Sunder-
lalji v State 6 7

(1939) AIR 1939 Lah 513 (V 26) =
41 Pun LR 198 Ram Pershad v
Dhanna 5

(1919) AIR 1919 Pat 70 (V 6) =
20 Cri LJ 526 Mahomed Saleh
v Emperor 6 7

L C Gama Public Prosecutor for Ap-
pellant Eduardo Faleiro for Respondent

ORDER This is an appeal by the State under section 417 of the Code of Criminal Procedure wherein acquittal of the respondent an employee in the Post Office Panjam is challenged on the ground that it is erroneous

2 I may glance for a few moments at the background of the facts out of which the present appeal arises. The broad facts are that a complaint was lodged against the respondent that he committed theft of the Bombay G P O insured letter no 478 for Rs 500/- The complaint was also under section 409 of the Penal Code. The learned Magistrate framed the charge against the respondent under section 409 of the Penal Code and also under section 52 of the Indian Post Office Act 1898. The trial proceeded against the respondent and after examining a number of witnesses the learned Magistrate directed the acquittal of the accused by his judgment dated 27th January 1968. He came to the conclusion that it is not definitely proved that it was the accused who has misappropriated the insured letter for Rs 500/- addressed to Feliciano Cardoso. He also came to the conclusion that 'there is a doubt whether he received it from the hands of P W 2 on 22nd March 1966'. P W 2 is a Post Master who is said to have given the insured letter along with other postal documents to the respondent while proceeding on short leave.

3 Mr Leo Gama learned Public Prosecutor does not press the appeal in regard to acquittal of the respondent of an offence under section 409 of the Indian Penal Code but, as will appear

from the memo of appeal, the grievance of the State is that the acquittal of the respondent of an offence under S. 52 of the Indian Post Office Act, 1898, is void and therefore should be set aside. This Act was brought into force in this territory on 1st September, 1962, vide notification S. O 2735 bearing the same date. Mr Gama presses the acquittal appeal, relying on the provisions of section 530 (q) of the Code of Criminal Procedure (hereafter referred to as "the Code"). The offence under Section 52 is triable exclusively by the Court of Session by virtue of Section 29 (2) read with Schedule II of the Code.

4. Section 52 reads thus:- "Whoever, being an officer of the Post Office, commits theft in respect of, or dishonestly misappropriates, or, for any purpose whatsoever, secretes, destroys, or throws away, any postal article in course of transmission by post or anything contained therein, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be punishable with fine". Section 409, Indian Penal Code, to the extent it is material for the present purpose, speaks of entrustment with property or with any dominion over property in capacity of a public servant and when such public servant commits criminal breach of trust in respect of that property he is punishable under that section. The definition of "criminal breach of trust" is contained in section 405 Indian Penal Code. Dishonest misappropriation is one of the essential ingredients of this definition. A comparison of section 52 and section 409 would seem to show that section 52 is wider in scope than section 409. The offence under section 52 is of a special nature and apart from dishonest misappropriation which is a common ingredient, it also includes theft, secretion, destruction or throwing away of postal articles.

5. Mr Gama relies on 'State of Mysore v. Dattatraya' AIR 1960 Mys 86 in support of his contention that the acquittal of the respondent of an offence under section 52 was void. In this connection he invites my attention to section 530 (p) of the Code. This section provides that if any Magistrate, not being empowered by law in this behalf, tries an offender, his proceedings shall be void. It is common ground that the learned Magistrate was not empowered to try the respondent of an offence under S. 52. This offence could only be tried by the Court of Session. The respondent, in the Mysore case, was charged with offences under sections 409 and 477 of the Penal Code. He was acquitted by the Judicial Magistrate of both offences. The State preferred an appeal. The offence under section 477 is exclusively triable

by the Court of Session, but the Magistrate was competent to try the offence under section 409 Indian Penal Code. The trial was challenged on the ground that the proceedings were void. The learned Judges of the Mysore High Court held that it is only so much of the proceedings as relate to the offence under section 477 Indian Penal Code that are rendered void, by reason of section 530 (p) of the Code, and not the proceedings in regard to the offence under S. 409 Indian Penal Code. The learned Judges on merits did not interfere with the acquittal in respect of the offence under section 409 Indian Penal Code but as regards acquittal of an offence under section 477, the same was set aside and retrial ordered. This authority is directly to the point and it does assist the contention of Mr. Gama that the trial in respect of an offence under section 52 is void and, therefore, acquittal is illegal.

The State of U P. v Sabir Ali, AIR 1964 SC 1673 is the second decision relied upon by Mr Gama. In this case the offender was charged with an offence under section 15 (1) of the U P. Private Forests Act, 1948. This offence was only triable by Magistrates, Second or Third Class. The offence was tried by Magistrate First Class. As jurisdiction of Magistrate First Class was excluded by section 29 (1) of the Code, it was held by the Supreme Court that the trial was void under section 530 (p) of the Code. The third decision relied upon by Mr. Gama is 'In re Subramania Achari,' AIR 1955 Mad 129. This decision construes sections 403 and 537 of the Code and not section 530 (p) of the Code. The question of applicability of section 403 of the Code has been raised by Mr. Faleiro, learned counsel for the respondent, and this aspect of the case would be considered at its proper place.

The fourth decision is 'M P State v. Veereshwar Rao', AIR 1957 SC 592. It also relates to the applicability of S. 403 of the Code. The Supreme Court held in this case that the offence of criminal misconduct punishable under section 5 (2) of the Prevention of Corruption Act is not identical in essence, import and content with an offence under section 409 of the Indian Penal Code. Therefore there can be no objection to a trial and conviction under section 409 of the Penal Code even if the accused had been acquitted of an offence under section 5 (2) of the Prevention of Corruption Act. Section 403 of the Code was inapplicable. The principle of this decision is helpful. The offence under section 52 is also not identical in essence, import and content with an offence under section 409 of the Penal Code except for criminal misappropriation which is a common ingredient. The fifth and the last decision

relied upon by Mr Gama is Ram Pershad v Dhanna' AIR 1939 Lah 513. In this case the complaint disclosed an offence under section 477 of the Penal Code while the accused was tried and acquitted under section 420 of the Penal Code. The trial Magistrate had no jurisdiction to try an offence under section 477. The proceedings before the trial Magistrate were therefore declared void and a re-trial of the accused was ordered in regard to an offence under section 477.

6 Mr Faleiro learned counsel for the respondent makes two submissions—(1) that there is only one offence though punishable under sections 409 and 52 and (2) in the alternative if there are two distinct offences the facts on the record are the same and therefore section 403 of the Code of Criminal Procedure will apply. In support of these two submissions he relies on 'Thakur Ram v State of Bihar AIR 1966 SC 911', 'State of U P v Prabhat Kumar AIR 1966 All 349', 'Sunderlal Bhagat v State AIR 1954 Madh Bha 129', 'Muhammad Saleh v Emperor 20 Cri LJ 526 (AIR 1919 Pat 70)' and 'Nandkishore v Mayadhar AIR 1968 Orissa 33'. Section 403 of the Code embodies the principle of *autrefois convict* and *autrefois acquit*. It gives effect to the maxim that no person should be twice disturbed for the same cause. Section 403 (1) provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237.

The emphasis in this sub-section is on a Court of competent jurisdiction. The learned Magistrate when he tried the offence under section 52 was certainly not a Court of competent jurisdiction and therefore section 403 is inapplicable in terms. I do not agree with Mr Faleiro that the complaint lodged makes out only one offence though punishable under section 409 of the Penal Code and section 52 of the Post Office Act. The complaint relates to theft of the insured letter containing Rs 500/- from the Post Office at Carmona between 22nd March 1966 to 28th March 1966. The offences under these two sections are distinct offences and section 403 does not bar the second trial of an offence under S 52. The second submission that the facts on the record are the same is also without substance. The complaint does not mention dishonest misappropriation although reference is made to section 409. The charge mentions misappropriation of the

insured letter but makes no reference to theft in terms although section 52 is expressly mentioned therein. The decisions cited by Mr Faleiro are clearly distinguishable.

7 In AIR 1966 SC 911 the Supreme Court discussed the implications of sections 206, 207, 435, 437 and 403 of the Code. What was stated in that case was that when a case is brought before a Magistrate in respect of an offence exclusively or appropriately triable by a Court of Session what the Magistrate has to be satisfied about is whether the material placed before him makes out an offence which can be tried only by the Court of Session or can be appropriately tried by that Court or whether it makes out an offence which he can try or whether it does not make out any offence at all. It was also stated that the ultimate duty of weighing the evidence in a committal proceeding is cast on the Court of Session which has the exclusive jurisdiction to try an accused person.

Thus where two views are possible about the evidence in a case before the Magistrate it would not be for the Magistrate to evaluate the evidence and strike a balance before deciding whether or not to commit the case to a Court of Session. It may be stated that the Magistrate is not bound to commit an accused person to stand his trial in the Court of Session where the case is triable exclusively by the Court of Session if he is of the opinion that the evidence and documents disclose no grounds for committing the accused person for trial but in that case he has to record his reasons and discharge him unless it appears to him that such person should be tried before himself in which case he shall proceed accordingly. This is what section 207-A (6) contemplates. The learned Magistrate did not act under this section. He seemed to have lost sight of the fact that the offence under section 52 was exclusively triable by the Court of Session and it is through error as rightly argued by Mr Gama that he proceeded to try the accused without committing him to the Court of Session to stand his trial of the offence under section 52 or without discharging him under section 207-A (6). This decision of the Supreme Court with respect has no direct bearing on the question under consideration except for the observation that section 403 (1) bars the trial of the person not only for the same offence but also for any other offence based on the same facts.

AIR 1966 All 349 also relates to construction of section 403 of the Code. In this case the accused was tried under section 25 of the Indian Arms Act and was acquitted. There was a subsequent

trial on same facts under section 411 of the Penal Code. It was held that this trial was not barred under any of the sub-sections (1), (2) or (5) of Section 403 of the Code. The learned Judge said that though some of the important ingredients of both the offences are common, it cannot be said that all the ingredients of the offence under section 411 of the Penal Code are common with the one punishable under section 25 of the Arms Act. This decision is not to the point. In AIR 1954 Madh Bha 129, the criteria regarding competency of Courts were explained. This case also is with reference to section 403 of the Code, which is inapplicable. According to this decision, the competency of the Court to try the subsequent case is not determined by the nature of the proceedings but by the power of the Magistrate to entertain them.

The facts in 20 Cr. L. J. 526 (AIR 1919 Pat 70) are also distinguishable. There, the accused was tried under section 363 of the Penal Code and was acquitted. Upon an application by the complainant, the learned Sessions Judge directed fresh inquiry to be made in order to ascertain whether the offence under section 363 or 368 or any other section of the Penal Code had been committed by the accused. It was held by the Patna High Court that the order directing further inquiry should not have been made, inasmuch as kidnapping is an essential element in offences under sections 365, 366 and 368, and the accused having already been acquitted of that offence, he could not be put on trial for the same offence, nor could he be convicted under Ss 365, 366 or 368, unless and until the prosecution established that he committed the offence of kidnapping. The case under section 368 is exclusively triable by the Court of Session. Lastly, in AIR 1968 Orissa 33, cited by Mr. Faleiro, it was held in the context of section 530 (p) of the Code that the trial without jurisdiction is void. Retrial, in this case, was not ordered as the learned Single Judge came to the conclusion that it would result in miscarriage of justice.

8. The aforesaid decisions relied upon by Mr. Faleiro have no direct bearing on the question of incompetency of the Magistrate to try the offence under section 52, except for the observation in Nandkishore's case decided by the Orissa High Court on desirability of retrial. The learned Magistrate erroneously assumed jurisdiction in regard to the offence under section 52. He was not competent to try it and the proper course which he should have followed was to have either committed the accused to the Court of Session to stand his trial or to have discharged him under section 207-A (6) after recording reasons. I agree with Mr. Leo

Gama that the trial of the offence under section 52 is void and ineffectual. The error committed by the learned Magistrate goes to the root of the trial. What is void ab initio cannot be quashed any more than it can be upheld. The proceedings in regard to the trial of an offence under section 52 are a nullity. In 'Alice in Wonderland' the Executioner refused to execute the Cheshire Cat on the ground that "you cannot cut off a head unless there is a body to cut it off from". Section 403 of the Code would bar the trial of an offence under S 409 of the Penal Code. The learned Public Prosecutor therefore does not seek retrial of this offence. What he seeks—and rightly—is retrial of the offence under section 52.

9. Mr. Faleiro next submits that the retrial, if any, should be on the basis of the evidence already on the record. This submission is not without substance. It is not fair to the respondent that the prosecution should be allowed to produce fresh evidence. The object of retrial is to render legal the proceedings that have taken place and not to give further opportunity to the prosecution to fill in the gaps. In 'Ukha Kolhe v State of Maharashtra' AIR 1963 SC 1531, it was observed by the Supreme Court that retrial is not to be ordered merely to enable the prosecution to adduce additional evidence for filling up lacuna. Retrial is to be directed in exceptional cases. Mr. Faleiro also pleads the delay as an argument against retrial. It was because of the mistake of the Court that the trial proceeded in regard to the offence under section 52 which was exclusively triable by the Court of Session. The law is well settled that a party should not suffer because of the mistake on the part of the Court. There is not a long delay but short delay in this case need not come in the way of retrial. The charge in this case expressly referred to S 52, and this *ex facie* indicated lack of jurisdiction. It is in the ends of justice that there should be retrial.

10. In the view taken of this case, the acquittal of the respondent of the offence under Section 52 of the Indian Post Office Act, is hereby set aside and the appeal allowed. It is directed that the respondent should stand his trial of the offence charged under this section. The learned Sessions Judge may send this case for retrial to a Magistrate other than the Magistrate who directed acquittal of the respondent. It would be open to that Magistrate to consider after hearing the arguments whether on the evidence already on the record there are grounds for committing the accused to stand his trial under this section. Order accordingly.

Appeal allowed

1970 Cri L J 46 (Vol 76, C N 10) =
AIR 1970 GUJARAT 26 (V 57 C 4)
N G SHELAT J

Balamal Matlomal Petitioner v State
of Gujarat Opponent

Criminal Revn Appln No 490 of 1963
D/ 28-2-1968 against order of Chief City
Magistrate Ahmedabad D/- 30 9 1965

(A) Criminal P C (1898), Ss 517 520
435 and 439 — S 520 is only enabling
provision — It confers no right as such
for filing appeal or application for revision
thereunder — Order under S 517
affecting third party not before court in
the main case — High Court can vary
order in exercise of powers under S 520
or in exercise of its powers under Ss 435
and 439 AIR 1960 Madh Pra 195 & 1957
MPLJ 67 (Nag) & AIR 1963 Guj 223 Rel
on (Para 5)

(B) Limitation Act (1963) Art 131 —
Starting point — Order under S 517 of
Criminal P C sought to be revised by a
third party — Period would run in such
a case not from date of order but from
date of knowledge of order AIP 1961 SC
1500 Applied — Delay of five days condoned
(Para 7)

(C) Criminal P C (1898) S 517(1) —
Power to confiscate — It is to be exercised
in reasonable and judicial manner —
Accused found carrying stolen property
in rickshaw — Rickshaw cannot be said
to have been used in commission of offence
— Order is liable to be set aside
AIR 1931 Lah 565 & (1904) 8 Cal WN
887 & AIR 1944 Mad 59 & AIR 1954 SC
312 Rel on (Para 8)

Cases Referred Chronological Paras

- (1968) Cri. Revn. Appln. No 156 of
1967 D/- 31 1-1968 = ILR (1968)
Guj 274 Natwarlal Damodardas
v State 4
(1963) AIR 1963 Guj 223 (V 50) =
1963-4 Guj LR 102 Kanchanlal
Somulal v The State 5
(1963) ILR (1963) Guj 1002 = (1963)
4 Guj LR 1019 Mohamed Yusuf v
Jivraj Premjibhai 4
(1961) AIR 1961 SC 1500 (V 48) =
1962 1 SCR 676 Harish Chandra
v Deputy Land Acquisition Officer 7
(1960) AIR 1960 Madh Pra 195
(V 47) = 1960 Cri LJ 919 Har Bhag-
andas v Diwan Chand 5
(1957) 1957 MPLJ 67 = 1957 Nag LJ
43 Nandu v Dhasada 5
(1954) AIR 1954 SC 312 (V 41) =
56 Bom LR 1180 = 1954 Cri LJ 881
Suleman Issa v State of Bombay 8
(1944) AIR 1944 Mad 59 (V 31) =
45 Cri LJ 516 In re Abdul Azeez 8
(1931) AIR 1931 Lah 565 (V 18) =
1931 Cr C 853 Phula Singh v
Emperor 8

- (1924) AIR 1924 Lah 75 (V 11) =
24 Cri LJ 713 Kanshi Ram v
Emperor 7
(1904) 8 Cal WN 887 = 1 Cri LJ 49
Jairp Gazi v Emperor 8
J M Acharyya for Petitioner A H
Thakar Asst Govt Pleader for the State

ORDER — The charge against one
Ibrahimkhan Fazalkhan in Criminal Case
No 1201 of 1964 in the Court of the
Chief City Magistrate Ahmedabad was
that he had committed theft of 5 catch
pit jalis ordinarily known as covers of
the gutters of the Municipal Corpora-
tion of Ahmedabad in the early morning
of 1-10 1964 so as to be liable for an offence
under Section 379 of the Indian
Penal Code The accused was found
going in auto rickshaw bearing No GTD
285 wherein he had put the said stolen
property He was stopped and as he could
not explain about the possession of those
catch-pit jalis that property as also the
auto rickshaw came to be attached under
a panchnama made in respect thereof
During that trial one Gokaldas Kanjibhai
was examined as a witness on behalf of
the prosecution as the owner of that auto
rickshaw According to his evidence he
had given that rickshaw to one Babubhai
Nurbhai on hire on 30 9-1964 with instructions
to return the same to him at
Amedpura before the next morning
Some time after he learnt that his rick-
shaw was lying at the Kalupur Police
Chowki Babubhai also informed him
about the rickshaw being attached by the
police In that case the learned Chief
City Magistrate Ahmedabad found the
accused guilty for an offence under section
379 of the Indian Penal Code and
sentenced him to suffer rigorous imprisonment
for three months and to pay a
fine of Rs 200 or in default to suffer
rigorous imprisonment for one month At
the same time he passed another order
whereby the Muddamal auto rickshaw
before the Court was directed to be confiscated
to the State Aggrieved by that
order passed on 21-4 1965 the accused had
preferred an appeal and it came to be
dismissed

2 During the pendency of that trial
however that Gokaldas Kanjibhai had
preferred his claim in respect of this auto
rickshaw and the same was rejected
That Gokaldas had also filed an applica-
tion in revision No 181 of 1965 against
that order of confiscation passed by the
learned Magistrate in this Court and on
that application the following order was
passed by Raju J on 5-7-1965 —

I see no reason to exercise my revisional
jurisdiction in this case

It further appears that the present
petitioner Balamal had also filed Criminal
Revision Application No 242 of 1965
against the order of confiscation passed
by the learned Magistrate In respect

of that the following order was passed by Mehta J. on 8-9-1965:

"Mr. Acharya gives an application to withdraw his revision application on the ground that he had not approached the trial Court.

This application is, therefore, rejected for want of prosecution"

Mr Acharya has stated that since he was advised by the Court that he should approach first to the Court of facts, he requested for being permitted to withdraw the application so as to enable him to file the same in the Court of the learned City Magistrate, Ahmedabad. After that order was passed on 8-9-1965 this petitioner Balamal presented an application on 17-9-1965 in the Court of the learned Magistrate who rejected the same. Feeling dissatisfied with that order passed on 30-9-1965 by Mr D C Mehta, Chief City Magistrate, Ahmedabad, the applicant has come in revision before this Court.

3. The application discloses two prayers. The first is that the order passed on 21-4-1965 by the learned Magistrate regarding the disposal of the auto rickshaw, the muddamal property, before the Court in Criminal Case No 1201 of 1964 was illegal and improper and that it should be set aside. By the second prayer he claimed to be entitled to have that rickshaw restored to him, he being its owner and if necessary, by holding an inquiry in respect thereof. However, before this court, Mr Acharya, the learned advocate appearing for him, has claimed to be entitled to its possession on the basis of hirepurchase agreement entered into between him and Gokaldas and as it was standing in his name before the registration authority before it came to be attached by the police. It was contended by Mr Acharya that since he was not a party to the proceeding in which the order of confiscation of auto rickshaw came to be passed by the learned Magistrate under Section 517(1) of the Code he could not file any appeal against that order and as soon as he came to know about it he approached the High Court for setting aside the same so as to enable the trial Court to make suitable inquiry as to whom the auto rickshaw should be returned under Section 517 of the Criminal Procedure Code. Mr. Acharya's contention then was that since it was the view of the Court that before filing an application in revision against that order, he should have first approached the original Court which passed the order and on that basis or rather feeling that view to be correct, he withdrew his application by obtaining permission from the Court so as to enable him to present an application in the trial Court. His first contention was that any order passed on his application is revisable by this

Court having powers to revise the same, if found to be illegal or improper and unjust in the circumstances of the case. According to him, the order can hardly be justified in law inasmuch as the use of rickshaw cannot be called use thereof in commission of an offence of theft by the accused and that again when it belongs to some one else, who cannot be said to have known that he would so use. On the other hand it was pointed out by Mr Thakar, the learned Assistant Government Pleader, for the State that this petitioner has no right to present any such application to the Court below for the simple reason that the Court had already passed an order directing confiscation of the muddamal property in the case, and since his remedy against that order was only before the Superior Court such as the Appellate Court or Revisional Court, and as he had already availed of that opportunity, and when his application had come to be rejected by the High Court on 8-9-1965, he cannot re-agitate the same question even if the order is found to be illegal or unjust, and more particularly after the period of limitation under Article 131 of the Limitation Act was over.

4. Before we consider the legality, propriety or otherwise of the order of confiscation passed by the learned Magistrate, in view of the contentions raised, it is essential to consider whether the petitioner has a right to come in revision in this Court in respect of an order passed by the learned Magistrate on an application presented by him on 17-9-1965, and if so whether this Revision Application is in time. The contention of Mr. Acharya is that this application can be treated both under Section 520 as also under Section 435 or 439 of the Criminal Procedure Code. As I said above there are two prayers in the application one for setting aside the order of confiscation of the auto rickshaw passed on 21-4-1965 at the conclusion of the trial and that obviously cannot be set at naught by the same Court, though no doubt it had authority to consider any such application wherein claim of any muddamal property if made during the pendency or at the conclusion of the trial, under Section 517 of Criminal Procedure Code. In the case of *Natwarlal Damodardas v State*, Criminal Revn Appln No 156 of 1967, decided by me recently on 31-1-1968 (Gui) section 517(1) of the Code was considered, and having regard to the use of words "any person claiming to be entitled to possession thereof" therein, and in agreeing with the view taken by Raju J in *Mohmed Yusuf v Jivraj Premjibhai*, ILR (1963) Gui 1002, while no difficulty arises in passing an order regarding disposal of the property at the end of the trial affecting the parties in the case, as it can

consider their claims but when no such claim or right to possession was made by a third party the Court cannot be required to take any notice of any such supposed claim. But if the claim is made by any third party before the Court even during the pendency of the trial that claimant has a right to be heard about his claim at the end of the trial and before passing any orders under Section 517(1) of the Code. In the present case however the Court appears to have before it the claim of Gokaldas and it had come to be rejected. Thus the learned Magistrate cannot be said to be in any way wrong in the order he passed in the case. This applicant was however not a party to the proceeding. Nor was he a witness in regard to the muddamal property so as to infer knowledge to him with regard to the trial. He is a third party-claimant and in my opinion he should have therefore made a claim before that Court so as to enable that Court to deal with his claim while passing an order under Section 517(1) of the Code. Not having so made a claim he cannot claim it in that Court as the order was already passed and in that event his remedy lay by preferring an appeal or revision against that part of the order and it is only if that order is set aside that his claim can be considered by the original Court. The learned Magistrate was therefore right in rejecting his application as he cannot reopen the matter and revise his own order of 21-4-1965.

5 The question then is whether this revision application lies against the order passed by the learned Magistrate. It was said that this may be treated as an application in revision under Section 520 or even under Section 435 or 439 of the Criminal Procedure Code and at any rate the High Court exercising supervisory jurisdiction over subordinate Courts can set aside an order of confiscation if found to be illegal and unjust and do justice to the party affected thereby. Now Section 520 of the Criminal Procedure Code provides

Any Court of appeal confirmation reference or revision may direct any order under Section 517 Section 518 or Section 519 passed by a Court subordinate thereto to be stayed pending consideration by the former Court and may modify alter or annul such order and make any further orders that may be just.

Since the order of confiscation of muddamal property was passed under Section 517 I would set out the relevant portion of that provision also—

517(1) When an inquiry or a trial in any Criminal Court is concluded the Court may make such order as it thinks fit for the disposal by destruction, con-

fiscation or delivery to any person claiming to be entitled to possession thereof or otherwise or any property or document produced before it or in its custody or regarding which any offence appears to have committed or which has been used for the commission of any offence.

On a plain perusal of Section 520 it appears to be an enabling provision and confers no right as such to any person for filing the appeal or an application in revision thereunder. By this provision the Court of Appeal or any Court of Revision has been empowered to modify alter or annul any such order that may have been passed under Sections 517 518 or 519 and make any further orders that may be just. It follows therefore that if any appeal or revision against the order in the case were before the Court of Appeal or Revision it could have considered the legality or propriety of the order passed therein under Section 517 of the Criminal Procedure Code even if no appeal or revision against that part of the order under Section 517 of the Code was before it. The question however is whether any such Court can entertain and decide any such question when no appeal or revision is filed against the main case. In other words whether any appeal or revision lies against any such order affecting a third party who was not before the Court in the main case under Section 520 of the Criminal Procedure Code. Such a question arose before the Division Bench of the Nagpur High Court in *Nandu v. Dhasada* 1967 MPLJ 67 viz as to whether an appeal lies under Section 520 of the Code against an order passed by a Criminal Court under Section 517 of the Code and the answer to the same can well be found in the observations which run thus—

On the whole we think that the concurrence of opinion on this point is that S 520 of the Code of Criminal Procedure does not confer a right of appeal but is only an enabling section creating a supervisory power in Courts of appeal confirmation reference or revision. These Courts can pass the order in the main case or if no appeal has been filed against the main case can be moved to pass such order as they think fit in respect of the property involved in the criminal case. It may be pointed out that the subordination of the Courts according to the better view is to be taken into account in determining the forum for the exercise of such supervisory powers. It is not necessary that the Court of appeal must every time be the Court of appeal to which an appeal against the main decision can be taken.

The same observations can well apply to revision contemplated in that section and therefore it can be held that while

the appeal or revision against that order of confiscation as such cannot lie, under Section 520 of the Code, such a Court of Appeal or Court of Revision can be moved to pass such an order as it thinks fit in respect of property involved in the criminal case. That power can thus be exercised by this Court which is both a Court of Appeal as also of Revision, in any such matter brought to the notice of the Court. But apart from that position, the revisional powers of the High Court are wide enough under Sections 435 and 439 of the Code, to consider the legality or propriety of any such order passed in any case by any subordinate Court, and they can be exercised by the Court even suo motu or on being moved by any party affected by any such order. In the case of *Har Bhagwandas v. Diwan Chand*, AIR 1960 Madh Pra 195, a similar question had arisen and it was held that even after the appeal or revision against the main order in the case is disposed of, an application under Section 520 would lie to the Court. Even if when the matter does not come up before High Court at all, the appellate Court can be moved by way of original application. Then the observations are that even a revision under Sections 435 and 439 of the Code would lie for the purpose. Thus while this Revision application may not so strictly lie under Section 520, it can be treated as an application invoking exercise of powers by this Court under Section 520 of the Criminal Procedure Code. In any event, the Court can exercise powers under Sections 435 and 439 of the Criminal Procedure Code, and therefore the present application whether against the order passed by the learned Magistrate or not, it can be heard, and the validity or propriety of the orders regarding the disposal of property etc passed under Section 517 of the Code, can well be raised, set aside or modified by this Court. The decision of this Court in *Kanchanlal Somalal v. State*, 1963-4 Guj LR 102= (AIR 1963 Guj 223) also leads support to the same

6. It was then pointed out by Mr Thakar that he had preferred a revision application against the order of confiscation passed in the case, and since it was rejected, he cannot be allowed to re-agitate the same. As already pointed out hereabove, the application was not decided on merits and it had come to be withdrawn with the Court's permission, with a view to file an application to the original Court. He had then filed an application in the lower Court, and it is against that order apparently that he has come before this Court. In these circumstances, there can therefore, be no bar to this application, as it was not decided on merits. It was on a probably doubtful position of law, that he withdrew the

application and at any rate it was obviously a bona fide act on his part.

7. It was next urged by Mr. Thakar the learned Assistant Government Pleader for the State that the application should be filed within 90 days from the date of the order of confiscation of the property under Art 131 of the Indian Limitation Act. The order was passed on 21-5-1964 and the application either to the trial Court or to this Court is obviously beyond 90 days provided therein, it being against an order passed under the provisions of the Criminal Procedure Code. On the other hand, it was pointed out by Mr. Acharya that in respect of any application under Section 520 of the Code before this Court, there would not arise any question of limitation within which he must come in revision. In support thereof he invited a reference to a case of *Kanshi Ram v. Emperor*, AIR 1924 Lah 75, where it was held that no period of limitation was prescribed for an application for restoration of property under section 517 and it can be made within a reasonable time from the date on which the accused is acquitted of the crime with which he was charged. Then it is observed that the words "and make any further orders that may be just" in Section 520 obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under Section 517. Now such a question would not arise, once it is found that this Revision Application can be treated as an application invoking the supervisory powers of a Court of Appeal or Revision in relation to any such order passed under Section 517, and that can be exercised by the Court at any time when it comes to its notice or is brought to its notice by any such party. This point would therefore, have only academic interest, and if any party were to come in revision or appeal against that order, the provisions of Limitation Act would no doubt govern. Since the matter was argued from this point of view, I would consider the same. Now under the old law of limitation no such provision as we have now Article 131 under the amended Act of Limitation, 1963, was there. The case relied upon by Mr. Acharya may not, therefore, apply. But now in the new amended Limitation Act, 1963, we have Article 131, namely added, whereby period of limitation of 90 days has been provided "from the date of the decree or order or sentence sought to be revised for the exercise of its powers of revision by any Court under the Civil Procedure Code or Criminal Procedure Code, 1898". The order of confiscation passed by the learned Magistrate under Section 517 of the Criminal Procedure Code is obviously an order under the

Criminal Procedure Code and is sought to be revised by the Court in exercise of its power of revision. In my view therefore Article 131 would apply and the period contemplated therein ordinarily would run from the date of the order of the confiscation of the muddamal auto rickshaw which was 21-4 1965. Now there is no doubt that this period of limitation would clearly govern the party to the proceeding who comes in revision of any such order. But the present petitioner was not a party to the proceeding and it would be therefore difficult to say that he knew of the order on the date it came to be passed by the learned Magistrate. If he can move the Court it appears reasonable and fair that the period should run from the date of his knowledge of that order in the case. In this respect I would refer to case of Harihar Chandra v Deputy Land Acquisition Officer AIR 1961 SC 1500 where the question arose as to whether the expression the date of the award in proviso (b) to Section 18(2) of the Land Acquisition Act 1894 must mean the date when the award is either communicated to the party or is known by him either actually or constructively. Their Lordships of the Supreme Court said that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order the making of the award must mean either actual or constructive communication of the said order to the party concerned. So the knowledge of the party affected by the award made by the Collector under Section 12 of the Land Acquisition Act 1894 either actual or constructive is an essential requirement for fair play and natural justice. Their Lordships then observed that it would be unreasonable to construe the words from the date of the Collector's award used in the proviso to Section 18 in a literal or mechanical way. Those observations were followed by this Court in Criminal Reference No. 75 of 1966 the judgment whereof was delivered on 23rd February 1967 where a similar question had arisen with regard to the provisions contained in Section 483(6) of the Criminal Procedure Code. In my opinion therefore the period of limitation would have to be counted not from the date of the order passed by the learned Magistrate in the case namely 21-4 1965 but from the date when this petitioner came to know about it. He can be said to have come to know on 14-6 1965 when he presented the revision application. If we calculate the period of 90 days from that date the application should have been filed by the petitioner in the trial Court on or before 12-9 1965. There has been therefore thus delay of 5 days. That deserves to

be condoned the same having been obviously due to misunderstanding of the position of law or at any rate due to time spent in bona fide having his remedy in the High Court. In fact that was a correct remedy and at that stage he was already in time. This is a fit case where such delay can well be condoned. But as already stated above this Court can pass just orders under Section 520 or under S. 439 of the Criminal Procedure Code now that the matter is brought to our notice for invoking revisional or supervisory jurisdiction of this Court. I may incidentally observe that the revision application No. 181 of 1965 preferred by Gokaldas against that order cannot come in his way for the reason that this applicant was not a party to that proceeding.

8. The material question however that arises to be considered is as to whether the order of confiscation passed by the learned Magistrate on 21-4-65 in the Criminal Case No. 1201 of 1964 under Section 517(1) of the Code is illegal and improper requiring interference by this Court. I have already set out Section 517(1) of the Code under which the order has been passed by the learned Magistrate. On a plain reading of this section it is clear that the Court has every authority and power to exercise discretion in making any order for the disposal of the muddamal property before him in any case. That can be done by passing an order for disposal by destruction, confiscation or delivery to any person claiming to be entitled to possession of any property or document produced before it or in its custody or regarding which any offence appears to have committed or which has been used for the commission of any offence. Now the learned Magistrate has observed in his judgment while passing such order in the end that he agreed with the learned Police Prosecutor that use of such vehicle makes the commission of such offence easy and therefore in his opinion since five gutter covers were found from the auto rickshaw it was liable to be confiscated to the State. In other words he directed it to be confiscated to the State as in his view it was used in commission of that offence of theft. Now the words which have been used for commission of an offence have to be read and interpreted in a reasonable manner. The accused was going away in that rickshaw and in that were put the stolen articles. The auto rickshaw therefore does not necessarily become an article which can be said to have been used in the commission of an offence of theft. It was not an instrument with which that theft was committed that it could be destroyed or confiscated. The theft was already committed and the mere fact that the stolen property

was placed in a rickshaw whereby he was going away, cannot be called an instrument used in commission of offence. If that were so, any motor car driven by any person from which a stolen property is found can well be taken as used in the commission of the offence. In that event the car may have to be confiscated to the State. Such a view hardly sounds in any way so reasonable or proper. I was referred to some cases by Mr. Acharya, in this respect, and I will refer to them in brief. In *Phula Singh v. Emperor*, AIR 1931 Lah 565, a motor driver was prosecuted for an offence of causing grievous hurt while driving the car rashly and negligently under Section 338 of the Indian Penal Code. On his conviction the car was confiscated to the State as one used for commission of the offence under Section 516-A of the Criminal Procedure Code. It was held that it would be straining the language to hold that the motor car was used for the commission of the offence within the meaning of Section 516-A, Criminal Procedure Code. In *Jarip Gazi v. Emperor*, (1904) 8 Cal WN 887, the point arose as to whether the confiscation in respect of two boats passed by the Court should be set aside. The facts of that case were that some persons broke into the granary of the complainant at night time and were carrying away two sacks of paddy. Those culprits left the sacks of paddy behind and managed to get into boats and tried to escape. They were pursued and they were then prosecuted for an offence under Section 457 of the Indian Penal Code. The accused were convicted in respect thereof and the two boats in which the accused had run away were directed to be confiscated by the Magistrate on the ground that they were used for the commission of the offence under Section 517 of the Criminal Procedure Code. The matter was taken in revision in the High Court. The High Court while setting aside the order observed as under:—

"We hardly think that such could have been the intention of the Legislature. A man may use a lathi or other instrument for committing an offence. No doubt such a weapon can be dealt with under the section in question, but if the interpretation put by the Magistrate upon the Section were sound, one might conceive a case in which the house used by thieves or counterfeiters of coin for carrying on their unlawful trade would be liable to confiscation. Such an interpretation has never been given to this section. Apart from the question of law we think that the confiscation of the boats which apparently were hired by the petitioners would be very unjust to the owners." Another case to which my attention was invited by Mr. Acharya was one of In

re, *Abdul Azeez*, AIR 1944 Mad 59. In that case the accused was charged under Section 65, City Police Act, in connection with some hides which he was found carrying in a cart. He was charged only in respect of the hides and not in respect of the cart, but all the same the Magistrate directed the confiscation of the cart as well. It was then held in that case that the offence being only in respect of the hides there was no justification for passing an order, in respect of the cart confiscating it. The only order that ought to have been passed was an order directing the return of the same to the accused from whose possession it was seized. Apart from this some observations made in *Suleman Issa v. State of Bombay*, 56 Bom LR 1180=(AIR 1954 SC 312) may well be quoted here: "The powers of the Court, under Section 517 of the Criminal Procedure Code no doubt extend to confiscation of property in the custody of the Court, but it is not every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case. It is possible to conceive of cases where the subject matter of the offence may be property which under the law relating to the offence is liable to be confiscated as a punishment on conviction. The section contains a general provision for disposal of the property in the circumstances mentioned in the latter part of the Section. Confiscation is not the only mode of disposal of property and is singularly inappropriate in a case where the accused is prosecuted for an offence punishable with the maximum sentence of 3 months and a fine of Rs 100/ under Section 61-E of the Bombay District Police Act. By reference to all these authorities, my attempt was to show that much though the learned Magistrate has powers to confiscate any such property under Section 517 of the Criminal Procedure Code, he has to exercise his powers in a reasonable and judicial manner. In the present case it is too much to say that the auto rickshaw was used in commission of an offence of theft in respect of the catch-pit covers from the Municipal gutters. All that he did was that he placed the stolen property in it and went away in that rickshaw and for that reason it cannot be said that rickshaw was used in commission of that offence. The order is not only, therefore, illegal, improper but also very unjust to the real owner of the auto rickshaw. It is, therefore, liable to be set aside."

9. Once that order is set aside the trial Court would have to consider the claim made by this applicant as also by any person who can be said to have any interest therein. During the course of the trial it transpired that Gokaldas

had made a claim in respect of that auto rickshaw. He would be a person interested and that way it would be necessary to give him an intimation by the Court while determining the claim sought to be made by the present petitioner in this case. It may well be necessary to issue notice to one Balamal Matlomal in whose possession that auto rickshaw was and from whom the accused is said to have taken. The learned Magistrate is therefore directed to issue suitable notices to those persons interested in the auto rickshaw and then after holding the proper inquiry with regard to the same pass orders under Section 517(1) of the Criminal Procedure Code.

10 The result therefore is that the order passed by the learned Magistrate on 21-4-1965 in the original Criminal Case No 1201 of 1964 in so far as it directs confiscation of the auto rickshaw mudda mal property before the Court is set aside. This matter shall be sent back to the Court of the learned Magistrate. On receipt of the papers he shall issue notices not only to this applicant but also to two other persons such as Gokaldas Kanjibhai and Babubhai Noorbhai as also the accused in that case and then after making suitable inquiry with regard to their being entitled to claim for possession there of pass suitable orders under Section 517 of the Criminal Procedure Code.

Order accordingly

(1950) AIR 1950 EP 53 (V 37)=

51 Cri LJ 480 (FB) Amirchand

v The Crown

8

I D Grover for Applicant Advocate General for the State

ORDER — This is an application under Sections 561 A and 498 of the Code of Criminal Procedure for quashing the proceedings pending against the applicant Nazir Mesiah who is one of the accused in F I R No 108 of 1968 relating to Thanna Sadder Jammu in the Court of the Chief Judicial Magistrate Srinagar or in the alternative for his release on bail.

2 I have heard Shri Inder Das appearing in support of the application as also the learned Advocate General appearing for the State.

3 The application under Section 561-A Cr P C has not been seriously pressed by the learned counsel for the applicant. Nor have I sufficient material to warrant quashing of the proceedings against the applicant at this interlocutory stage. The prayer for quashing the proceedings pending against the applicant is therefore rejected.

4 The only other question that arises for consideration and determination is whether this court has got power to release the accused when he has not been actually arrested.

Section 498 Cr P C which governs the matter runs as follows —

(1) The amount of every bond executed under this Chapter shall be fixed with the due regard to the circumstances of the case and shall not be excessive and the High Court or Court of Session may in any case whether there be an appeal on conviction or not direct that any person be admitted to bail or that the bail required by a police officer or Magistrate be reduced.

(2) A High Court or Court of Session may cause any person who has been admitted to bail under Sub-section (1) to be arrested and may commit him in custody.

5 In AIR 1954 Raj 279 it has been held that there must be some kind of restraint to him before a person who appears before the court is granted bail by the court and that neither the High Court nor the subordinate courts have power under the Code of Criminal Procedure to grant bail to a person seeking bail if he has not been arrested or detained in custody or brought before them or no warrant of arrest or even an order in writing for his arrest under Section 56 Cr P C has been issued against him.

6 In AIR 1954 Hyd 55 it has been held that where a non-bailable offence has been registered against the accused the threat and the power of the officer in charge of investigation of arresting the

1970 Cri. L J 52 (Vol 76, C N 11) =

AIR 1970 JAMMU AND KASHMIR 1

(V 57 C 1)

JASWANT SINGH J

Nazir Mesiah Applicant v The State Respondent

Criminal Misc Appln No 49 of 1968 D/- 30 11 1968

Criminal P C (1898) Ss 497, 498 — Non bailable offence registered against accused and warrant of arrest issued — Held as accused was liable to be arrested and as such under threat of arrest and he having surrendered himself before court was entitled to ask for bail. Case law discussed. (Para 9)

Cases Referred Chronological Paras (1966) AIR 1966 Guj 146 (V 53)=

1966 Cri LJ 746 State of Gujarat

v Govindlal Manilal

(1954) AIR 1954 Hyd 55 (V 41)=

1954 Cri LJ 458 Sunder Singh

v The State

(1954) AIR 1954 Raj 279 (V 41)=

1955 Cri LJ 66 Juharna v

State

CM/EM/A984/69/MBR/B

accused is always hanging on his head and that is a sufficient restraint for the purposes of Section 497 Cr. P. C.

7. In AIR 1966 Guj 146, it was held that a person merely accused or suspected of an offence cannot ask for bail by appearing in court unless he is actually under arrest or a warrant of arrest has been issued and he being liable to arrest has appeared before the Court

8. In AIR 1950 East Punj 53 (FB) it has been held that in case of a person who is not under arrests but for whose arrest warrants have been issued, bail can be allowed if he appears in court and surrenders himself

9. The legal position that emerges from the aforesaid authorities is that for exercise of power under Sections 497 and 498 Cr. P. C the person asking for bail must be under some sort of restraint or a warrant of arrest must have been issued against him. As not only a non-bailable offence has been registered against the applicant but warrant of arrest under Section 512 Cr. P. C has according to his affidavit been issued against him, I cannot but in the light of the aforesaid rulings hold that the applicant is liable to be arrested and as such as under a threat of arrest. Thus a warrant for his apprehension having been issued under Section 512 Cr. P. C and he having surrendered himself before me, I think he is entitled to ask for bail. As the other accused namely O N Chadda, Bimal Kumar and Himmat Singh have already been released on bail vide my order dated 25th November, 1968, and as the case of the applicant appears to stand at par with them I am of the opinion that he should also be released on bail. I, therefore, direct that the applicant be released on his furnishing bail and a personal recognizance bond to the satisfaction of the Chief Judicial Magistrate, Srinagar

10. The learned counsel for the applicant has undertaken to cause the attendance of the applicant before the Chief Judicial Magistrate, Srinagar, on the 2nd December, 1968

Order accordingly

1970 Cri. L. J. 53 (Vol. 76, C. N. 12) =

AIR 1970 KERALA 15 (V 37 C 3)

T. C. RAGHAVAN, J.

Kunnummal Raghavan, Appellant v. M Narayana Menon, Respondent

Criminal Appeal No 150 of 1968, D/- 26-8-1968, from District Magistrate Court, Tellicherry in C. C. No. 63 of 1963

DM/EM/B660/69/CWM/B

(A) Criminal P. C. (1898), Ss. 479-A and 476 — Application by a party under S 476 — Person sought to be prosecuted given opportunity of being heard in that motion — Fresh show cause notice unwarranted.

In a case falling under Section 479-A (or even under Section 476) where the court suo motu proposes to prosecute a person, the court has to issue a notice to him calling upon him to show cause. But, in a case where the court is moved by a party under Section 476 and the court hears the person sought to be prosecuted in that motion before it decides to prosecute him, the notice in that proceeding is the show cause notice. There is no need for another notice. (Para 2)

(B) Criminal P. C. (1898), Ss. 479-A and 476 — Disposal of judicial proceeding — Court not deciding to take action under S. 479-A — S. 476 cannot be resorted to subsequently.

Where the Court does not form an opinion, when it disposes of a judicial proceeding, that the witness has given intentionally false evidence or intentionally fabricated false evidence, it cannot later on resort to Section 476 and make a complaint against the witness under that section. It is not as if the court has an option to proceed either under S 479-A or under Section 476, and that if it does not take action under Section 479-A, it can do so under Section 476. AIR 1963 SC 816, Foll. (Para 3)

(C) Penal Code (1860), Ss. 191 and 192 — Swearing to a false affidavit amounts to giving false evidence and fabricating false evidence. AIR 1967 SC 68, Foll. (Para 4)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 68 (V 54) =

1967 Cri LJ 6, Baban Singh v Jagadish Singh 4

(1963) AIR 1963 SC 816 (V 50) =

(1963) (1) Cri LJ 803, Shabir Hussain Bholu v State of Maharashtra 3, 4

T. Karunakaran Nambiar, for Appellant; State Prosecutor, for Respondent.

JUDGMENT :— The appellant was directed to be prosecuted for offences under Sections 182 and 193 of the Penal Code by the District Judge of Tellicherry. The appellant (the defendant in a suit) lost before the trial court and filed an appeal before the District Court. He filed an application for stay of execution of the decree of the trial court, and in the affidavit in support of that petition, he alleged that he had executed a bond before the trial court to secure the decree that might be passed against him. The District Judge ordered interim stay; but, when the other side (the plaintiff) appeared and it was brought to the notice of the District Judge that no such security bond was completed by registration though a

bond was prepared the District Judge called for a report from the trial court. The report said that no security bond was registered and then the District Judge vacated the interim stay and dismissed the petition for stay. Subsequently the plaintiff filed an application under Section 476 of the Code of Criminal Procedure requesting the District Judge to file a complaint against the appellant for offences under Sections 182 and 193 of the Penal Code. The District Judge issued notice to the appellant heard him and ultimately passed the order now impugned before me.

2 The first argument of Mr T Karunakaran Nambiar the counsel of the appellant is that the District Judge did not issue a show cause notice to the appellant. The argument is that after the disposal of the application filed by the plaintiff seeking to prosecute the appellant the District Judge should have issued another notice calling upon the appellant to show cause why he should not be prosecuted. I do not think that such a notice is contemplated by either Section 476 or Section 479 A. In a case falling under Section 479 A (or even under Section 476) where the court suo motu proposes to prosecute a person the court has to issue a notice to him calling upon him to show cause. But in a case where the court is moved by a party under Section 476 and the court hears the person sought to be prosecuted in that motion before it decides to prosecute him the notice in that proceeding is the show cause notice. There is no need for another notice as claimed by the counsel of the appellant.

3 The next argument of the counsel is that this was a case coming under Section 479 A of the Code so that the District Judge should have issued notice when he dismissed the application for stay, and that the District Judge had no jurisdiction to take action under Section 476 subsequently at the instance of a party, e.g., the plaintiff. In support of this argument he draws my attention to the decision of the Supreme Court in *Shabir Hussain Bhola v State of Maharashtra* AIR 1963 SC 816. More particularly the counsel draws my attention to paragraph 8 of the judgment. The Supreme Court has said in unmistakable terms that under S 476 the action may proceed suo motu or on application while under Section 479 A no application seems to be contemplated. The Supreme Court has also said that it is not as if that court has an option to proceed either under Section 479 A or under Section 476 and that if it does not take action under Section 479 A it can do so under Section 476. The Supreme Court has said further that if the court does not form an opinion when it disposes of the matter that the witness has given intentionally false evidence or intentionally

fabricated false evidence no question of making a complaint can properly arise and that when the court has formed an opinion that though the witness has intentionally given false evidence or intentionally fabricated false evidence the nature of the perjury or fabrication committed by him is not such as to make it expedient in the interests of justice to make a complaint it has the discretion not to make a complaint. The Supreme Court has proceeded to lay down that once a court does not think it necessary to act under Section 479 A it cannot later on resort to Section 476 and make a complaint against the witness under that section.

4 In the case before me the appellant swore to a false affidavit in a petition for stay. He was a party and was also a witness before the appellate court when he swore to the affidavit. Swearing to a false affidavit is giving false evidence and fabricating false evidence there cannot be any doubt and if any authority is required for this the decision of the highest tribunal in the land the Supreme Court in *Baban Singh v Jagdish Singh* AIR 1967 SC 68 may be perused. The said decision lays down that swearing to a false affidavit is an offence falling under Ss 191 and 192 of the Penal Code. At the time when the District Judge dismissed the stay application he could have issued notice under Section 479 A of the Code to the appellant to show cause why the appellant should not be prosecuted for giving false evidence if the District Judge thought that for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice it was expedient that the appellant should be prosecuted. Since he did not think it necessary or expedient in the interests of justice to prosecute the appellant nor did he record a finding that the appellant should be prosecuted stating his reasons therefor he cannot subsequently proceed against the appellant under Section 476 of the Code at the instance of the other side the plaintiff in the case. The position appears to be clear in the light of the decision of the Supreme Court in *Shabir Hussain Bhola's* case AIR 1963 SC 816 already referred to.

5 For these reasons I allow the appeal and quash the complaint filed by the District Judge.

Appeal allowed

1970 Cri. L. J. 55 (Vol. 76, C. N. 13) =

AIR 1970 MADRAS 14 (V 57 C 7)

M. ANANTANARAYANAN C. J.
AND NATESAN J.

Abdul Razack Sahib, Appellant v. Mrs. Azizunnissa Begum and others, Respondents.

Letters Patent Appeal No 70 of 1967 and C M. P. No 4302 of 1967 in C R P No. 708 of 1965, D/-24-7-1968, against order of Kailasam J., D/-29-11-1967

Contempt of Courts Act (1952), S. 1 — Contempt — What constitutes — Mere failure to deposit amount into Court as ordered, does not amount to contempt.

While it is difficult to rigidly define contempt, in a general way contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudice parties to the action or their witnesses during the litigation. For an act to amount to contempt punishable under the summary jurisdiction of the High Court, it must fall within the principle of those cases in which the power to punish has been decided to exist, the unfailing criterion being whether or not there has been an interference or a tendency to interfere with the administration of justice. Contempt jurisdiction is reserved and exercised for what essentially brings the administration of justice into contempt, or unduly weakens it, as distinguished from a wrong that might be inflicted on a private party by infringing a decretal order of Court. (Para 2)

Having regard to the high function of a Court of justice, proceedings by way of contempt of Court should not be used as a 'legal thumbscrew' by a party against his opponent for enforcement of his claim. AIR 1966 Mad 21 (22), Rel on (Para 3)

Mere failure to deposit into Court moneys claimed by the opposite party and ordered to be deposited cannot amount to contempt of Court. 1893-1 QB 105 (107), Rel on: C. M. P. No. 4302 of 1967, D/-29-11-1967 (Mad), Reversed.

(Paras 2, 5)

Cases Referred: Chronological Paras

(1966) AIR 1966 Mad 21 (V 53) =

78 Mad LW 314 = 1966 Cri LJ 35,

Ramalingam v Mahalinga Nadar 3

(1893) 1893-1 QB 105 = 62 LJQB

87, Buckley v Crawford 4

V V. Raghavan, for Appellant; S K Ahmed Meeran and M Khaja Mohideen, for Respondents

NATESAN J.:— This appeal has been filed under Letters Patent from an order of committal of the respondent for contempt in a pending civil revision petition in this Court. The civil revision petition arises out of proceedings under the

Madras' Cultivating Tenants Protection Act (Act 25 of 1958) and has been preferred by the legal representatives of the landlord on the dismissal of a petition for eviction of the tenant, on the ground of wilful default in the payment of rent. The contention in the civil revision petition appears to be that the Revenue Court erroneously went into the question of title and rejected the petition for eviction. The revision petitioners moved this Court in C M. P. No 5345 of 1965 for a direction to the respondent therein the appellant before us, to deposit into Court the arrears of rent to the credit of T. P. No 2 of 1964 on the file of the Court of the Ex-officio First Class Magistrate, Tirunattur, for the prior four years at the rate of Rs 226 37 per year and future rent at the rate of Rs 250 per year pending the civil revision petition in this Court. In this civil miscellaneous petition on 28-1-1966, after hearing counsel on both sides, this Court passed an order in the following terms—

"The respondent will deposit the arrears of rent at Rs 226-37 due up-to-date in the Rent Court within two months from this date and continue to deposit future rent at the same rate as and when it falls due"

The respondent, the present appellant (referred to hereafter as appellant) who failed to deposit the arrears of rent in terms of the order, applied by C. M. P 6057 of 1966 for extension of time to pay the arrears. But this C. M. P was dismissed on 12-8-1966. Surprisingly though other remedies may be available to the petitioners to secure the arrears of rent claimed by them, they moved this Court in C M P 4302 of 1967 for committal of the appellant for contempt of Court in that he disobeyed the order of this Court dated 28-1-1966 in C M P 5345 of 1965. The appellant, in his counter affidavit to this application for committal, submitted inter alia that he was unable to pay the amount directed by this Court, as he was not in possession of the lands and that further he was very old and had a paralytic attack and was bedridden. The plea that he was not in possession of the lands, had been put forward even in C M P No 5345 of 1965 and had been overruled. When this application for committal came on for hearing on 24-10-1967, before the learned single Judge, who passed the original order for deposit, the learned Judge granted time for deposit in the following terms—

"Adjourned two weeks to enable the respondent to pay as directed by this Court"

On 13-11-1967, when the matter was taken up again, the counsel on record for the appellant reported no instructions. There was no appearance by the appellant and in his stead his son appeared. In the

order passed on that date the learned judge observed—

'On the facts stated above it is clear that the respondent has not deposited the amount as directed. He also admitted his liability and prayed for extension of time for depositing the amount. Till now it does not appear that the respondent has deposited any amount as directed by this Court. The respondent is therefore guilty of contempt of Court.'

The appellants son who appeared at the hearing on the 13th represented to the Court that some amount had been deposited in the lower Court on 6-11-1967 and that he would arrange to make the deposit as per the orders of this Court. The attitude of the appellant as disclosed by the proceedings is one of surrender praying for time and pleading inability. On the representation made by the appellants son on his behalf the order stated—

'The respondents son S A Batcha represents that some amount had been deposited in the lower Court on 6-11-1967 and that he would arrange to make the deposit as per orders of this Court. If the amount is deposited as directed it will not be necessary to inflict any punishment on the respondent taking into consideration that he is aged 82 years. Call the petition on 27-11-1967.

On 28-11-1967 the Court passed the following order—

'The pronouncement of punishment was adjourned so as to enable the respondent or his son to deposit the amount directed. The money has not been deposited. The respondent is clearly guilty of contempt. Considering the extreme old age of the respondent I sentence the respondent to two weeks simple imprisonment.'

At this hearing the respondent was represented by counsel. It is this committal of the appellant for contempt of Court that is now challenged before us as wholly outside the contempt jurisdiction of this Court.

2 It is submitted that there was only non-compliance with a simple order no doubt of this Court for payment of money claimed by the landlord as due for rents and such non-compliance does not carry with it penal sanctions as contempt of Court. From the record it does not appear that the appellant before us who had succeeded in the final Court and who was only the respondent here had even bargained to deposit these arrears of rent and continue to deposit the future rent pending the civil revision petition as a condition of his being allowed to continue in possession of the lands undisturbed till the disposal of the civil revision petition. His answer to that petition for deposit was that he was not in possession of the lands. We do not find recorded any undertaking by him to the Court at any stage of the

proceeding to deposit the moneys into Court. The petitioners in the civil revision petition moved for committal of the appellant for contempt only for disobedience of the order dated 28-1-1966 in C M P No 5345 of 1965. The learned Judge appears to be of the view that the failure to deposit the amount as directed by this Court is itself contempt of Court for the learned Judge observes—

respondent has deposited any amount as

Till now it does not appear that the directed by this Court. The respondent is therefore guilty of contempt of Court. We fail to see how mere failure to deposit into Court moneys claimed by the opposite party and ordered to be deposited can amount to contempt of Court. Counsel for the petitioners cannot place a single decision before us nor do we recollect a single instance where default of an order for payment of money has been held to constitute contempt of Court and the defaulting party sent to prison. While it is difficult to rigidly define contempt in a general way contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudice parties to the action or their witnesses during the litigation. For an act to amount to contempt punishable under the summary jurisdiction of this Court it must fall within the principle of those cases in which the power to punish has been decided to exist the unfailing criterion being whether or not there has been an interference or a tendency to interfere with the administration of justice. Contempt jurisdiction is reserved and exercised for what essentially brings the administration of justice into contempt or unduly weakens it as distinguished from a wrong that might be inflicted on a private party by infringing a decretal order of Court.

3 In *Ramalingam v Mahalinga Nadar* 78 Mad LW 314 at p 315 = (AIR 1966 Mad 21 at p 22) we formulated the principle of contempt jurisdiction thus—

'Essentially contempt of Court is a matter which concerns the administration of justice and the dignity and authority of judicial tribunals. A party can bring to the notice of Court facts constituting what may appear to amount to contempt of Court for such action as the Court deems it expedient to adopt. But essentially jurisdiction in contempt is not a right of a party to be invoked for the redressal of his grievances nor is it a mode by which the rights of a party adjudicated upon by a tribunal can be enforced against another party.'

If we may use what may be considered an irrelevant expression, having regard to the high function of a Court of justice proceedings by way of contempt of Court should not be used as a 'legal thumbscrew'.

by a party against his opponent for enforcement of his claim. But that is what the petitioners have attempted in this case.

4. The inapplicability of contempt process to an order like the one before us, is too well established to require any citation. We shall, however, refer to one case where the principle is neatly brought out. In *Buckley v. Crawford*, 1893-1 QB 105 at p. 107 in Volume I, an application was made for an order to commit the plaintiff in the action for disobedience to an order which had been made directing him to pay a sum of money to the claimant in inter-pleader proceedings. It was argued in that case that there was a bargain and an undertaking, and a breach of the undertaking to pay amounted to contempt of Court which may be punished by attachment, just as a breach of an injunction may. *Wills, J.*, with whom *Lord Coleridge, C. J.* concurred, holding that there was no jurisdiction in the Court in such a case to make an order for attachment for contempt, observed—

"This was a simple order to pay money, but it is sought to treat the default in obeying the order as a contempt of Court, on the ground that the order for payment was made in pursuance of an undertaking which had been given by the plaintiff. There is however, no difference between an order to pay money made in pursuance of an undertaking and any other order to pay a sum of money. It is true that the undertaking is the original ground of the liability, but attachment is never granted except for disobedience of an order to do or abstain from doing some specific thing".

5. It follows that the non-compliance by the appellant with the order of this Court directing him to deposit the arrears of rent due to the petitioners within the time prescribed and continue to deposit the future rent, does not amount to any contempt of Court. The penal sanction under the contempt procedure should not be invoked for default of compliance with such an order. It is not for us to suggest the processes that may be resorted to in such a case. The appeal is, therefore, allowed.

6. Normally we would not have ordered costs. But in this case, the appellant has been sentenced to two weeks simple imprisonment, at the instance of the respondents. All the while the appellant had been making vain attempts to find the money and make the deposit to escape the penal consequences of the summary proceedings initiated by the respondent. The appellant, in fact, has been able to make some deposit. Incidentally, pending the appeal before us, the petitioner had a receiver appointed for the properties without any objection by the appellant. In these circumstances, we award the ap-

pellant his costs in this appeal, which we fix at Rs 50.

7. As the appellant has disclaimed his possession of the lands, we direct the receiver, appointed pending the L. P. Appeal to continue to function till the disposal of the civil revision petition.

Order accordingly.

1970 Cri. L. J. 57 (Vol. 76, C. N. 14) =

AIR 1970 MANIPUR 12 (V 57 C 4)

R. S. BINDRA, J. C.

Thokchom Nimai Singh and another,
Petitioners v. Thangba Kom and another,
Respondents

Criminal Ref. Case No. 12 of 1969, D/-
5-8-1969 from order of Addl. S. J.; Mani-
pur in Cri. Revn. Case No 46 of 1966

(A) Criminal P. C. (1898), S. 145(5) —
Cancellation of preliminary order —
Satisfaction of Magistrate that dispute
does not exist and did not exist.

The proceedings initiated under Section 145 can be dropped only in terms of sub-section (5) thereof. That sub-section provides that nothing in the section shall preclude any party required to attend the Magistrate's Court, or any other person interested, from showing that no dispute exists or has existed. In such a case, the Magistrate shall cancel his preliminary order, and all further proceedings thereon shall be stayed. But the preliminary order can be cancelled only if the Magistrate feels satisfied that no dispute concerning the land involved exists at present or had existed before. Mere representation of a party is not enough. It is the finding of the Magistrate that the dispute does not exist at present or had not existed before which alone can provide him the legal sanction for cancellation of the preliminary order. (Para 5)

(B) Criminal P. C. (1898), S. 145 (5), (6) and (4) — Proceedings dropped — One party prohibited to interfere with possession of other — Order of Magistrate is illegal.

The apprehension of breach of the peace being the basis of the jurisdiction of the Magistrate to proceed under Section 145, he cannot make an order of the nature mentioned in sub-sections (4) and (6) if he is satisfied that there is no such likelihood and as a consequence he drops the proceedings under sub-section (5). With the cancellation of the preliminary order, the Magistrate becomes functus officio except, to pass orders necessary to wind up the proceedings, and so he ceases to have jurisdiction to pass an order that one of the two contestants should not interfere with the posses-

HM/HM/D567/69/MVJ/D

sion of the other over the property in dispute. In other words the Magistrate cannot simultaneously act both under sub-section (5) and under sub-sections (4) and (6). Once the Magistrate cancels the preliminary order it befits him to ensure that none out of the parties arrayed before him gets an advantage at the expense of another. The ideal step to take on cancellation of preliminary order under sub-section (5) would be to restore the parties to the status quo ante.

(Para 6)

Petitioners in Person Respondent No 1 in Person, N Ibotombi Singh Public Prosecutor for Respondent No 2

ORDER — In this reference under section 438 of the Criminal Procedure Code hereinafter called the Code the learned Additional Sessions Judge recommends that the order dated 16-6-1966 by which the sub-divisional Magistrate Bishenpur dropped the proceedings under Section 145 of the Code and lifted the attachment in favour of the first party with the direction that the opposite party should not interfere with the possession of the first party over the land in dispute should be quashed.

2 The facts of the case may first be briefly summarised. On 22-11-1965 the Officer-in-charge of the Police Station, Bishenpur reported to the sub-divisional Magistrate that there was serious probability of clash and blood-shed between the two parties respecting their right to harvest the crop standing on some patta land in the village. The Magistrate after studying the report and examining the Officer-in-charge of the Police Station directed that proceedings under Section 145 be drawn up and he simultaneously attached the land in dispute. The two parties involved in the conflict were summoned and in course of time they put in their written statements. On 16-6-1966 *only the first party was present before the Magistrate and that party prayed that the proceedings be dropped inasmuch as the second party had failed to put in appearance on no less than four hearings. The learned Magistrate was of the opinion that the repeated absence of the second party was indicative of the fact that they had no more interest in the disputed land. He therefore dropped the proceedings and lifted the attachment in favour of the first party and gave the direction that the second party shall not interfere with the peaceful possession of the first party over the land in dispute. The second party, having felt aggrieved with the Magistrate's order dated 16-6-66 took the matter in revision before the Sessions Court.*

3 The revision petition came up for hearing before Shri P N Roy the Additional Sessions Judge. He reached the conclusions as gathered from his re-

ference made to this Court that the Magistrate had no jurisdiction to drop the proceedings without first recording the finding that he felt satisfied that there was no apprehension of breach of the peace that such a finding was never recorded by the Magistrate and that the Magistrate had acted illegally in lifting the attachment and directing the second party not to interfere with the possession of the first party over the land. In view of these legal infirmities in the order of the Magistrate the Additional Sessions Judge was of the opinion that it could not be sustained and so he recommended that it should be set aside.

4 Unfortunately the counsel for none of the parties to the dispute has turned up in this Court today. Only Shri N Ibotombi Singh the Government Advocate has put in appearance on behalf of the Union Territory. Shri Ibotombi Singh supports the recommendation made by the learned Additional Sessions Judge in its entirety.

5 The proceedings initiated under Section 145 can be dropped only in terms of sub-section (5) thereof. That sub-section provides that nothing in the section shall preclude any party required to attend the Magistrate's Court or any other person interested from showing that no dispute exists or has existed. In such a case the section states further the Magistrate shall cancel his preliminary order and all further proceedings thereon shall be stayed. It is apparent that the preliminary order can be cancelled only if the Magistrate feels satisfied that no dispute concerning the land involved exists at present or had existed before. Mere representation of one party to the case that dispute does not exist or had never existed cannot constitute justification for cancellation of the order. It is therefore the finding of the Magistrate that the dispute does not exist at present or had not existed before which alone can provide him the legal sanction for cancellation of the preliminary order. In the instant case the Magistrate did not record the finding that the dispute between the parties had either never existed or had ceased to exist. Hence it is not possible to uphold the validity of the cancellation of the preliminary order.

6 The Additional Sessions Judge was very right in his observation that the part of the impugned order by which the attachment was lifted in favour of the first party and direction was issued to the second party not to interfere with the peaceful possession of the first party over the land in dispute is open to more serious objection. This part of the order apparently partakes the nature of a final order passed under sub-sections (4) and (6) of Section 145 after conclusion of the enquiry. However if the Magistrate had

dropped the proceedings under Section 145 on the basis that the dispute between the two parties had come to an end, he had no jurisdiction to make an order of the nature which is normally passed under sub-sections (4) and (6) of Section 145. The apprehension of breach of the peace being the basis of the jurisdiction of the Magistrate to proceed under Section 145, he cannot make an order of the nature mentioned in sub-sections (4) and (6) if he is satisfied that there is no such likelihood and as a consequence he drops the proceedings under sub-section (5). With the cancellation of the preliminary order, the Magistrate becomes functus officio except, of course, to pass orders necessary to wind up the proceedings, and so he ceases to have jurisdiction to pass an order that one of the two contestants should not interfere with the possession of the other over the property in dispute. In other words, the Magistrate cannot simultaneously act both under sub-section (5) and under sub-sections (4) and (6). Once the Magistrate cancels the preliminary order, it befits him to ensure that none out of the parties arrayed before him gets an advantage at the expense of another. The ideal step to take on cancellation of the preliminary order under sub-section (5) would be to restore the parties to the status quo ante. Since, however, the sub-divisional Magistrate in the present case had directed the second party not to interfere with the possession of the first party over the land in dispute after he had made up his mind to drop the proceedings and cancel the preliminary order, that direction cannot be sustained in law.

7. A perusal of the record reveals that the finding of the Police, while reporting the case to the Magistrate, was that both the parties had been in possession of the land for about 4 to 5 years and that the dispute arose between them at the time of harvesting of the standing crops in November 1965. In such a situation the direction of the Magistrate after dropping the proceedings, that the second party should not interfere with the possession of the first party was highly unjust to the former. The proper course to follow was to proceed with the case to its logical conclusion and then either to hold that one of the parties was in possession of the land if such a conclusion could be arrived at on the basis of the material placed before the Magistrate, or to refer the dispute to the Civil Court under Section 146(1) of the Code. None of these two courses legally open to the Magistrate having been followed, and he having instead cancelled the preliminary order without first recording the finding that the dispute had never existed between the parties or had ceased to exist, I have no option but to accept the recommenda-

tion made by the learned Additional Sessions Judge. Consequently I quash the order dated 16th of June 1966 and remit the case to the Magistrate for deciding it in accordance with the provisions of law. I may observe in passing that if the second party had exhibited contumacy in the matter of appearing before the Magistrate, the latter could have proceeded to pass final order in the case despite that party's absence on the basis of material available on the record.

8. Announced.

Reference accepted.

1970 Cri L. J. 59 (Vol. 76 C. N. 15) =
AIR 1969 MYSORE 221 (V 56 C 45)
M. SADASIWAYYA, J.

Subbamma and another, Accused, Petitioners v V Kannappachari now deceased by V. Muthuswamy Complainant, Respondent

Criminal Revn. Petn. No 362 of 1967, D/- 12-7-1968, against order of First Class Magistrate, Raichur, D/- 11-9-1967

Criminal P. C. (1898), Ss. 247 and 259 — Non-cognizable offence — Death of complainant — Magistrate has discretion to substitute fit and willing complainant.

The death of the complainant in a case of non-cognizable offence does not abate the prosecution. It is within the discretion of the trying Magistrate in a proper case to allow the complaint to continue by a proper and fit complainant if the latter is willing. AIR 1926 Bom 178, Foll (Para 3)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 983 (V 54) =	
1967 Cri LJ 943, Aswinbhai Nanu Vyas v State of Maharashtra	2
(1926) AIR 1926 Bom 178 (V 13) =	
27 Cri LJ 491, Mohamed Azam v. Emperor	3
(1916) AIR 1916 Pat 152 (V 3) =	
18 Cri LJ 151, Jitan Dusadh v. Damoo Sahoo	3
(1915) AIR 1915 Cal 263 (V 2) =	
15 Cri LJ 726, Madho Choudhry v Turab Mian	3
(1915) AIR 1915 Cal 708 (V 2) = 16	
Cri LJ 322, Puran Chandra v. Dengar Chandra	3
(1889) ILR 13 Bom 600, In re, Ganesh Narayan Sathe	3
Appa Rao, for Petitioners, Smt G S Anasuya, for Respondent.	

ORDER: The petitioners were the accused in Criminal Case No 181/3 of 1967 in the Court of the First Class Magistrate, Raichur. The offence which had been complained of against them was one punishable under Section 7 (1) of the

LL/BM/F875/68

Suppression of Immoral Traffic in Women and Girls Act Process had been issued against the accused and they appeared in response to the summons and were represented by Advocate In the meanwhile the complainant having died an application was made on behalf of her brother's son praying for permission to continue the prosecution On behalf of the accused a contention had been raised to the effect that on the death of the complainant the complaint had abated and that the accused had to be acquitted In support of this contention reliance appears to have been placed on the provisions of Section 247 of the Code of Criminal Procedure The Magistrate rejected the contention which had been raised on behalf of the accused and he permitted the brother's son of the deceased complainant to lead the evidence in support of the complaint It is against that order of the Magistrate that the present revision petition has been preferred by the accused persons

2 I have heard Sri Apparao learned Advocate for the respondent As pointed out by the Supreme Court in para 3 at page 984 of AIR 1967 SC 983 Ashwin Nanubhai Vyas v State of Maharashtra

The Code of Criminal Procedure provides only for the death of an accused or an appellant but does not expressly provide for the death of a complainant The Code also does not provide for the abatement of inquiries and trials although it provides for the abatement of appeals on the death of the accused in appeals under sections 411-A (2) and 417 and on the death of an appellant in all appeals except an appeal from a sentence of fine Therefore what happens on the death of a complainant in a case started on a complaint has to be inferred generally from the provisions of the Code

3 No uniform view appears to have been taken by the High Courts in India on the question as to whether on the death of a complainant the complaint abates and on that ground the accused must necessarily be acquitted The view taken by Madgavkar J in AIR 1926 Bom 178 is that even in case of non-cognizable offence instituted upon a complaint it would be within the discretion of the trying Magistrate in proper cases to allow the complaint to continue by a proper and fit complainant if the latter is willing The learned Judge took the view that Section 247 of the Code was applicable primarily to the case of a complainant who was alive but did not appear It was doubted whether it applied to the case of a complainant that was not alive While pointing out that the courts would always be on their guard against needless harassment of an accused by substituting a complainant who is not a fit person the learned Judge stated that the

trying Magistrate had the discretion in proper cases to allow the complaint to continue by a proper and fit complainant if the latter was willing This is what has been stated at page 179 of AIR 1926 Bom 178 Mohamed Azam v Emperor

But even in the case of non-cognizable offences such as for instance bribery as is pointed out by this Court In Re Ganesh Narayan Sathe (1889) ILR 13 Bom 600 the Code does not intend to confine prosecutions to the persons directly injured

On the whole we agree with the view of Chamber C J in Jitan Dusadh v Damoo Sahu AIR 1916 Pat 152 after considering Madho Chowdhry v Turab Mian AIR 1915 Cal 263 and Puran Chandra v Dengar Chandra AIR 1915 Cal 708 that it is open to doubt whether S 247 of the Code was intended to apply to such a case as this It seems to apply primarily to the case of a complainant who is alive but does not appear

We are of opinion therefore that in the present case of a non-cognisable offence instituted upon a complaint the axiom of *actio personalis moritur cum persona* in civil law confined to torts does not apply and that the trying Magistrate has discretion in proper cases to allow the complaint to continue by a proper and fit complainant if the latter is willing The Courts would always be on their guard against needless harassment of an accused by 'substituting a complainant who is not a fit person' Having regard to the fact that there is no specific provision to the effect that on the death of the complainant the complaint abates it seems to me that the view taken in AIR 1926 Bom 178 should be accepted as it is supported by sound reasons if I may say so with great respect

4 Thus the view taken by the learned Magistrate in the present case is sustainable and I find no good ground to interfere with the same in revision This revision petition is dismissed
CWM/DVC Revision dismissed.

1970 Cri L J 60 (Vol 76, C N 16) =

AIR 1970 ORISSA 3 (V 57 C 2)

A MISRA J

In re Beda

Criminal Ref No 1 of 1968 (Deaf & Dumb) D/ 14-1 1969 made by Sub divisional Magistrate, Athmallik D/- 23-4-68

Criminal P C (1898) S 341 — Trial of deaf and dumb accused — Duties and powers of Court before forwarding proceedings to High Court — Magistrate before making reference should ascertain

CM/CM/A970/69/KS/B

whether accused can be made to understand proceedings — Similar duty is cast on Sessions Court after accused is committed to it.

It is well settled that before making a reference u/s 341 Cr. P. C. it is obligatory on the Court to make necessary enquiries and endeavour to find out if the accused can be made to understand the proceedings and come to a definite conclusion.

Where the Magistrate has simply recorded his conclusion that the accused is deaf and dumb and has committed the accused to take his trial before the Sessions Court it is hardly sufficient to make a reference under Section 341. It is also necessary for the Sessions Judge to ascertain for himself whether the accused can be made to understand the proceedings with the help of relations and friends and if necessary to keep him under medical observation to enable him to come to his conclusion. If he finds that the said accused can be made to understand the proceedings, he will proceed in the ordinary way. If on the other hand, he is satisfied that the said accused cannot be made to understand the proceedings of the Court, the procedure prescribed u/s 341 Cr. P. C. should be followed. AIR 1957 Ker 9 & AIR 1960 Mys 315 & AIR 1960 Bom 526, Foll.

(Para 4)

Cases Referred: Chronological Paras

(1960) AIR 1960 Bom 526 (V 47)=

1960 Cri LJ 1575, State v. Radhamal

3

(1960) AIR 1960 Mys 315 (V 47)=

1960 Cri LJ 1476, State v. N

Maktumsab Jatgat

3

(1957) AIR 1957 Ker 9 (V 44)=

1957 Cri LJ 447, In re, Padmnabhan Nair Narayanan Nair

2

A B Misra, for the State.

ORDER: This is a reference u/s 341 Cr P. C. by the Sub-divisional Magistrate Athmallik forwarded by the Sessions Judge, Cuttack-Dhenkanal

This pertains to Beda alias Suramani Sahu (accused no 3) who along with two others charged with offences u/ss 302, 324 and 323 read with S 341 P C has been committed to take his trial before the Court of Session. After making the commitment, the learned Magistrate has made the present reference having come to the conclusion that the said accused who is deaf and dumb is incapable of being made to understand the proceedings.

2. Shri A B Misra, learned counsel appearing for the State points out that before making the reference, the learned Magistrate should have made adequate enquiries about the antecedents of the said accused, an endeavour to find out as to how his friends and close relatives are accustomed to communicate with him in

ordinary affairs, got him kept under medical observation and thereafter recorded his own conclusions. In this case, no such steps appear to have been taken and the learned Magistrate seems to have come to his conclusions on the basis of his impression and made this reference. Therefore, learned counsel for the State suggests, as was done in a Kerala case reported in AIR 1957 Ker 9, In re: Padmnabhan Nair Narayanan Nair, to issue necessary directions to the Sessions Judge, who is to try the case, to ascertain and satisfy himself whether the said accused can be made to understand the proceedings and thereafter proceed with the trial

3. The learned committing Magistrate has simply observed as follows:

"During committal enquiry, it came to light that accused Beda alias Suramani Sahu is not able to understand the proceedings of the enquiry as he happens to be deaf and dumb."

He appears to have reached the aforesaid conclusion simply on the ground that the said accused is deaf and dumb. This manner of coming to a conclusion by the learned Magistrate is neither proper nor helpful to this Court. Apart from observing the demeanour and conduct of the said accused and being influenced by the fact that he is deaf and dumb, the learned Magistrate does not seem to have made any attempt or taken any steps to make him understand the proceedings of the court. So also, no endeavour seems to have been made to find out as to whether it was not possible for any of the relations or friends of the said accused to communicate with him by signs and as to whether it would not be possible for such a person to interpret the proceedings of the court by means of such signs to him. In the decision reported in AIR 1960 Mys 315, State v. N Maktumsab Jatgat, it has been observed.

"The fact that the person is deaf and dumb does not necessarily mean that he cannot understand or cannot be made to understand the proceedings before a court, though the disability is undoubtedly a serious handicap to communication either way. Before the Court of enquiry or trial forwards the proceedings to the High Court u/s 341 Cr P. C, it must be satisfied that the accused cannot be made to understand the proceedings and the enquiry or trial must result in a commitment or a conviction"

Similarly, in the decision reported in AIR 1960 Bom 526, State v. Radhamal, it was observed:

"When it is alleged in any criminal proceedings that an accused is deaf and dumb, the court may proceed with the enquiry or trial, but it should first enquire into the antecedents of the accused and should also make an endeavour to

find out as to how his friends and close relatives are accustomed to communicate with him in ordinary affairs and record its own conclusions if necessary by taking evidence.

In the Kerala case referred to by the learned counsel though the learned Magistrate who conducted the earlier stage of the enquiry had got the accused kept under medical observation and the doctor's evidence had also been taken to the effect that the accused was deaf and dumb and unable to hear and reply to questions put by him the Court observed

The enquiry as to the capacity of the accused to understand the proceedings in court preceded the preliminary enquiry. The Magistrate who conducted the latter enquiry did not endeavour to see whether the accused can be made to understand the proceedings x x x It is the court's duty to make a proper endeavour to see whether the accused can be made to understand the proceedings.

4 Thus it is well settled that before making a reference u/s 341 Cr P C it is obligatory on the court to make necessary enquiries and endeavour to find out if the accused can be made to understand the proceedings and come to a definite conclusion. In the present case the learned Magistrate has simply recorded his conclusion that the accused is deaf and dumb which in my opinion is hardly sufficient to make such a reference. Any way as the commitment has already been made it is for the learned Sessions Judge who will try the case to satisfy himself about the capacity of the accused to understand. If it is found that the accused cannot be made to understand the proceedings the court can convict him if the evidence warrants it but it cannot pass sentence against him. The court must forward the proceedings to this Court for such orders as the court thinks fit. On the other hand if the court finds that it is possible for the accused to be made to understand the proceedings the trial will proceed in the ordinary way and the court if the accused is found guilty convict him and pass sentence. Therefore I direct that the learned Sessions Judge should first ascertain for himself whether the accused Beda alias Suramani Sahu can be made to understand the proceedings with the help of his relations or friends, if any such person is available and if he considers necessary he may keep him under medical observation to enable him to come to his conclusion. If he finds that the said accused can be made to understand the proceedings he will proceed in the ordinary way. If on the other hand he is satisfied that the said accused cannot be made to understand the proceedings of the court the procedure prescribed

u/s 341 Cr P C should be followed. The learned Sessions Judge will see that the said accused gets the necessary legal assistance if he finds him undefended. The trial will proceed against him on the basis that he has pleaded not guilty to the charge and all possible defences open to him in the circumstances of the case shall be taken into consideration. The reference stands disposed of accordingly.

Reference disposed of accordingly.

1970 Cri L J 62 (Vol 76, C N 17) =

AIR 1970 ORISSA 10 (V 57 C 5)

A MISRA, J

Prasanna Kumar Samal and others,
Petitioners v Anand Chandra Swain
Opposite Party

Criminal Revn No 214 of 1966 D/
27 1969 against order of Sub Divisional
Magistrate Kamalshyanagar D/ 283-
1966

(A) Criminal P C (1898) Ss 236 and 237 — Principal offence and abetment — No specific charge of abetment — When accused can be convicted for — (Penal Code (1860) Ss 323 and 109)

As a general rule it cannot be laid down that a person charged for the substantive offence can in no circumstances be convicted for abetment of the same. Where a case is covered under Ss 236 and 237 of Criminal P C and the accused had notice of all the facts which go to make up the charge of abetment he can be convicted for such abetment, even in cases where the charge framed against him is only for the substantive offence. On the other hand if in a given case it is found that the accused had no notice of the facts constituting abetment and as such had no chance of meeting such a case a conviction for abetment will not be justified when he is charged with the substantive offence. (Para 5)

Where the accused were charged only under S 323 of Penal Code and the facts constituting abetment by any of them were not mentioned in the complaint petition nor in their examination under S 342 Criminal P C and there was also no evidence that they had instigated or intentionally offered any aid by any act or omission for the commission of the assault by the other accused they could not be convicted for abetment of the offence in the absence of a specific charge in that respect. (Para 6)

(B) Cattle Trespass Act (1871) Ss 10 and 20 — Mistake as to one's right to land or crop — Seizure of cattle trespassing — Seizure not theft — Owner of cattle has no right to use force to rescue cattle — His remedy is only under S 20

GM/IM/D96/69/TVN/P

— Seizure by watcher appointed by villagers including owner of land into which cattle trespassed — Seizure, held, not theft. AIR 1965 SC 926, Foll.; AIR 1963 Orissa 52, hed, bad Law — (Penal Code (1860), Ss. 390 and 97). (Para 7)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 926 (V 52)=

1965 (2) Cri LJ 18, Ramratan v. State of Bihar 7

(1963) AIR 1963 Orissa 52 (V 50)= 1963(1) Cri LJ 308, Lokenath v. Rahas Beura 7

A. K Padhi, for Petitioners, S. C. Mohapatra, S. Mohanty, for Opposite Party.

ORDER:— Petitioners Nos 1 and 6 have been convicted under Section 323 I. P. C and the other petitioners under Section 323/109 I. P. C and each of them sentenced to pay a fine of Rs. 30/- and in default, to undergo S I for ten days

2. In short, complainant's case, is that on 16-10-64 while P. Ws 2 and 3 were taking some cattle belonging to petitioners to the pound alleging that they had damaged paddy crops in some field of Baligorada village, petitioner no 1 assaulted P. W. 2 and threatened P. W. 3 when he intervened. The complainant (P. W 1) tried to intervene, but was assaulted by petitioner no 6. Thereafter, petitioners rescued and took away their cattle. Petitioners in defence deny to have assaulted P W 1 or P W 2. According to them, P W. 1 and his villagers seized their cattle which were grazing on a waste land and when petitioner no 1 protested, P. W. 1 rushed to assault him with a tangia. Petitioner no. 1 managed to snatch away the tangia and thereafter left the place, while petitioners drove away their cattle. The other petitioners deny to have been present at the time of occurrence

3. The learned Magistrate who tried the case accepted P. W. 1's version about the occurrence and the place where it is said to have taken place and found that petitioners nos 6 and 1 committed assault on P. Ws 1 and 2 respectively. He accordingly convicted them under Section 323 I. P. C. So far as the other petitioners are concerned, he found them guilty of abetment and convicted them under Section 323/109 I. P. C

4. Learned counsel for petitioners has assailed the convictions mainly on two grounds. Firstly, it is contended that the conviction of petitioners 2 to 5 who were accused Nos 3 to 6 u/s 323/109, I P C. is not maintainable as no specific charge was framed for abetment against them and they had no notice of such a charge. The second contention is that the conviction of petitioners Nos 1 and 6 u/s 323, I P. C. is not maintainable, because the seizure of the cattle was illegal and they exercise of their right of private

defence of property were entitled to use force to rescue their cattle from such illegal seizure

5. The aforementioned first contention, in my opinion has considerable force. It is not disputed that all the petitioners were charged with the substantive offence u/s 323 I P. C and no separate charge for abetment was framed against any of them. It is no doubt true that as a general rule it cannot be laid down that a person charged for the substantive offence can in no circumstances be convicted for abetment of the same. The position seems to be fairly well settled that where a case is covered u/ss 236 and 237, Cr P C and the accused had notice of all the facts which go to make up the charge of abetment, he can be convicted for such abetment, even in cases where the charge framed against him is only for the substantive offence. On the other hand, if in a given case, it is found that the accused had no notice of the facts constituting abetment, and as such, had no chance of meeting such a case, a conviction for abetment will not be justified when he is charged with the substantive offence

6. In this case, it is conceded by learned counsel for opposite party that facts constituting abetment by any of the petitioners are not mentioned in the complaint petition nor in their examination u/s 342, Cr. P C, such facts have been put to petitioners Nos 2 to 5. As clearly stated, there is no specific charge of abetment. There is hardly any evidence on the prosecution side that petitioners Nos 2 to 5 instigated or intentionally offered any aid by any act or omission for the commission of the assault by the other two petitioners. Thus, in the circumstances proved in this case, it cannot be said that petitioners nos 2 to 5 had any notice of facts which would constitute the accusation of abetment by them. As such, it cannot be said that they had any opportunity to defend themselves against such a charge. Therefore, the conviction of petitioners nos 2 to 5 for abetment under Section 323/109 I. P. C is not sustainable and must be set aside.

7. Coming to the conviction of petitioners nos 1 and 6 under Section 323 I. P. C, learned counsel for petitioners refers to Section 10 of the Cattle Trespass Act and contends that the seizure of the cattle was illegal as P. W. 2 was not the cultivator or occupier of the land and there is no proof that the cattle had actually damaged the paddy crop. Reliance is placed on a decision of this Court reported in AIR 1963 Orissa 52, Lokenath v. Rahas Beura in support of the contention that the owner is entitled to rescue his cattle against illegal seizure even by use of force. In the aforementioned decision, it was observed —

"Illegal seizure of cattle with a view to amputate them is theft because though the person who has seized animals had no intention to cause wrongful gain to himself nevertheless his intention was to cause wrongful loss to the owner of the animals. In such a case the owner of the cattle has a right to exercise the right of private defence of property in rescuing them."

If the aforesaid observations are accepted as laying down the correct position of law the necessity of considering whether the seizure in this particular case was legal or illegal would not have arisen.

In view of the decision reported in AIR 1965 SC 926 Ramratan v State of Bihar the above observations cannot be accepted as laying down the correct position of law. The Supreme Court in the aforementioned decision observed —

"When a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that he was taking them to the pound, he commits no offence of theft however mistaken he may be about his right to that land or crop. The remedy of the owner of the cattle so seized is to take action under Section 20 of the Act. He has no right to use force to rescue the cattle so seized."

In the present case rightly or wrongly P Ws 2 and 3 were admittedly taking the cattle to the pound giving out that the cattle had trespassed into and damaged the crop. This fact is not disputed. P W 2 seized the cattle in his capacity as watcher appointed by the villagers including the owner of the land into which the cattle are said to have trespassed to guard the crops. In such circumstances even assuming that he was mistaken about his right to seize as has been observed by the Supreme Court his action will not amount to an offence of theft and the remedy of the owner was only to take action under Section 20 of the Act. No right to use force to rescue the cattle is available to the owner. Therefore the contention of learned counsel so far as petitioners nos 1 and 6 are concerned has no merit and has to be rejected.

8. In the result the revision is allowed in part. The conviction and sentence of petitioners Narayan Samal Bhikari Ch Samal Ugrasen Samal and Sudarsan Samal U/s 323/109 I P C are set aside and they are acquitted of the charge. The conviction and sentence of petitioners Prasanna Kumar Samal and Dibakar Samal are confirmed.

Petition partly allowed

1970 Cr L J 64 (Vol. 76, C N 18) =

AIR 1970 PATNA 20 (V 57 C 4)

B D SINGH J

Bageshwar Misser, Petitioner v Mt. Khandari Kuer and the State Opposite Party

Criminal Revn. No 223 of 1968 D/ 12-2-1969 against decision of S J, Chapra D/- 13-1-1968

(A) Evidence Act (1872), S 3 — Appreciation of evidence — Prosecution story disbelieved as to its material part — As a rule of prudence it is not safe to rely on one part of story for convicting the accused — (Criminal P C (1893) S 367)

Though it cannot be laid down, as a law of general application that in no case a judge can accept a part of the prosecution story when he has disbelieved its other part as a rule of prudence it will not be safe to rely on the evidence of witnesses on one part of the prosecution story when it has been disbelieved as to its material part. It is elementary that where the prosecution has a definite or positive case it must prove the whole of the case AIR 1954 Pat 483 Foll. (Para 5)

(B) Penal Code (1860), S 420 — Prosecution under — Criminal intention of accused at the time the offence is said to have been committed must be established — Mere breach of contract cannot give rise to criminal prosecution — Complainant having alternative remedy in civil court — Conviction, held could not be sustained

For a conviction for an offence under Section 420 of the Code it is essential to establish the criminal intention of the accused at the time the offence is said to have been committed (Para 6)

Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in the civil court the matter should not be allowed to be fought in the Criminal Courts (1936) 37 Cr LJ 38 (Pat) Rel on. (Para 8)

Held, that on the facts and circumstances of the case it could not be said with certainty that the accused had criminal intention to cheat complainant at the time the offence was said to have been committed. Besides the complainant had alternative remedy in civil court. Hence

IM/IM/D861/69/LGC/D

conviction under Section 420 could not be sustained (Para 4)

Cases Referred: Chronological Paras

(1954) AIR 1954 Pat 483 (V 41)=

1954 Cri LJ 1546, Awadh Singh

v The State 5

(1936) 37 Cri LJ 38 = 16 Pat LT

553, Sheosagar Pandey v Emperor 8

Janardan Prasad Singh and Kailash Roy, for Petitioner, Ram Nandan Sahaya Sinha and Lala Sachundra Kumar, for Opposite Party.

ORDER:— This criminal revision has been preferred by the sole petitioner who was convicted for an offence under Section 420 of the Indian Penal Code (hereinafter referred to as 'the Code') and was sentenced to suffer six months' rigorous imprisonment and a fine of Rs 200/- was also imposed upon him for the said offence. In default of payment of the fine, he was ordered to undergo further rigorous imprisonment for two months, by the trial court. On appeal his conviction and sentence were maintained. It may be noted that the trial court had convicted also his two brothers, namely, Nag Narain Misser and Saligram Misser for the offence under the aforesaid section, and the same sentences were imposed upon them. The appellate court, however, gave benefit of doubt to Nag Narain Misser and Saligram Misser and acquitted them.

2. Facts, in brief, which have given rise to this application are: The prosecution was initiated on a complaint dated 4-1-1965 (Ext. 1) lodged by Mosammat Khandari Kuer (P. W. 4) widow of Dhorai Pandey. According to the complainant, on 14-12-1964 the petitioner along with his two brothers, who have been acquitted by the Sessions Judge, came from their village Bankata to the complainant who was living then at village Dhamnagar which is 16 miles from the village of the petitioner, and requested her to execute a zerpeshgi deed in respect of her 19 kathas 16 dhurs of land after taking a loan of Rs 1,000/- from the accused. To this she agreed. On 15-12-1964 she was taken to Gopalganj Sub-Registry Office, and was made to execute a document (Ext. 2) by obtaining her thumb impression, which she took to be a zerpeshgi deed, as according to her, the contents thereof were not read out or explained to her. The accused also promised to pay the consideration at her home after the registration. After the deed was registered the registration slip was also taken from her after obtaining her thumb impression thereon, but even later no money was paid to her. Thereafter, on enquiry she learnt that fraud was committed by the accused as in fact it was not a zerpeshgi deed but it was an out and out sale, and for that also no consideration was paid to her. Then she filed the said complaint on 4-1-1965.

1970 Cri.L.J. 5.

3. The defence, in short, was that she had knowingly sold her lands after receiving Rs 920/- by way of adjustment of prior loans before the execution and the balance of Rs. 80/- in cash, was paid to her after the registration. The trial court after considering the evidence on record, however, convicted the petitioner along with his two brothers as mentioned earlier. On appeal the conviction and sentence passed upon the petitioner were maintained whereas his two brothers were acquitted. Hence this revision.

4. Learned counsel appearing on behalf of the petitioner has raised the following points for consideration by this Court:

(i) The prosecution story about misrepresentation to the complainant regarding the zerpeshgi nature of the deed having been disbelieved by the appellate court, the petitioner cannot be convicted under Section 420 of the Code.

(ii) The appellate court has erred in convicting the petitioner solely on the ground that no consideration was paid to her contrary to the promise made by the petitioner. For the payment of consideration the court ought to have examined the terms mentioned in the document (Ext. 2) itself, specially when there is no finding that the document was not read over and explained to her. Even if consideration had not passed the court below ought not to have gone into the matter as it was a civil right.

5. I will take up for consideration points Nos (i) & (ii) together. Learned counsel appearing on behalf of the petitioner has contended that the prosecution examined 4 witnesses, namely, P. Ws 1 to 4, to prove the prosecution story. The appellate court discarded the evidence of P. Ws. 1 to 3 and based the conviction solely on the testimony of P. W. 4, the complainant, even P. W. 4 has not been relied regarding her story that the accused had approached her for zerpeshgi and not for sale. The learned Judge held that her story regarding the zerpeshgi was false, and he gave the accused benefit of doubt for that part of the prosecution story. The learned Judge, however, convicted the petitioner on the ground that P. W. 4 did not receive any consideration for the sale deed (Ext. 2) and she was made to part with the registration slip on the pretext of paying the consideration later at home.

Learned counsel submitted that the appellate court erred in holding that the recital of the deed (Ext. 2) clearly showed that such an intention was present from the very beginning. He has drawn my attention to Ext. 2, wherein it is stated that Rs 920/- was paid to her by adjustment of a prior loan, and the balance of Rs. 80/- was paid to her at the time of execution. Therefore, he urged that

there was neither intention of cheating from the very beginning nor there was existence of such intention at any subsequent stage. In fact the balance of Rs 80/- was paid to P W 4 on the same date after the registration of the document and before she parted with its receipt. The deed was scribed by one Jagannath who has written in the deed that he read it out and explained it to her. There is no finding by the court below that Jagannath, the scribe did not explain or read over the deed to her. In that view of the matter it cannot be said that Rs 920/- was not paid to her by way of adjustment. She put the thumb impression on the deed after it was fully explained to her. If she would not have received Rs 920/- she would not have put her thumb impression on it. The balance of Rs 80/- was also paid to her before she parted with the registration receipt (receipt for the exchange of the deed). At one stage I wanted to see this receipt in order to find out what was written on her behalf or by her on this receipt. Hence I called for the receipt from the office of the Sub-registry Office Gopalganj but it was reported that the same had been destroyed. The case of the prosecution is as mentioned earlier that she put her thumb impression on the receipt and parted with it on the assurance that the consideration money will be paid to her at her home but that was not paid. In examination under Section 342 of the Code of Criminal Procedure the petitioner has stated that he paid the consideration money and he further stated that he would file written statement. In the written statement also it was stated that Rs 920/- was paid to her before the execution of the sale deed and the balance of Rs 80 was paid to her after the registration and she put her thumb impression on the receipt after the payment of the balance amount. Learned counsel further contended that once she parted with the registration receipt the presumption would be that the entire amount was paid to her. The complainant (P W 4) is the only witness on the point that no consideration was paid to her and the court below has disbelieved her so far as the story regarding the zerpeshgi is concerned. According to him the learned Judge ought not to have convicted the petitioner on her evidence when she was disbelieved on material particulars. In this connection reference may be made to a decision of this court in *Awadh Singh v The State* AIR 1954 Pat 483 where Choudhary J (as he then was) at page 486 observed that of course it is true that where the prosecution story is disbelieved as to its essential details it is still open to the court to rely on a part of the story for the purpose of convicting the accused persons but at the same time it is elementary that where the prosecution

has a definite or positive case it must prove the whole of the case. His Lordship further observed that though it cannot be laid down as a law of general application that in no case a Judge can accept a part of the prosecution story when he has disbelieved its other part as a rule of prudence it will not be safe to rely on the evidence of witnesses on one part of the prosecution story when it has been disbelieved as to its material part.

6 Learned counsel further submitted that even assuming that no consideration money was paid to her the definite case of the prosecution was that the petitioner misrepresented to the complainant to execute the zerpeshgi deed although in fact it was a sale deed. The learned Judge disbelieved this part of the prosecution story. Therefore learned counsel has urged that when the deed was executed petitioner had no intention to cheat her. It is well established that for a conviction for an offence under Section 420 of the Code it is essential to establish the criminal intention of the accused at the time the offence is said to have been committed. In that view of the matter the conviction of the petitioner according to him cannot be sustained.

7 On the other hand Mr Ram Nandan Saraya Sinha appearing on behalf of the complainant-opposite party submitted that the prosecution made out two distinct grounds of cheating namely

(i) the complainant was given to understand by the petitioner that she was executing a zerpeshgi deed whereas in fact it was a sale deed.

(ii) the recital in the sale deed regarding the payment of Rs 920/- to the complainant before the execution by adjustment of prior loans and the balance of Rs 80/- at the time of registration of the deed was false and fraudulent. The petitioner got the thumb impression of the complainant affixed on the registration receipt on the false promise that the consideration money would be paid to her later on at her home but did not pay at all, contrary to his promise which amounted to a clear case of cheating.

Learned counsel further submitted that it is true that on the first ground she has been disbelieved by the learned Judge but she has been relied so far ground No (ii) is concerned and the conviction of the petitioner is based upon ground No (ii). The learned Judge observed that the recital in the deed that Rs 920/- had been paid to her by way of adjustments towards prior loans at the time of execution of the deed and the balance of Rs 80/- at the time of registration of the deed clearly indicated that the petitioner had criminal intention to cheat her from the very beginning. He further held that

admittedly no amount had been paid to her at the time of the execution of the deed.

8. In order to repel this argument, Mr. Kailash Ray, appearing on behalf of the petitioner, contended that the finding of the learned Judge that "admittedly no amount had been paid to her at the time of the execution of this deed" is an error of record; and drew my attention to the examination of the petitioner under Section 342 of the Code of Criminal Procedure, which I have already mentioned in the earlier part of my judgment; and also referred to the written statement which was filed on behalf of the petitioner, the relevant portion whereof reads as follows—

"That the real story is that the complainant received Rs 920/- before the execution of the sale deed and she willingly and voluntarily executed the sale deed and incorporated Rs 920/- in the sale deed which she had taken and after registration, she executed the receipt duly thumb impressed by her on receipt of Rs. 80/- the balance of the consideration money of the deed. The complainant was later manoeuvred by Manu Pandey and filed the complaint with false allegations"

Hence, he urged that it was not an admitted case of the petitioner. On the contrary, the case of the petitioner was and is that the entire consideration money was paid to her. Besides, before she executed the deed, the scribe Jagannath read it out to her and explained it to her, as it is mentioned in the deed itself, and there is no finding of the court below that the document was not read over and explained to her. If the deed clearly mentioned that Rs 920/- was paid to her by way of adjustment, it cannot be said that the petitioner had criminal intention from the very beginning. In that view of the matter also, his conviction cannot be upheld. In order to substantiate his point, he has relied on a decision of this Court in Sheosagar Pandey v. Emperor (1936) 37 Cri LJ 38 (Pat), where Fazl Ali, J. (as he then was) observed that mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed, and where the party said to be aggrieved has an alternative remedy in the civil court the matter should not be allowed to be fought in the Criminal Courts.

9. In view of the above discussions, I am inclined to agree with the contentions of learned Counsel for the petitioner. On

the facts and in the circumstances of the instant case, it cannot be said with certainty that the petitioner had criminal intention to cheat her at the time the offence is said to have been committed. Besides, in the present case also, she has alternative remedy in civil court. The judgment of the court below convicting the petitioner cannot be upheld.

10. In the result, I allow this application and set aside the conviction and sentence imposed upon the petitioner.

Application allowed.

1970 Cri. L. J. 67 (Vol. 76, C. N. 19) =
AIR 1970 PUNJAB & HARYANA 21

(V 57 C 4)

JINDRA LAL J.

Data Ram, Petitioner v. Ved Parkash
Chopra, Respondent

Criminal Revn No. 75-R of 1968, D/-
1-5-1969, from order of Addl S J. Ambala
D/-21-3-1968

Penal Code (1860), S. 19 — Judge —
Definition of — Election of Co-operative
Society — Returning Officer scrutinizing
nomination papers is not Judge — Criminal
P. C. (1898), S. 197 — Punjab
Co-operative Societies Rules (1956), R. 25
— Words & Phrases — Judge — Definition.

Any order passed by an officer in proceeding under any law is not a judgment as contemplated by Section 19 of the Penal Code. To give it a different meaning would mean that any officer who is deciding any matter which he is enjoined by law to decide would be a judge as defined in Section 19, Penal Code, and would enjoy all the protection contemplated by S 197, Criminal P. C.

(Para 9)

A Returning Officer, scrutinizing the nomination papers of the candidates contesting the election of the Managing Committee of a Co-operative Society, is not a "Judge" as defined in Section 19, Penal Code (1860), and hence cannot claim protection under Section 197, Criminal P. C. (1898). Moreover, Section 197, Cr P C. cannot also be invoked when by the time the complaint is filed, the Returning Officer has already given his decision and is no longer acting as such. AIR 1961 SC 1395, Foll, AIR 1929 Mad 175, Disting

(Paras 5, 9, 10)

Cases Referred: Chronological Paras
(1961) AIR 1961 SC 1395 (V 48) =
1961 (2) Cri LJ 571. Keshavlal
Mohanlal v. State of Bombay 10
(1929) AIR 1929 Mad 175 (V 16) =
30 Cri LJ 365, S. C. Abboy Naidu
v. Kannappa Chettiar 2, 11

FM/FM/C390/69/DVT/B

G S Grewal Advocate and P S Mann Advocate for Petitioner C L Lakhanpal Advocate Munishwar Puri Adv for Advocate General Haryana for Respondent

ORDER — This case has been reported by the learned Additional Sessions Judge Ambala with a recommendation that the order dated 22nd of November 1967 passed by the Judicial Magistrate First Class Jagadhri in case No 183/2 of 1967 be quashed and a complaint filed by the present respondent *Shri Ved Parkash Chopra Advocate Jagadhri* be dismissed

2 The facts on which this recommendation has been made have been set out very clearly by the learned Additional Sessions Judge and need not be set out fully. In brief the petitioner *Shri Data Ram Inspector Co-operative Societies Surgacane Model Town, Yamunanagar* was appointed a Returning Officer by the Registrar Co-operative Societies Haryana to scrutinize the nomination papers in connection with the election of the Managing Committee of the *Naharpur Cane Growers Co-operative Society Limited Naharpur* to be held under the Punjab Co-operative Societies Act 1961. The scrutiny was being held on the 23rd of August 1967 and *Madan Lal* one of the candidates being keen to get the nomination paper of the other candidate *Dosti* rejected engaged the respondent *Shri Ved Parkash Chopra* as his counsel. *Dosti* had produced a witness and the respondent-counsel had started cross-examining him when the petitioner was called out by somebody and on returning to the room where the scrutiny was being held he declined permission to the respondent to participate claiming that there was no provision for a lawyer to represent a candidate. The petitioner is alleged to have told the respondent that he did not know his job and was misleading the petitioner. He also tore away the statement of *Doom Singh* which had been reduced into writing. The respondent made a complaint before the learned Magistrate under Sections 166 and 500 Indian Penal Code against the present petitioner who raised an objection that in view of want of sanction under Section 197 Criminal Procedure Code and also in view of Section 84 of the Punjab Co-operative Societies Act the complaint must be dismissed.

The learned Magistrate did not agree with this contention of the petitioner and held that there was no ground for dismissing the complaint on the objections raised. The petitioner went up in revision and the only ground on which recommendation is made for the acceptance of this revision is that when the incident took place the petitioner was acting as a Judge within the meaning of Section 19 Indian

Penal Code and a Court could not take cognizance of the complaint in view of Section 197 Criminal Procedure Code. The learned Additional Sessions Judge relied upon *S C Abboy Naidu v Kannappa Chettiar AIR 1929 Mad 175* in support of his view.

3 Section 197 Cr P C inter alia provides for protection to any person who is a 'Judge' within the meaning of S 19 of the Indian Penal Code when he is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty and it is provided that no Court shall take cognizance of such an offence.

4 Section 19 Indian Penal Code provides that the word Judge denotes not only every person who is officially designated as a Judge but also every person, who is empowered by law to give in any legal proceeding civil or criminal a definitive judgment or a judgment which, if not appealed against would be definitive or a judgment which if confirmed by some other authority would be definitive.

5 It is difficult in view of the definition of the word Judge in S 19 Indian Penal Code to hold that the petitioner when he was scrutinizing the nomination papers was acting as a Judge.

6 It is possible to hold that in the wider sense of the word the petitioner might have been acting in legal proceeding if by legal proceeding is meant performing functions under the authority of some law. It is not however possible to hold that the functions which the petitioner was performing at the relevant time were in either civil or criminal proceeding. Nor is it possible to hold that he was to give a definitive judgment in the matter.

6-A Learned counsel for the respondent-complainant has taken me through the provisions of the Punjab Co-operative Societies Act 1961 and the Rules made thereunder.

7 Section 26 of the Act lays down that the members of the committee of a co-operative society shall be elected in the manner prescribed and no person shall be elected so unless he is a shareholder of the society. Rule 23 of the Punjab Co-operative Societies Rules 1963 provides that the members of the committee of a co-operative Society shall be elected in accordance with the rules set out in Appendix 'C'. Rule 25 lays down certain disqualifications for membership of the committee. Rule 2 of Appendix C provides that no person shall be eligible for election as a member of the committee if he is subject to any disqualification mentioned in rule 25. Rule 3 (5) of Appendix 'C' provides that the nomination papers shall be scrutinized by

the Returning Officer on the date specified for the purpose. The list of the validly nominated candidates for election shall be announced, where necessary zone-wise, four days before the general meeting is held. The Registrar may by general or special order grant exemption from this sub-rule to any co-operative society or any class of co-operative societies."

8. In view of these provisions, it has been urged by the learned counsel for the respondent that there is no procedure prescribed for holding an inquiry, hearing arguments, taking evidence on oath or giving a definitive judgment. All that is required is that the Returning Officer should look at the nomination papers and see that a candidate is not subject to any disqualification mentioned in Rule 25. The words "proceeding" and "judgment" are not defined either in the Indian Penal Code or in the Criminal Procedure Code but Section 2 (9) of the Civil P. C. defines "judgment" as the statement given by the Judge of the grounds of a decree or order.

9. In Stroud's Judicial Dictionary, Third Edition, Vol. 2, 'judgment' is said to be the sentence of the law pronounced by the Court upon the matter contained in the record and the decision must be one obtained in an action. Volume 1 of the same dictionary defines 'action' as meaning a litigation in a Civil Court for the recovery of individual right or redress of individual wrong, inclusive, in its proper legal sense, of suits by the Crown. It would mean, therefore, that any order passed by an officer in proceeding under any law is not a judgment as contemplated by Section 19 of the Indian Penal Code. To give it a different meaning would mean that any officer who is deciding any matter which he is enjoined by law to decide would be a judge as defined in Section 19, Indian Penal Code, and would enjoy all the protection contemplated by Section 197, Cr. P. C. It must, therefore, be held that the petitioner could not be considered to be a judge as defined by Sec. 19, Indian Penal Code, and S. 197, Cr. P. C., would not protect him.

10. It was further urged by the learned counsel for the respondent that a judge is protected under S. 197, Cr. P. C. only as long as he is a judge because after he ceases to be a judge the protection is not available to him. For this proposition he relied upon *Keshavlal Mohanlal Shah v. State of Bombay*, AIR 1961 SC 1395, where it was held that no previous sanction under Section 197 Criminal Procedure Code, is necessary for a Court to take cognizance of an offence committed by a magistrate while acting or purporting to act in the discharge of his official duty if he had ceased to be a Magistrate at the time the

complaint is made or police report is submitted to the Court, i.e., at the time of the taking of cognizance of the offence committed. It is urged, therefore, that when the complaint was made by the respondent before the Magistrate, the petitioner had already given his decision and was no longer acting as a judge. There appears to be merit also in this last point urged on behalf of the respondent.

11. It remains now to deal with the ruling relied upon by the learned counsel for the petitioner on the basis of which recommendation has been made by the learned Additional Sessions Judge. The learned Judge who decided the case reported in AIR 1929 Mad 175 confining himself to Section 19 of the Indian Penal Code held that legal proceedings are proceedings in which a judgment may or must be given, a judgment being not an arbitrary decision but a decision arrived at judicially. The learned Judge further held that in his opinion 'legal proceeding' means a proceeding regulated or prescribed by law in which a judicial decision may or must be given. It is difficult to see how this decision by a Returning Officer whose duty was to scrutinize nomination papers under the Punjab Co-operative Societies Act, 1961, can be called judgment in a civil proceeding or a judicial decision as commonly understood. Consequently, I decline to accept the recommendation of the learned Additional Sessions Judge and dismiss this revision.

Revision dismissed.

1970 Cri. L. J. 69 (Vol. 76, C. N. 20) =

AIR 1970 TRIPURA 1 (V 57 C 1)

C. JAGANNADHACHARYULU, J. C.

State of Tripura, Appellant v. Shri Ashu Ranjan Saha, Respondent.

Criminal Appeal No. 13 of 1965, D/-13-11-1968, against Judgment of Special J., Agartala in Spl Court Case No. 1 of 1965.

(A) Evidence Act (1872), S. 5 — Partisan witness — Police Officer should not be disbelieved simply because he figures as witness, provided his evidence is reliable and credible. AIR 1967 Delhi 26 & AIR 1967 Delhi 51 & AIR 1967 Raj 10 Rel. on. (Para 15)

(B) Prevention of Corruption Act (1947), S. 4 (1) — Seizure of money from pocket of accused — Accused not proved to have accepted money as illicit gratification — Presumption under S. 4 (1) cannot be raised. (Para 18)

(C) Prevention of Corruption Act (1947), S. 4 (1) — Presumption under — Rebuttal of, need not be by direct evidence — Circumstances showing that prosecution version is not correct — Pre-

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sumption is sufficiently rebutted AIR 1966 SC 1762 Rel on (Para 18)

(D) Prevention of Corruption Act (1947) S 6 (1) (c) — Bengal Municipal Act (15 of 1932) (as applicable to Tripura) Ss 66 67 — Supersession of municipality — Appointment of Sanitary Inspector by Administrator and empowering him to act as Food Inspector — Prosecution of Food Inspector for accepting bribe — Administrator is competent to give sanction under S 6 (1) (c) — (General Clauses Act (1897) S 15) — (Criminal P C (1898) S 39)

The Administrator of a superseded municipality appointed a person as Sanitary Inspector and empowered him to act as Food Inspector. He was prosecuted for accepting bribe.

Held that the Administrator was competent to give sanction under S 6 (1) (c) of the 1947 Act (Para 21)

Under Section 251 General Clauses Act Sanitary Inspectors could be appointed by virtue of their office and it was not necessary that their appointment should be made by their names. The mere delegation of powers to the Sanitary Inspector to be exercised as Food Inspector does not take away the power of the Administrator to dismiss him AIR 1960 Andh Pra 282 Rel on

(Paras 20 21)

It could not be said that under S 67 of Bengal Municipal Act the Administrator could not appoint Sanitary Inspector. Since the Administrator was appointed by the Chief Commissioner on supersession of municipality he could appoint any person as Sanitary Inspector under S 66. The provisions of Sections 66 and 67 are mutually exclusive. Consequently the sanction given by him was legal.

(Para 21)

Cases Preferred Chronological Paras

- (1967) AIR 1967 Delhi 26 (V 54) = 1967 Cri LJ 744 Ram Sarup Charan Singh v The State 15
 (1967) AIR 1967 Delhi 51 (V 54) = 1967 Cri LJ 1138 Kesho Parshad v State 15
 (1967) AIR 1967 Raj 10 (V 54) = 1967 Cri LJ 121 Ganpat Singh v The State 15
 (1966) AIR 1966 SC 1762 (V 53) = 1966 Cri LJ 1357 V D Jhungan v State of Uttar Pradesh 18
 (1964) AIR 1964 SC 575 (V 51) = 1964 (1) Cri LJ 437 Dhanvantraai Balvantraai v State of Maharashtra 18
 (1950) AIR 1960 Andh Pra 282 (V 47) = 1960 Cri LJ 569 Public Prosecutor (AP) v N Srinambhadraya 20
 (1958) AIR 1958 SC 124 (V 45) = 1958 Cri LJ 265 Jaswant Singh v State of Punjab 22

- (1955) AIR 1955 SC 70 (V 42) = 1955 Cri LJ 249 Mahesh Prasad v State of U P 21
 (1955) AIR 1955 SC 585 (V 42) = 1955 Cri LJ 1300 Bansidhar Mohanty v State of Orissa 13
 (1954) AIR 1954 SC 322 (V 41) = 1954 Cri LJ 910 Shiv Bahadur Singh v State of Vindhya Pradesh 13 15
 (1954) AIR 1954 SC 621 (V 41) = 1954 Cri LJ 1645 Bhagat Ram v State of Punjab 17
 (1953) AIR 1953 SC 122 (V 40) = 1953 Cri LJ 662 Wilayatkhani v State of U P 13
 (1948) AIR 1948 PC 82 (V 35) = 49 Cri LJ 261 Gokulchand Dwarkadas v The King 22
 M C Chakraborty for Appellant H. Dutta for Respondent

JUDGMENT This is an appeal filed by the State of Tripura against the judgment and acquittal of one Shri Ashu Ranjan Saha Food Inspector working in Agartala Municipality of the offences under section 161 I P C and S 5 (2) of the Prevention of Corruption Act (Act 2 of 1947) by Shri T K Pal MA B L Special Judge Agartala in the Special Court case no 1 of 1965

2 The case of the prosecution as brought out in the evidence is that the respondent who is working as Food Inspector in Agartala Municipality visited the grocery shop of the complainant P W 4 Sachindra Chandra Datta in Bhatla Bazar at about 10 or 11 A M on 11-4-1964. The respondent seized 8 tins of mustard oil weighing 17 to 18 seers 2 maunds of turmeric and 5 seers of coconut oil from his shop under the provisions of the Food Adulteration Act (Act 37 of 1954). After giving notice Ext P-7 dated 11-5-1964 of his intention to take sample the respondent took sample of 2 chhataks of mustard oil out of the seized oil. He paid the price for the same and gave Ext P-8 receipt for the sample to P W 4 (Sachindra Chandra Datta). P W 4 (Sachindra Chandra Datta) protested that his commodities were not adulterated. The respondent, however, allowed the seized articles to be kept in the custody of P W 4 (Sachindra Chandra Datta).

3 On 17-6-1964 the respondent again visited the shop of P W 4 (Sachindra Chandra Datta) and asked him to give him a sample of turmeric seized by him. The respondent purchased a sample of the turmeric and gave P W 4 (Sachindra Chandra Datta) Ext P-9 receipt dated 17-9-1964. P W 4 (Sachindra Chandra Datta) again told the respondent that he was unable to sell the seized articles and that he had no money to purchase more of the articles from the wholesalers and requested him to release

the articles The respondent asked P. W. 4 (Sachindra Chandra Datta) to see him in the office of Agartala Municipality.

4. On 18-6-1964, P. W. 4 (Sachindra Chandra Datta) went to the office in Agartala Municipality. Then P. W. 15 (Birendra Chandra Banik) met P. W. 4 (Sachindra Chandra Datta) in the office and on enquiry learnt that P. W. 4 (Sachindra Chandra Datta) had come to the office of the Municipality in connection with the seizure of his commodities by the respondent. P. W. 4 (Sachindra Chandra Datta) met the respondent in his room in the office and requested him to release his commodities. The respondent demanded payment of bribe of Rs. 300/- and promised to release all the commodities and not to take any action against P. W. 4 (Sachindra Chandra Datta). But the latter pleaded that he was a poor man and could not afford such a huge money. Ultimately, the bargain was struck at Rs. 250/-. P. W. 4 (Sachindra Chandra Datta) promised to pay the amount in 4 or 5 days' time. After coming home, P. W. 4 (Sachindra Chandra Datta) narrated what had happened to his brother P. W. 6 (Nani Gopal Datta). P. W. 4 (Sachindra Chandra Datta) also made up his mind that, as the respondent was demanding payment of bribe, he would pay it and at the same time see that the respondent was arrested by the police.

5. At about dusk on 22-6-1964, P. W. 4 (Sachindra Chandra Datta) came to a place to the west of Battala Choumohani with P. W. 5 (Sunil Chandra Banik), another grocer of Battala Bazar. P. W. 4 (Sachindra Chandra Datta) saw the respondent who called him. P. W. 5 (Sunil Chandra Banik) went away. The respondent demanded the bribe amount of Rs 250/- as agreed to on 18-6-1964. But, P. W. 4 (Sachindra Chandra Datta) pleaded that he had no money with him and that he would pay it on the next day. On his enquiry as to where he should pay the money, the respondent told him that he would be near a fruit stall at Kaman Choumohani after dusk and that he should pay the amount there. P. W. 4 (Sachindra Chandra Datta) went back to his shop and told his brother P. W. 6 (Nani Gopal Datta) what had happened.

6. On 23-6-1964, P. W. 4 (Sachindra Chandra Datta) wrote Ext P-1/1 petition addressed to P. W. 8, Shri N. R. Bose, S. P., Tripura to take action against the respondent for demanding payment of bribe. P. W. 8 the S. P. questioned P. W. 4 (Sachindra Chandra Datta) and assured him that he would take the necessary action. P. W. 4 (Sachindra Chandra Datta) went back to his shop. P. W. 8 the S. P. made an endorsement on Ext. P-1/1 in favour of P. W. 1 Monoranjan Bhattacharjee, Dy. S. P., Special

Branch, Tripura, directing him to examine P. W. 4 (Sachindra Chandra Datta) and to work out the information. At about 4 P. M., P. W. 1 the Dy S P called P. W. 4 (Sachindra Chandra Datta) through P. W. 2 (Swadesh Ranjan Paul), S. I Special Branch to his office at Ronaldsay Road. After arrival of P. W. 4 (Sachindra Chandra Datta), P. W. 1 the Dy. S P. interrogated him and recorded his statement Ext P-10/3. P. W. 4 (Sachindra Chandra Datta) showed him 25 ten-rupee currency notes Exts M-1 to M-25, which he proposed to hand over to the respondent as bribe money. P. W. 1 Dy S. P. noted the numbers of the currency notes on the statement of P. W. 4 (Sachindra Chandra Datta) recorded by him.

Thereafter, accompanied by P. W. 11 (Ramanuj Bhattacharjee) Circle Inspector, P. W. 2 (Swadesh Ranjan Paul) S. I., P. W. 3 (Kamal Das Gupta), S. I and P. W. 4 (Sachindra Chandra Datta), P. W. 1 Dy S P. went to the office of P. W. 7, the then S D M. Shri Premananda Nath. He submitted Exts P-1/1 and P-10/3 with Ext P-2 requisition for issuing a search warrant against the respondent. P. W. 7 the S D M compared the numbers of the currency notes Exts M 1 to M-25 with those mentioned in the statement and issued Ext P-3 search warrant in favour of P. W. 1 Dy S. P. for searching the person of the respondent.

7. P. W. 1 Dy. S P. went to the Kotwali police station along with P. Ws. 2 (Swadesh Ranjan Paul), 3 (Kamal Das Gupta) and 11 (Ramanuj Bhattacharjee) police officers and P. W. 4 (Sachindra Chandra Datta) the complainant. P. W. 4 (Sachindra Chandra Datta) went away to Kaman Choumohani under the direction of P. W. 1 the Dy. S P. A little later, P. W. 1 Dy. S P. went to Kaman Choumohani along with the police officers P. Ws. 2 (Swadesh Ranjan Paul), 3 (Kamal Das Gupta) and 11 (Ramanuj Bhattacharjee) and also with P. W. 9 (Nirmal Kumar Majumder) officer-in-charge of Kotwali police station and P. W. 12 (Upendra Chandra Paul) a non-official witness. After some time, the respondent was seen coming from the southern side along the Central road in a rickshaw. The rickshaw stopped at a spot near the place where P. W. 4 (Sachindra Chandra Datta) stood and the respondent alighted from it. P. W. 4 (Sachindra Chandra Datta) and the respondent proceeded together towards the northern side. After they came in front of a fruit stall to the north of Kaman Choumohani, the respondent asked P. W. 4 (Sachindra Chandra Datta) to pay him the money.

Then, P. W. 4 (Sachindra Chandra Datta) handed over Exts M-1 to M-25

in one bundle which the respondent put inside the breast pocket of his shirt. P W 4 (Sachindra Chandra Datta) quickly went away. The respondent moved forward to a betel stall. Just then P W 11 (Ramanuj Bhattacharjee) the Circle Inspector also came to the stall keeper and asked him to give him a pan. P W 10 (Sachindra Kumar Paul) the stall holder gave them pan. P W 1 the Dy S P came followed by the other police officers and asked the respondent his name and profession. The respondent told him that his name was Ashu Ranjan Saha and that he was employed as Food Inspector in Agartala Municipality. P W 1 the Dy S P then showed him Ext P-3 search warrant and asked him to come to Agartala Pharmacy which was to the west of the pan stall. P Ws 1 and 11 Dy S P and Circle Inspector escorted the respondent to Agartala Pharmacy where P W 14 (Sukhendu Bivash Paul) proprietor of the Pharmacy was also present. After the other witnesses also came P W 1 Dy S P showed the respondent Ext P-3 and after P W 1's body was searched by the respondent P W 1 Dy S P asked the respondent to produce the money which he had with him.

The respondent produced Exts M 1 to M-25 the numbers on which tallied with those mentioned in Ext P-3. P W 1 Dy S P prepared Ext P-4 search list in duplicate and got it attested by all the witnesses and obtained the signature of the respondent on Ext P-4. P W 1 Dy S P handed over a copy of Ext P 4 to the respondent and arrested him and took him away to the Kotwali police station. He lodged Ext P-5 F I R with the Officer-in-Charge of Kotwali police station. The case was registered in Kotwali P S as case no 37 (6) 64 under section 161 I P C and section 5 (2) of the Prevention of Corruption Act against the respondent.

8 P W 1 the Dy S P took up the investigation and examined P W 13 (Rabindra Kumar Ghosh) Administrator of Agartala Municipality and seized certain documents under Ext P-6.

9 Under the orders of P W 8 S P the investigation was taken over by P W 17 (Santi Ranjan Bardhan) Dy S P in charge of Home Guards from P W 1 Dy S P on 14-7-1964. P W 17 (Santi Ranjan Bardhan) the Dy S P completed the investigation and filed the charge-sheet.

10 The learned Special Judge framed two charges against the respondent one under section 161 I P C. and another under S 5 (2) of the Prevention of Corruption Act 1947 to which the respondent pleaded that he was not guilty. His defence was that in the dusk of 23-6-

1964 he had been to Kaman Choumohan for checking adulteration and sale of unwholesome milk that when he was passing along the road P W 4 (Sachindra Chandra Datta) told him that he had a letter for the respondent and thrust an envelope into the breast pocket of the respondent and ran away that as the respondent had suspicion he called P W 4 (Sachindra Chandra Datta) loudly saying what it was that he had put inside his pocket calling it a letter that a large crowd gathered that he did not demand or take any bribe and that on account of malice P W 4 (Sachindra Chandra Datta) and the police officers conspired against him.

11 The learned Special Judge thoroughly discussed the evidence and held that the charges against the respondent were not made out. He further held that there was no valid sanction for the prosecution of the respondent. He therefore acquitted the respondent. Hence the appeal by the State Government.

12 The points which are argued and which arise for determination are

(i) whether the charges under S 161 I P C and under section 5 (2) of the Prevention of Corruption Act 1947 were brought home against the respondent and whether he is guilty of the same and

(ii) whether there was a valid sanction for the prosecution of the respondent.

13 POINT (I)

It is well settled that though in the case of an appeal against judgment of acquittal the High Court is entitled to review the evidence yet proper weight should be given to the following matters:

(i) the views of the trial Court as to the credibility of witnesses

(ii) the presumption of innocence which is strengthened by the acquittal.

(iii) the right of the accused to the benefit of the doubt and

(iv) the reluctance of the appellate court to disturb a finding arrived at by the trial Judge after seeing the witnesses. Vide *Wilayat Khan v State of U P* AIR 1953 SC 122 *Shiv Bahadur Singh v State of Vindhya Pradesh*, 1954 Cr LJ 910 = (AIR 1954 SC 322) and *Bansidhar Mohanty v State of Orissa* 1955 Cr LJ 1300 = (AIR 1955 SC 585).

13A The evidence let in by the prosecution to prove the guilt of the respondent can be analysed under four heads. The first category of evidence relates to that which was alleged to have happened on 18-6-1964 in the room of the respondent in the office of the Municipality in Agartala. There is no dispute that the respondent seized 8 tins of mustard oil weighing 17 to 18 seers, 2 maunds of turmeric and 5 seers of coconut oil on

11-5-1964 from the grocery shop of P. W. 4 (Sachindra Chandra Datta) the complainant and purchased a sample of mustard oil as can be seen from Exts. P-7 and P-8 and that he kept the seized articles in the custody of P. W. 4 (Sachindra Chandra Datta). There is also no dispute that on 17-6-1964 the respondent again visited the shop of P. W. 4 (Sachindra Chandra Datta) and seized sample of turmeric as can be seen from Ext. P-9. P. Ws 4 (Sachindra Chandra Datta) and 6 (Nani Gopal Datta) speak to the seizure and the respondent admits the same. But, according to the prosecution, on 17-6-1964, when P. W. 4 (Sachindra Chandra Datta) requested the respondent to release the seized commodities, the respondent asked P. W. 4 (Sachindra Chandra Datta) the complainant to see him in his room in the office of Agartala Municipality, that accordingly, on 17-6-1964 P. W. 4 (Sachindra Chandra Datta) went to the office, that in the office he met P. W. 15 (Birendra Chandra Banik) and told him that he had come to the office in connection with the seized articles, that later on he saw the respondent in his room and that in the room the bargain was struck for payment of bribe money of Rupees 250/-, which the respondent promised to pay after some days.

The prosecution thus alleges that the bargain took place in the room of the respondent in the office of the Municipality in Agartala on 17-6-1964. To prove the bargain there is only the evidence of P. W. 4 (Sachindra Chandra Datta). It is correct to state that in such matters it is unnatural that a bargain for payment of bribe would take place in the presence of witnesses. But, there are very material circumstances, which throw doubt on the evidence of P. W. 4 (Sachindra Chandra Datta). Firstly, he never mentioned in Ext. P-1/1 the petition filed by him before P. W. 8 S. P. that there was such a bargain on 17-6-1964. Secondly, the evidence of P. W. 8 S. P., who questioned P. W. 4 (Sachindra Chandra Datta) at about 8 A. M. on 24-6-1964 also does not show that he was informed that there was any such bargain between the respondent and P. W. 4 (Sachindra Chandra Datta) on 18-6-1964. Thirdly, even when P. W. 1 Dy. S. P., S. B. recorded Ext. P-10/3 statement of P. W. 4 (Sachindra Chandra Datta) before the trap the latter never told him that there was a bargain between him and the respondent in the room of the respondent in the office in Agartala Municipality on 18-6-1964. Thus, the consistent absence of this material allegation in Exts. P-1/1 and P-10/3 and before P. W. 8 S. P. clearly shows that this was an afterthought.

Again, even the evidence of P. W. 15 (Birendra Chandra Banik) that he met

P. W. 4 (Sachindra Chandra Datta) in the Agartala Municipal office on 18-6-1964 is also doubtful. For, not only is the name of P. W. 15 (Birendra Chandra Banik) not found in Exts. P-1/1 and P-10/3 but also the evidence of P. W. 15 (Birendra Chandra Banik) shows that it cannot be relied upon. P. W. 17 (Santi Ranjan Bardhan) the Investigating Officer examined him on 31-7-1964, though he took over the charge of investigation on 14-7-1964 according to his evidence. Besides, P. W. 17 (Santi Ranjan Bardhan) recorded the statement under section 161 Cr. P. C., that P. W. 15 (Birendra Chandra Banik) met P. W. 4 (Sachindra Chandra Datta) in the Municipal office on 18-7-1964 and not on 18-6-1964. P. W. 15 (Birendra Chandra Banik) denied having stated before P. W. 17 (Santi Ranjan Bardhan) that he met P. W. 4 (Sachindra Chandra Datta) in the Municipal office on 18-7-1964. According to P. W. 17 (Santi Ranjan Bardhan) he wrongly mentioned the date of 18-6-1964 as 18-7-1964. At any rate, it is not the case of the prosecution that P. W. 15 (Birendra Chandra Banik) was also present along with P. W. 4 (Sachindra Chandra Datta) when the bargain for payment of bribe was struck.

In view of the fact that the evidence of P. W. 4 (Sachindra Chandra Datta) is contradicted by Exts. P-1/1 and P-10/3 no reliance can be placed on the evidence of P. Ws 4 (Sachindra Chandra Datta) and 15 (Birendra Chandra Banik).

14. The second category of evidence relates to the case of the prosecution that on 23-6-1964 P. W. 4 (Sachindra Chandra Datta) the complainant and P. W. 5 (Sunil Chandra Banik) of Battala Bazar were going to Battala Choumohani, that there the respondent called P. W. 4 (Sachindra Chandra Datta), that P. W. 4 (Sachindra Chandra Datta) went to meet him, while P. W. 5 (Sunil Chandra Banik) went away and that the respondent asked P. W. 4 (Sachindra Chandra Datta) about the payment of the bribe money agreed upon on 18-6-1964, that P. W. 4 (Sachindra Chandra Datta) told him that he did not have the money and promised to pay it on the next day and that the respondent fixed the venue at a fruit stall near Kaman Choumohani as the place where he should pay the bribe money. Here again, there is only the evidence of P. W. 4 (Sachindra Chandra Datta) to prove the talks, alleged to have taken place between him and the respondent. Of course, the general evidence of his brother P. W. 6 (Nani Gopal Datta) to whom P. W. 4 (Sachindra Chandra Datta) was alleged to have narrated the story is of no weight because P. W. 6 (Nani Gopal Datta) is not an eye-witness. It is pertinent to note that P. W. 4 (Sachindra Chandra Datta) did not mention this

important aspect of the case in Ext. P-1/1. Nor did he mention this to P W 8 the S P on 24-6-1964. Nor was this disclosed by him to P W 1 the Dy S P in Ext P-10/3 statement recorded by P W 1 Dy S P.

So here again the consistent absence of such an important and material aspect of the prosecution version in Exts P-1/1 and P-10/3 and before P W 8 the S P throws suspicion over the case of the prosecution. The evidence of P W 5 (Sunil Chandra Banik) is not of much avail except to show that at dusk time on 22-6-1964 he saw the respondent and that P W 4 (Sachindra Chandra Datta) went and talked with him. But even P W 5 (Sunil Chandra Banik) is not an independent witness. He was examined by P W 17 (Santi Ranjan Bardhan) on 16-7-1964. It was suggested to P W 5 (Sunil Chandra Banik) that the respondent seized coloured rice from the shop of his brother Gopal Banik that the same was destroyed under the orders of the S D M and that therefore P W 5 (Sunil Chandra Banik) was inimically disposed towards the respondent. P W 5 (Sunil Chandra Banik) denied that any such thing had happened to his knowledge. But P W 13 (Rabindra Kumar Ghosh) the Administrator of Agartala Municipality admitted in his cross-examination that the respondent seized coloured rice from the said shop and that the same was destroyed. Though P W 5 (Sunil Chandra Banik) stated that he and his brother were living separately, he admitted that both of them jointly purchased one house.

So his denial only shows that he is not a witness of truth. As such even this aspect of the case of the prosecution has not been proved beyond reasonable doubt.

15 The third aspect of the case is that after P W 4 (Sachindra Chandra Datta) the complainant went to Kaman Choudhary the other witnesses namely P Ws 1 (Dy S P) 2 (S I) 3 (S I) 9 (S I) 11 (C I) and 12 (Upendra Chandra Paul) a resident of Nandannagar took their stand by spreading themselves in Kaman Choudhary that within a short time the respondent came in a rickshaw that he got down from the rickshaw at the place where P W 4 (Sachindra Chandra Datta) was standing that P W 4 (Sachindra Datta) and the respondent proceeded towards a fruit stall that the respondent asked P W 4 (Sachindra Chandra Datta) to pay him the bribe that P W 4 (Sachindra Chandra Datta) handed over Exts M-1 to M-25 in one bundle that the respondent put the bundle in the breast pocket of his shirt and that the respondent asked him to meet him on the next day. All these witnesses stated that they saw P W 4 (Sachindra Chandra Datta) handing over Exts M-1

to M-25 to the respondent and the respondent putting the bundle in his pocket.

As rightly pointed out by the learned trial Judge except the interested testimony of P W 4 (Sachindra Chandra Datta) there is no other evidence to show that the respondent asked P W 4 (Sachindra Chandra Datta) in front of the fruit stall to pay him the bribe money and that after payment of the money the respondent asked P W 4 (Sachindra Chandra Datta) to meet him on the next day. The learned Special Judge points out that P Ws 2 3 9 and 11 are all police officers who were specially called by P W 1 the Dy S P to assist him that they were all nothing but partisan witnesses and that their evidence cannot be relied upon without independent corroboration. He relied on 1954 Cr LJ 910 = (AIR 1954 SC 322). But it is not correct to state that a police officer should be disbelieved simply because he figures as a witness provided his evidence is reliable and credible. *Ram Sarup Charan Singh v The State* 1967 Cr LJ 744 = (AIR 1967 Delhi 26). *Kesho Parshad v State* 1967 Cr LJ 1138 = (AIR 1967 Delhi 51) and *Ganpat Singh v The State*, 1967 Cr LJ 121 = (AIR 1967 Raj 10). The learned Special Judge discussed their evidence to scrutinize whether their evidence is believable and pointed out a number of discrepancies in their evidence. Besides the discrepancies pointed out by him there are other circumstances in their evidence which show that they were only too enthusiastic to support the prosecution version.

While P W 3 the S I (Kamal Das Gupta) stated that he witnessed the entire transaction including the search proceedings yet he deposed in the cross-examination that he did not attest Ext P-4 the seizure list prepared by P W 1 Dy S P when Exts M1 to M25 were seized by P W 1 Dy S P P W 9 (Nirmal Kumar Majumder) asserted that he was an eye-witness to the payment of the bribe money by P W 4 (Sachindra Chandra Datta) to the respondent. But in the cross-examination he stated that he did not mention in the general diary maintained by him in Kotwali P S that he had seen the payment of the bribe by P W 4 (Sachindra Chandra Datta) to the respondent and that the respondent produced Exts M1 to M25 from the breast pocket of his shirt in the course of the search proceedings. P W 1 the Dy S P stated that in his case diary he mentioned the name of P W 11 the C I only as the police officer who accompanied him to Kaman Choudhary. So this casts doubt over the evidence of the other police official witnesses. Regarding P W 13 (Rabindra Kumar Ghosh) who is the only non-police official witness as rightly observed by the trial Judge the

circumstances under which he was present were shrouded in mystery.

According to him, he had gone to the Kotwali police station on that day and waited for two hours to meet a relation of his namely, Harendra Paul But, he did not state why he asked Harendra Paul to meet him in the Kotwali police station. Strangely enough, he deposed that he did not meet Harendra Paul since then. Then according to him, he accompanied the police officers from the kotwali police station without knowing where they were going. According to the respondent, this witness P. W. 14 (Sukhendu Bikash Paul) is a police informant. The circumstances which further belie and improbabilise their evidence and the prosecution case will be presently referred to.

16. The fourth category of evidence relates to the search proceedings. It is the case of the prosecution that after P. W. 1 the Dy. S. P. confronted the respondent with Ext. P-3 search warrant and took him to the neighbouring Agar-tala Pharmacy, on search Exts. M-1 to M-25 were removed by the respondent from his breast pocket and that P. W. 1 the Dy. S. P. seized the same under Ext. P-4 search list. Besides the police witnesses and P. W. 12 (Upendra Chandra Paul) already referred to, P. W. 14 (Sukhendu Bikash Paul) the proprietor of the Pharmacy also deposed to the seizure of Exts. M-1 to M-25 from the respondent. P. W. 14 (Sukhendu Bikash Paul) contradicted the other witnesses by stating that the currency notes were in three separate parts and that they were lying with certain papers when they were removed from the pocket of the respondent. He was treated as hostile and cross examined by the prosecution.

17. But, there are the following circumstances which throw doubt over the evidence of P. Ws. 1 to 4 (Dy. S. P., Swadesh Ranjan Paul, Kamal Das Gupta and Sachindra Chandra Datta), 9 (Nirmal Kumar Majumder), 11 (Ramanuj Bhattacharjee) and 12 (Upendra Chandra Paul) who deposed that they saw P. W. 4 (Sachindra Chandra Datta) handing over Exts. M1 to M25 to the respondent and that they further saw the respondent putting the bundle into his breast pocket.

(i) It is their consistent evidence that immediately after P. W. 4 (Sachindra Chandra Datta) handed over Exts. M1 to M25 to the respondent, he quickly moved away and that within about one minute the police officers swooped on him. If really there was regular bargain between the respondent and P. W. 4 (Sachindra Datta) for the payment of the bribe money and if the respondent voluntarily accepted the same, then there was no need for P. W. 4 (Sachindra Chandra Datta) to quickly move away immediately

ly after he was alleged to have handed over Exts. M1 to M25 to the respondent. He would have waited for some time to see whether the trap succeeded or not. His conduct in running away immediately after he was alleged to have handed over the money to the respondent was not explained by the prosecution and, as rightly pointed out by the learned trial Judge, P. W. 4 (Sachindra Chandra Datta) must have run away in apprehension of being confronted by the respondent with his case that P. W. 4 (Sachindra Chandra Datta) inserted the money in his pocket under a false pretext.

(ii) Secondly, none of the eye-witnesses was examined by P. W. 17 (Santi Ranjan Bardhan) until after 14-7-1964, although the occurrence took place on 23-6-1964. Though according to P. W. 1 Dy. S. P., he filed a memo on 2-7-1964 before P. W. 8 S. P. requesting him to make over the charge of investigation to some other police officer, that paper was not filed into the Court. On the other hand, P. W. 17 (Santi Ranjan Bardhan) simply stated that he took over charge on 14-7-1964 from P. W. 1 Monoranjan Bhattacharjee, Dy. S. P. Until 14-7-1964 P. W. 1 Monoranjan Bhattacharjee, Dy. S. P. must be held to have been in charge of the investigation and he examined only one witness by that date. So, the non-examination of the eye-witnesses was certainly fraught with mischievous possibilities and they might have taken advantage of the delay to make uniform statements before P. W. 17 (Santi Ranjan Bardhan) after mutual consultation. More so is the possibility in view of the evidence of P. W. 1 the Dy. S. P. that his case diary disclosed that only one police officer viz. P. W. 11 the C. I. accompanied him to lay the trap.

(iii) Thirdly, it is improbable that the respondent would have fixed a public place near a fruit stall in a crowded locality like Kaman Choumohani as the venue for the payment of the bribe money to him.

(iv) Fourthly, while according to P. W. 14 (Sukhendu Bikash Paul) the money was in three separate bundles, the other witnesses stated that the currency notes were in a single bundle. According to P. W. 14 (Sukhendu Bikash Paul) there were also some papers along with the bundles. The prosecution produced Ext. P-11 envelope in which Exts. M-1 to M-25 were said to have been preserved by P. W. 16 (Chitta Ranjan Bhattacharjee), A. S. I. in the police station. According to him, he entered the seized money in the Malkhana register Ext. P-18 as per Ext. P-18/1 and preserved the money in Ext. P-11. Also, he further stated that he received five papers on 1-8-1964 and put them in Ext. P-12 envelope after making an entry as per Ext. P-18/2. Thus, he explained away the pre-

sence of Exts P 11 and P 12 envelopes. But in the cross examination he stated that he did not mention anywhere that he kept the currency notes in an envelope that Ext P 11 envelope was not supplied by the Government and that it is a private one. According to P W 9 (Nirmal Kumar Majumdar) S I of Police the articles in the Malkhana were preserved in envelopes purchased by the office unless the same had been supplied by the P W D and whenever envelopes were purchased an account in respect thereof had to be maintained. The prosecution did not produce any account to show that the envelopes in question were purchased by P W 16 (Chitta Ranjan Bhattacharjee). At any rate the evidence of P W 14 (Sukhendu Bikash Paul) that the three bundles were mixed with papers shows that the version of the respondent that P W 4 (Sachindra Chandra Datta) inserted something in his pocket stating that he had a letter for him appears to be probable.

(v) Fifthly almost immediately after the occurrence took place the respondent came forward with his version that P W 4 (Sachindra Chandra Datta) played mischief. P W 14 (Sukhendu Bikash Paul) admitted in his cross-examination that after the search was over the respondent stated that somebody had put something inside his pocket. So the respondent came forward with his case within a few minutes after the occurrence took place. Again P W 11 the Circle Inspector admitted that when P W 1 the Dy S P showed the search warrant to the respondent in Agartala Pharmacy the respondent muttered that somebody had put something into his pocket. Even P W 1 the Dy S P admitted in his cross examination that at about 11 P M when he interrogated the respondent the latter stated that when he was taking betel from the betel shop P W 4 (Sachindra Chandra Datta) told him that he had a letter for the respondent and introduced the letter into his breast pocket and left the place very quickly but that he had put money into his pocket and that the respondent raised hue and cry. So even though the respondent did not examine any person from the crowd it is clear that the respondent set up his case immediately after the incident took place and this is a strong reason for thinking that his defence was very likely to have been true. Vide *Bhagat Ram v State of Punjab* 1954 Cr L J 1645 = (AIR 1954 SC 621).

(vi) The sixth circumstance is that P W 13 (Rabindra Kumar Ghosh) admitted in his cross-examination that after the respondent was appointed as Food Inspector the income of the Municipality from the fees from licenses granted to the dealers in rice increased to some ex-

tent. So it is evident that the respondent must have been discharging duties strictly and must have therefore incurred the displeasure of the grocery shopkeepers.

(vii) Last but not the least the evidence of P W 13 (Rabindra Kumar Ghosh) shows that the respondent intimated to him about the seizure of the commodities made by him and about the samples taken by him both on 11 5 1964 and 17 6 1964 according to the rules and the Prevention of Food Adulteration Act. Ext D 4 shows that the respondent sent the samples to the Public Analyst for analysis. P W 13 further stated that the respondent had no power to release any article seized by him for the purpose of taking samples for chemical examination except with the permission of the Administrator or the Magistrate. In such a case it is highly improbable that the respondent would have demanded payment of bribe promising to release the seized articles.

18. The learned Counsel for the appellant contended that the fact that Exts M 1 to M 25 were seized from the pocket of the respondent raises a presumption under Section 4 (1) of the Prevention of Corruption Act and that the burden lay upon the respondent to prove that the money was not bribe money. He relied on *Dhanvantrai Balwantrai Desai v State of Maharashtra* (1964) 1 Cr LJ 437 = (AIR 1964 SC 575) in support of his contention. In that case it was held that in order to raise the presumption under Section 4 (1) of the said Act the prosecution has to prove that the accused person received a gratification other than legal remuneration and that when it is so proved the presumption is raised. In the present case there is no proof that the respondent accepted Exts M 1 to M 25 as illicit gratification. But the respondent's contention that the money was put into his pocket by P W 4 (Sachindra Chandra Datta) under a false pretext is more probable than the case of the prosecution. So no such presumption can be raised. But even if such a presumption arises it is sufficiently rebutted. The rebuttal need not be by direct evidence. If there are circumstances which show that the prosecution version is not correct then the presumption is sufficiently rebutted. Vide *V D Jhingan v State of Uttar Pradesh* 1966 Cr LJ 1357 = (AIR 1966 SC 1762).

It was held that the burden of proof lying upon the accused under section 4 (1) of the Act will be discharged if he establishes his case by a preponderance of probability as is done by a party in civil proceedings and that it is not necessary that he should establish his case by the test of proof beyond reasonable doubt.

19. Thus, the case of the prosecution is highly doubtful and was rightly rejected by the lower Court I find point (I) in the negative.

POINT (II).

20. The evidence of P. W. 13 (Rabindra Kumar Ghosh) the Administrator of Agartala Municipality is that the Agartala Municipality was superseded with effect from 25-4-1955, that the Chief Commissioner, Tripura assumed all the powers of the Chairman and the Commissioners of the Municipality, that the supersession was made according to the Tripura Municipal Act (Bengal Act XV of 1932) that since 15-8-1961 the Bengal Municipal Act is in force in Tripura in the place of Tripura Municipal Act (Act 2 of 1349 T. E.) and that the Chief Commissioner appointed the District Magistrate, Tripura as the Administrator of Agartala Municipality. He further stated that the respondent was appointed as Sanitary Inspector on 6-2-1963 in Agartala Municipality, that P. W. 13 (Rabindra Kumar Ghosh) himself appointed him with the approval of Shri L. B. Thanga, the then Administrator of Agartala Municipality, that the Chief Commissioner empowered him by Ext. D-8 notification in the official gazette to exercise the powers of Food Inspector under the Prevention of Food Adulteration Act, 1954 within the local municipal area of Agartala and that, therefore, after perusing the papers, he gave sanction Ext. P-13 under section 6 (1) (c) of the Prevention of Corruption Act, 1947 to prosecute the respondent.

The trial Judge held that as the Chief Commissioner appointed the respondent as Food Inspector under Ext. D-8 notification, the sanction should have been given by the Chief Commissioner and not by P. W. 13 (Rabindra Kumar Ghosh). Under section 292 of the repealed Tripura Municipal Act the Minister concerned had the power to supersede Municipal Commissioners in case of their incompetency, default or abuse of powers. Section 293 of the said Act laid down a number of consequences which followed the order of supersession and empowered the Minister to exercise the powers of the Chairman and the Councillors of the Municipality. The corresponding sections are sections 553 and 554 in the Bengal Municipal Act, 1932. Under section 553 the State Government has the right to supersede the Commissioners under the circumstances mentioned therein. Section 554 lays down that all the powers and duties of the Chairman and the Commissioners may be exercised by such person as the State Government may direct.

In the present case the Chief Commissioner representing the Union Territory of Agartala appointed the District Magistrate, Tripura as the Administrator of

Agartala Municipality. So, the latter was competent to exercise all the powers of the Chairman and the Councillors of the superseded Municipality. Under S. 66 of the Bengal Municipal Act the Administrator appointed by the Chief Commissioner had the power to appoint the respondent as Sanitary Inspector. Under section 9 of the Prevention of Food Adulteration Act the Central Government or the local Government can appoint a Food Inspector by notification in the official gazette if the qualifications of the Food Inspector as laid down in rule 8 of the Prevention of Food Adulteration Rules, 1955 are satisfied. This is only in the nature of delegation of power to a Sanitary Inspector. Under section 15 of the General Clauses Act Sanitary Inspectors would be deemed to be a class of officers generally by their official title in the sense in which it was used in section 39 of the Cr. P. C. As such, Sanitary Inspectors can be appointed by virtue of their office and it is not necessary that their appointments should be made by their names. Vide note 8 at page 49 of Prevention of Food Adulteration Act and Rules by H. B. Shrivastava, 1965 edition and also Public Prosecutor (AP) v. N. Srirambhadrappa, 1960 Cr. L.J. 569 = (AIR 1960 Andh Pra 282). So, the respondent was appointed as Food Inspector by virtue of his office as Sanitary Inspector and as such P. W. 13 (Rabindra Kumar Ghosh) could be said to be competent to give the sanction.

21. The learned Counsel for the respondent contended that under section 67 of the Bengal Municipal Act the State Government may require the Commissioners of any Municipality to appoint an executive officer, a Secretary, an Engineer, a Health Officer and one or more Sanitary Inspectors, that under sub-section (5) of section 67 they can be removed subject to confirmation by the Government, but that under S. 544 of the said Act, the State Government can delegate to the District Magistrate any of the powers vested in the State Government except those under Ss. 6, 8, 13, 15, 17, 67, 135 second proviso, 285, 548, 549, 550, 552 and 553 of the Act, that thus the State Government has no power to delegate its authority under S. 67 of the Act to the Commissioners and that, therefore, P. W. 13 (Rabindra Kumar Ghosh) had no power to appoint the respondent as Sanitary Inspector. Section 67 of the Act empowers the State Government (if it so desires) to call upon the Commissioners of any Municipality to appoint the officers mentioned therein.

But, the Chairman of the Municipality and P. W. 13 (Rabindra Kumar Ghosh) who stepped into his shoes could validly appoint the respondent as Sanitary Inspector under section 66 of the Act. The

provisions of Sections 66 and 67 of the Act are mutually exclusive. The mere delegation of powers to the respondent to be exercised as Food Inspector does not take away the power of the respondent to dismiss him. As can be seen from *Mahesh Prasad v State of Uttar Pradesh* AIR 1955 SC 70 it is enough that the removing authority is of the same rank or grade as the authority who has appointed the public servant. So I do not think that the sanction Ext P-13 given by P W 13 (Rabindra Kumar Ghosh) is illegal.

22 The trial Judge again held that P W 13 (Rabindra Kumar Ghosh) did not peruse all the documents and give his sanction and that therefore Ext P 13 is not a valid sanction. In *Gokulchand Dwarkadas v The King* AIR 1948 PC 82 and *Jaswant Singh v State of Punjab* AIR 1958 SC 124 it was held that the papers must be studied properly by the competent authority before the sanction is granted. The evidence of P W 13 (Rabindra Kumar Ghosh) in the cross-examination shows that all the statements recorded by P W 17 (Santi Ranjan Bardhan) were placed before him that he perused all the relevant records and that he gave the sanction. There is no reason for disbelieving him.

23 At any rate the question of validity of sanction need not be pursued at length in view of my finding that the prosecution did not make out its case against the respondent. I find point (II) in the affirmative.

24 In the result the appeal fails and is accordingly dismissed.

Appeal dismissed.

The identification proceedings conducted before submission of a charge sheet against an accused is merely a step in the process of investigation of a crime. When witnesses claim that they had marked the features of an accused during the commission of a crime the prosecution has to ascertain whether the said claim is correct or incorrect. It is merely for this purpose that the investigating agency puts up an accused at a test identification parade. If the witnesses fail to identify an accused at the test identification parade and there is no other evidence connecting the accused with the crime, the officer in charge of the police station or the investigating officer has to release the accused under S 169, Criminal P C and submit a final report under S 173 (1) Criminal P C. Identification of an accused at a test identification parade is not a substantive piece of evidence and consequently identification proceedings are not subject to directions by a Court. The substantive evidence against an accused is only his identification by the witnesses in Court and the record of the test identification proceedings can be utilised only for the purpose of corroborating or contradicting the witnesses who identify the accused in Court. AIR 1951 All 475 Rel on.

(Paras 9-10)

The holding of a test identification parade is merely a step in the investigation of a crime and it is entirely up to the investigating agency to decide as to whether it would hold a test identification parade or not and if it decides to do so the venue for it. AIR 1968 SC 117 & AIR 1968 SC 447 Rel on. (Para 11)

(B) Criminal P C (1896) Ss 167 (2), 344 — Expiry of 15 days mentioned in S 167 (2) — Investigation not completed — It is only Magistrate having jurisdiction to take cognizance of offence can remand accused to custody in exercise of powers under S 344. AIR 1955 All 521, Rel.

(Para 12)

(C) Prisoners (Attendance in Courts) Act (1955), S 3 — Provisions of the Act apply only after charge sheet has been submitted and Court has taken cognizance of case. (Para 15)

Cases Referred Chronological Paras (1968) AIP 1968 SC 117 (V 55)

(1967) 8 SCR 638, *Abhinandan Jha v Dinesh Mishra* 11

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1970 Crl L J 78 (Vol 76 C N 21)

(ALLAHABAD HIGH COURT)

GAYIPIDPA KUMAR AND YASHODA
NANDAN JJ

The State Applicant v Raghubar Singh,
Opposite Party

Criminal Ref No 225 of 1967 D/ 209
1968

(A) Evidence Act (1872) S 9 — Test identification parade — Purpose and value of — It is not substantive piece of evidence — It is merely a step in investigation of crime and it is entirely up to investigating agency to decide as to whether it would hold a test parade or not and if it decides to hold, venue for it — Proceedings are not subject to directions by a Court

- (1955) AIR 1955 All 521 (V 42) :
 1955 Cri L J 1305, Dukhi v. State 12
 (1951) AIR 1951 All 475 (V 38) : 1951
 All L J 497, State v. Ghulam Mohi-
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 (1945) AIR 1945 P C 18 (V 32) : 46
 Cri L J 413, King Emperor v. Nazir
 Ahmad 11

A. G. A., for Applicant; P. C. Chaturvedi,
 for Opposite Party

YASHODA NANDAN, J. — This case has come up before us on a reference made by a learned single Judge of this Court because in his opinion there is a conflict between the decisions of two learned single Judges of this Court on the question of law arising for consideration.

2. The relevant facts giving rise to this reference are that Raghuraj Singh was wanted in connection with a cognizable offence alleged to have been committed in Mohalla Akbarabad, Casba and Police Station Sehawani, District Budaun. The offence is alleged to have been committed on the 10th May, 1966. In August, 1966, Raghuraj Singh was arrested in district Bulandshahr and was produced before the Additional District Magistrate (J), Bulandshahr, under S. 167 (1), Criminal P. C. It appears that a report was made that the prosecution intended to put up Raghuraj Singh for identification at a test identification parade. The learned Additional District Magistrate (J), Bulandshahr passed an order under S. 167 (2), Criminal P. C. authorising the further detention of Raghuraj Singh. Raghuraj Singh then filed an application before the Additional District Magistrate, Bulandshahr, stating that he had an apprehension that if he was sent to Budaun he would be shown to the witnesses and he consequently prayed that his identification be conducted at Bulandshahr and be transmitted to Budaun only thereafter. The Additional District Magistrate (J), Bulandshahr, considered the prayer of Raghuraj Singh as reasonable and ordered that his identification proceedings be held at Bulandshahr and that he should be sent to Budaun only thereafter. This order was communicated to the Superintendent of Police, Budaun, for taking necessary action for conducting the identification proceedings of Raghuraj Singh at Bulandshahr.

3. Instead of holding identification proceedings of Raghuraj Singh at Bulandshahr, an application was made on behalf of the State before the Additional District Magistrate (J), Budaun, for an order of transfer of the accused to Budaun Jail. It was alleged in this application that the witnesses, who were to take part in the identification proceedings, were not prepared to go to Bulandshahr and the

police had no power to compel them to do so. The Additional District Magistrate (J), Budaun, allowed the application and intimated to the Additional District Magistrate (J) Bulandshahr, that as the witnesses were reluctant to go to Bulandshahr the accused be transferred to Budaun Jail. However, the Additional District Magistrate (J) Bulandshahr, intimated to the Additional District Magistrate (J), Budaun, that since he had already passed an order for detention of the accused at Bulandshahr, he could not change it and consequently could not order the transfer of the accused to Budaun Jail.

4. The Superintendent, District Jail, Bulandshahr, had also been asked by the Additional District Magistrate (J) Budaun, through a warrant and order under S. 3 of the Prisoners (Attendance in Courts) Act, 1955, to forward the accused to his Court. But in view of an order to the contrary passed by the Additional District Magistrate (J), Bulandshahr, the Superintendent, District Jail, Bulandshahr expressed his inability to comply with the order of the Additional District Magistrate (J), Budaun.

5. Meanwhile Raghuraj Singh applied for bail to the Sessions Judge, Bulandshahr. It appears that the State Counsel made a statement that identification proceedings of Raghuraj Singh would be held within a month and consequently on the 6th February, 1967, the learned Sessions Judge, Bulandshahr, passed an order directing that the application for bail be put up after a month. On the 6th March, 1967, the bail application again came up for consideration before the Sessions Judge, Bulandshahr and on that date he directed that the application be put up for hearing on the 15th March, 1967. But it was on the 16th March, 1967, that the application actually came up for hearing before the learned Sessions Judge, Bulandshahr. It was urged by the State that Raghuraj Singh should not be released on bail because he was to be put up for identification at a test identification parade. It was further urged on behalf of the State that identification proceedings of Raghuraj Singh could not be held at Bulandshahr and the attention of the learned Sessions Judge was invited to a decision by Satish Chandra, J in *Kailash Chandra v. State*, Cri. Misc. Case No. 3259 of 1964 D/- 8-2-1965 (All) in which the learned Judge had taken the view that an accused person had no right to demand his identification, much less a right to demand that the identification should be held at a particular place. The learned Sessions Judge distinguished the decision in *Kailash Chandra* (supra) on the ground that while in the case decided by Satish Chandra, J. the accused had

surrendered in Court and had himself demanded to be put up for identification in the present case Raghuraj Singh had not surrendered but had been arrested and he did not himself demand identification but it was the prosecution which desired to put him up for identification. The distinction drawn by the learned Sessions Judge between the present case and the decision in Kailash Chandra (supra) is absolutely without any foundation. The learned Sessions Judge placing reliance on a decision of one of us in Mahendra Singh v State Cr Revn No 230 of 1963 D/ 22 8 1963 (All) ordered that the prosecution should arrange for holding identification proceedings of Raghuraj Singh at Bulandshahr within one month from the 16th March 1967 and that after the expiry of one month the question of granting bail could be considered by him. The application for bail made by the applicant was rejected but the learned Sessions Judge ordered that the accused could make another application for bail after one month.

6 On the 17th March 1967, the learned Sessions Judge Bulandshahr passed an order apparently on the application for bail made by Raghuraj Singh that Raghuraj Singh was not to be transferred to Budaun Jail till further orders. After the expiry of one month Raghuraj Singh applied afresh for release on bail and ultimately on the 22nd May 1967 the learned Sessions Judge passed an order that since the State did not want to have identification proceedings at Bulandshahr and the accused could not be kept in jail indefinitely, he be released on bail. It seems that an undertaking was given by Raghuraj Singh that after coming out of the jail he would not take the plea that the witnesses had the opportunity of seeing him.

7 In the meantime on 7th May 1967 the Assistant Public Prosecutor made an application before the Additional District Magistrate (J) Budaun, alleging that the Additional District Magistrate (J) Bulandshahr had no power to take cognizance of the case against Raghuraj Singh accused that he could pass an order of remand only for a fortnight under S 167, Criminal P C and that the order passed by the Additional District Magistrate Bulandshahr directing that the identification proceedings should be held at Bulandshahr was beyond his jurisdiction. It was further stated in the application that it was the Additional District Magistrate (J) Budaun who had jurisdiction to hold an inquiry into the case against Raghuraj Singh and he alone had the power to order the detention of the accused beyond a period of a fortnight. On the 20th April 1967, the Additional District Magistrate (J), Budaun made the present reference to

this Court recommending that the orders of the Courts at Bulandshahr be set aside and the accused be directed to be transferred to the District Jail Budaun in compliance with the orders of the Additional District Magistrate (J) Budaun.

8 Having heard the learned counsel for the parties we are of the opinion that the orders passed by the Additional District Magistrate (J), Bulandshahr and the Sessions Judge Bulandshahr directing that Raghuraj Singh be put up for identification at Bulandshahr and detaining him there for that purpose were entirely illegal.

9 The identification proceedings conducted before submission of a charge sheet against an accused is merely a step in the process of investigation of a crime. When witnesses claim that they had marked the feature of an accused during the commission of a crime the prosecution has to ascertain whether the said claim is correct or incorrect. It is merely for this purpose that the investigating agency puts up an accused at a test identification parade. If the witnesses fail to identify an accused at the test identification parade and there is no other evidence connecting the accused with the crime, the officer in charge of the police station or the investigating officer has to release the accused under S 160, Cr P C and submit a final report under S 173 (1) Cr P C. Identification of an accused at a test identification parade is not a substantive piece of evidence and consequently identification proceedings are not subject to directions by a Court. It was observed in State v Ghulam Mohiuddin AIR 1951 All 475 that

'Identification parades are held not for the purpose of giving defence advocates material to work on but in order to satisfy investigating officers of the bona fides of the prosecution witnesses. The identification proceedings being in the nature of tests no provision for holding them is to be found in the Code or even in the Evidence Act. The proceedings are record of facts which establish the identity of any thing or person and which may be relevant under S 9 Evidence Act. The facts are to be proved according to law and in the absence of such proof the identification proceedings are valueless.'

In the same case it was further held that

'When at the commencement of or during the course of the trial the accused informs the Court that the prosecution witnesses had never seen him committing the crime and he was not even known to them, the Court may, in its discretion satisfy itself by a ruling the accused to stand among other persons present in Court and then call upon the witnesses who appear before the Court to identify the

accused and make a note of the result on the record; but the Court cannot make an order for the holding of a regular identification parade at the instance of an accused before the witnesses were examined in Court, there being no provision in the Criminal P. C. authorising the Court to do so."

10. The substantive evidence against an accused is only his identification by the witnesses in Court and the record of the test identification proceedings can be utilised only for the purpose of corroborating or contradicting the witnesses who identify the accused in Court. In our judgment, Satish Chandra, J. correctly held in *Kailash Chandra, Cri. Misc. Case No. 3259 of 1964, D/- S 2-1965 (All) (Supra)* that an accused had no right to demand that his identification be held at a particular place and the Court has no power to direct the investigating agency either to put up an accused at a test identification parade or to direct that the identification proceedings be held at a particular place.

11. The manner in which an officer investigating the crime will carry on the investigation is entirely the concern of the police and is not subject to any control by the Court. In *Abhinandan Jha v. Dinesh Misra, A I R 1968 S C 117* while considering the provisions contained in Chapter XIV, Cr. P. C. the Supreme Court observed that,

"But the point to be noted is that the manner and method of conducting the investigation are left entirely to the police, and the Magistrate, so far as we can see, has no power under any of these provisions, to interfere with the same."

The Supreme Court quoted with approval the following observations made by the Judicial Committee in *King Emperor v. Nazir Ahmad, A. I. R. 1945 P. C. 18*:

"Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping and the combination of

individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Court to intervene in an appropriate case when moved under section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus."

In *State of West Bengal v. S. N. Basak, A I R 1963 S C 447* the Supreme Court observed as follows:—

"Section 154 deals with information in cognizable offences and S 156 with investigation into such offences and under these sections the police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the police to investigate cannot be interfered with by the exercise of power under S. 439 or under the inherent power of the Court under S 561-A, when there was no case pending at the time excepting that the person against whom the investigation has started had appeared before the Court, had surrendered and had been admitted to bail."

As already stated, the holding of a test identification parade, is merely a step in the investigation of a crime and it is entirely up to the investigating agency to decide as to whether it would hold a test identification parade or not and if it decides to do so, the venue for it.

12. The crime in respect of which Raghuraj Singh was arrested is alleged to have been committed in District Budaun and the learned Additional District Magistrate (J), Bulandshahr, was not competent either to hold an inquiry or to hold the trial of Raghuraj Singh. Consequently the learned Additional District Magistrate, Bulandshahr, had no power to detain the accused at Bulandshahr for a term exceeding 15 days in view of Section 167 (2), Cr. P. C. The learned Sessions Judge, Bulandshahr, also, in our opinion acted in contravention of the law by directing Raghuraj Singh's detention at Bulandshahr after the expiry of a fortnight from the date of his arrest. It is only the Magistrate having jurisdiction to take cognizance of the offence, who can remand an accused to custody in exercise of powers under Section 344, Cr. P. C. after the expiry of 15 days mentioned in Section 167 (2), Cr. P. C., if the investigation has not been completed (See *Dukhi v. State, A I R 1955 All 521* decided by Desai and Beg, JJ.)

13. This case was referred to a larger Bench because the learned Single Judge before whom it came up for hearing was of the opinion that there is a conflict of decisions between two learned Single Judges of this

Court His attention was invited to the decision in Mahendra Singh Cr. Revn No 280 of 1963 D/ 22 8 1963 (All) (Supra) decided by one of us on the 22nd August 1963. The learned Sessions Judge Bulandshahr has also placed reliance on this decision. In that case the accused was wanted at Bulandshahr in connection with a case under Section 295/296 I P O. He surrendered in the Court of the Additional District Magistrate (J) Mathura. An application was moved on behalf of the accused before the Additional District Magistrate (J) Bulandshahr that his identification test be conducted in the jail at Mathura. The application was allowed by the Additional District Magistrate (J) Bulandshahr subsequently on an application made on behalf of the State the learned Additional District Magistrate Bulandshahr recalled his earlier order and directed that the accused be brought from Mathura Jail to Bulandshahr so that his identification proceedings may be held in Bulandshahr Jail. On a revision filed by the accused this Court took the view that the Additional District Magistrate Bulandshahr 'having once ordered that the identification of the applicant should be carried out in Mathura Jail had no jurisdiction to review and vacate that order and later on direct that the accused should be brought from Mathura and put up for identification at Bulandshahr'. The decision was based on the reasoning that the learned Additional District Magistrate had no jurisdiction to review his order. The question as to whether a Court had the power to make a judicial order directing the police to hold a test identification parade at a particular place was not considered in that decision.

14 Raghuraj Singh was arrested as far back as 1966 and because of the unfortunate manner in which the Additional District Magistrate Bulandshahr and the learned Sessions Judge Bulandshahr have acted the inquiry proceedings do not seem to have started yet. Due to the lapse of time much valuable evidence might have been lost. Courts must bear in mind that it is not for them to hamper the investigations of crimes by orders which might result in miscarriage of justice.

15 Before parting with this case we might observe that the reliance placed by the learned Additional District Magistrate Bulandshahr on the provisions of the Prisoners (Attendance in Courts) Act, 1955 was also misconceived. These provisions apply only after a charge sheet has been submitted and the Court has taken cognizance of the case.

16 In the result this reference is accepted and the orders passed by the learned Additional District Magistrate (J), Bulandshahr

and the learned Sessions Judge Bulandshahr, directing that Raghuraj Singh be detained and put up for identification at Bulandshahr are quashed.

Order accordingly

1970 Cri L J 82 (Vol 76 C N 22)

(ALLAHABAD HIGH COURT)

S D SINGH J

Ranbir Singh, Applicant v The State, Opposite Party

Criminal Revn No 890 of 1967 D/ 16 5 1968 against order of Addl S J Meerut, D/ 5 5 67

Prevention of Food Adulteration Act (1954), Ss 13 (2), (5) and 11 (1) (c) (i) and (iii) — Two samples taken under sub cls (i) and (iii) of S 11 (1) (c) — Analysis by Director under S 13 (2) — Accused can ask for analysis only of either of the two — He cannot exercise the right for a second time

Once the accused exercises his right under S 18 (2) of the Prevention of Food Adulteration Act and gets the sample with the municipal body analysed by the Director of Central Food Laboratory and the Director sends his report then the accused cannot again claim that the other sample with himself must also be analysed by the Director (Para 8)

Section 13 (2) of the Act permits an accused person to get only either of the two samples mentioned in sub cls (i) and (iii) of cl (c) of S 11 (1) being sent to the Director. Thereafter when the report of the Director is received, the law provides that the report shall be treated as final and conclusive. This provision in the Act virtually prohibits any other evidence being brought on record relating to the adulteration of the particular food stuff. Once that conclusiveness is reached, then, no other report can be obtained even from him for otherwise the effect of that second report from him if it is not in conformity with his earlier report would be to negative the opinion given by him in his first report. That would take away the finality and conclusiveness of the report. It is clear therefore that the intention of the Legislature is that the report of the Director when once received should be treated as final and conclusive (Para 8)

D P Mital, for Applicant, A G A for Opposite Party

ORDER — This revision arises out of proceedings relating to the prosecution of the applicant under S 16 of the Prevention of

Food Adulteration Act, 37 of 1954 (hereinafter to be referred to as the Act).

2. A sample of milk was taken by the Food Inspector and sealed in three bottles. One of these bottles was sent to the Public Analyst in ordinary course. When the report of the analysis was received the applicant was prosecuted. He asked for the sample in the possession of the Cantonment Board, Meerut, being sent to the Director of Central Food Laboratory, Calcutta, under sub-s. (2) of S. 13 of the Act. The report of the Director not being favourable to the applicant, he made a fresh application for the sample in his possession being sent to the Director but his request was rejected by the Magistrate and his revision to the Sessions Judge also having been dismissed, he has come to this Court against the aforesaid order.

3. The question involved for decision, therefore is whether a second request can be made by an accused person under sub-s. (2) of S. 13 of the Act to have the sample of the alleged adulterated food being examined again by the Director of Central Food Laboratory. So far as the provisions of sub-s. (2) of S. 13 of the Act are concerned, the accused person has the option to apply for the sample mentioned in sub-cl. (i) or the sample mentioned in sub-cl. (iii) of cl. (c) of sub s. (1) of S. 11 being sent to the Director of Central Food Laboratory. Sub-clause (1) aforesaid relates to the sample which is delivered to the person from whom the article is taken and it is the third part of the sample which is retained in the office of the Municipal or Cantonment Board. Sub-section (2) of S. 13 of the Act, therefore, entitles an accused person only to get either of the two samples analysed and examined by the Director of Central Food Laboratory. When his report is received, the proviso to sub-s. (5) of S. 13 makes that report final and conclusive evidence of the facts stated therein. Although there is no clear prohibition in the Act that the accused person cannot ask for the third sample in his possession also being sent to the Director for examination by him, the intention behind the provisions of S. 13 is obvious. In the first place there is no specific provision that even after the report of the Director of the Central Food Laboratory is received, a third attempt may be made to have the third sample also examined.

Then, sub-s. (2) of S. 13 of the Act permits an accused person to get only either of the two samples mentioned in sub-cla. (i) and (iii) of cl. (c) of S. 11 (1) being sent to the Director. Thereafter when the report of the Director is received, the law provides that that report shall be treated as final and conclusive. This provision in the Act virtually prohibits any

other evidence being brought on record relating to the adulteration of the particular food-stuff. If the report received from the Director of the sample being sent under sub-s. (2) of S. 13 becomes final and conclusive no other report can be obtained even from him for otherwise the effect of that second report from him, if it is not in conformity with his earlier report, would be to negative the opinion given by him in his first report. That would take away the finality and conclusiveness of the report. It is clear, therefore, that the intention of the Legislature is that the report of the Director when once received should be treated as final and conclusive. The only option given to the accused is that he may get either of the two samples examined. Having exercised that option, he could not have the third sample sent to the Director of Central Food Laboratory for securing a second opinion. The view taken by the two Courts below is correct.

4. The application in revision has no force and is consequently dismissed. The stay order is vacated.

Petition dismissed.

1970 Cri. L. J. 83 (Vol. 76, C. N. 23)
(ANDHRA PRADESH HIGH COURT)
KONDAIAH, J.

D. Rama Subba Reddy, Petitioner v. P. V. S. Rama Das and another, Respondents.

Criminal Revn. Case No. 878 of 1966 and Criminal Revn. Petn. No. 786 of 1966, D/- 4.11.1967.

(A) Evidence Act (1872), Ss. 101, 105—Criminal trial—Onus — Duty of prosecution—Onus to prove exception — Nature and extent of — Prosecution for defamation—Held, on facts, accused had established that case fell within Exceptions 8 and 9 of S. 499, Penal Code.

It is the fundamental doctrine of criminal law relating to onus of proof that the prosecution must establish all the ingredients of the offence with which the accused was charged, by independent evidence for convicting the accused, irrespective of the fact whether the accused is able to adduce evidence bringing his case within any one of the exceptions, or not. The nature and the extent of the onus of proof that lies on the prosecution to prove the guilt of the accused is absolute and it stands on a different footing from the kind and nature of proof expected of the accused person to bring his case within any one of the exceptions pleaded by him. The prosecution has to establish the guilt of the accused beyond

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all reasonable doubt whereas it is enough for the accused to bring his case within any one of the exceptions, if he succeeds in proving a preponderance of probability Case law Ref (Para 7)

The accused in his capacity as the Secretary of All India Postal Employees Union, Class III Kurnool Division submitted a memorandum to the Director General of Posts and Telegraphs against the then Superintendent of Post Offices Kurnool for his alleged acts of omissions and commissions Under the head Favouritism it was mentioned

'The post of Wireless Inspector, Kurnool has been given temporarily to an official who has Court attachment to his salary who is heavily indebted who is declared unfit to work in cash counters and who is used to intemperate habits On a complaint preferred by the Wireless Inspector in question, the accused was charged for the offence of defamation The accused contended that his case was covered by Exceptions 8 and 9 of S 499, Penal Code

Held on a consideration of the entire facts and circumstances that the accused had established the allegations made against the complainant in the memorandum submitted to the Director General the lawful authority, to be true Even assuming without admitting that the accused did not establish the truth of the allegations beyond reasonable doubt, he had discharged the onus of proof by proving the preponderance of probability of the accusations preferred by him with an honest and bona fide belief on the information available to him as true against the complainant to the Director General the lawful authority There was no malice or illwill against the complainant whose name also was not mentioned The case of the accused was clearly covered by Exception 8 to S 499 Penal Code (Para 9)

Held further that all the four allegations amounted to an imputation on the character of the accused On the information available to him as the Secretary of the Union the accused after taking due care and caution and under an honest and bona fide belief that the allegations were true keeping in view the interests of the other deserving and better qualified employees of the Postal Department and the general public good at large had made the impugned imputations on the character of the complainant Thus the accused had satisfied all the ingredients of Exception 9 to S 499 Penal Code (Para 14)

(B) Penal Code (1860) S 499, Exception 9—Character—Meaning of

"Character is an expression of very wide import which takes in all the traits special

and particular qualities impressed by nature or habit which serve as an index to the essential intrinsic nature of a person 'Character' also includes reputation but 'character' and 'reputation' are not synonymous (Para 18)

Cases Referred Chronological Paras

- (1966) AIR 1966 S O 97 (V 53) 1966 Ori L J 82 Harbhajan Singh v State of Punjab 6 7
 (1964) AIR 1964 Ker 277 (V 51) 1964 (2) Ori LJ 549 Chandrasekhara v Karthikeyan 7
 (1963) 1963 2 All ER 1188 Sodeman v R 7
 (1959) A I R 1959 Ker 100 (V 46) 1959 Ori L J 464, R Sankar v State 7
 (1948) AIR 1948 Mad 469 (V 85) 49 Ori L J 724, Anthony Udayar v Veluswami Thevar 6
 (1935) 1935 A C 482 104 L J K B 438, Woolmington v Director of Public Prosecutions 7
 (1921) 61 S C R 609 2 W W R 446, R. v Clark 7
 (1907) ILR 81 Bom 293 5 Ori L J 237, Emperor v Abdool Wadood Ahmed 6
 (1879) ILR 4 Cal 124 3 Cal LR 122, In the matter of the Petition of Shibu Prasad Pandah 6
 (1832) 1 Mood & R 198 Blake v Pilford 10
 A Bhujanga Rao and A Gopal Rao for Petitioner O Padmanabha Reddy, for 1st Respondent K Jayachandra Reddy, Addl Public Prosecutor, for the State

ORDER —This revision by the Secretary of All India Postal Employees Union Class III, Kurnool Division is directed against the judgment of the Sessions Judge Kurnool in Criminal Appeal No 13 of 1968 confirming the conviction of the petitioner for the offence of defamation

2 The brief and material facts that led to this revision are as follows —The petitioner in his capacity as the Secretary of All India Postal Employees Union Class III Kurnool Division submitted a memorandum to the Director General of Posts and Telegraphs against the then Superintendent of Post Offices Kurnool for his alleged acts of omissions and commissions Under the head 'Favouritism', it was mentioned about the appointment of the complainant in the following terms

The post of Wireless Inspector Kurnool has been given temporarily to an official who has Court attachment to his salary who is heavily indebted who is declared unfit to work in cash counters and who is used to intemperate habits "

On the complaint preferred by the 1st respondent herein, the petitioner was charged for the offence of defamation. The prosecution examined P. Ws. 2 to 4, postal employees in addition to the complainant P. W. 1 and filed Exs. P.1 to P.3. The petitioner admitted the submission of the memorandum and the allegations made by him in his capacity as the Secretary of the Union but pleaded that he had no malice against P. W 1, that the allegations were true and that in any event the case would fall within the Exception 8 or 9 to Section 499, I. P. C. The accused examined D. Ws. 1 to 5 and filed the documents Exs. D 1 to D-8 in support of his pleas. The trial Court found that the salary of the complainant was attached and that he was indebted, but held that the accused failed to prove the other 3 allegations and convicted the accused under Section 500, I. P. C. and sentenced him to pay a fine of Rs. 300/-. On appeal, the Sessions Judge Kurnool confirmed the conviction but reduced the sentence of fine from Rs. 300/- to Rs. 100/-. Hence this revision.

3. Mr. Bhujangarao, the learned counsel for the accused urged that the Exceptions 8 and 9 to Section 499, I. P. C. are satisfied in the instant case and the petitioner is entitled for an acquittal. Mr. Padmanabha Reddy, the learned counsel for the complainant contended contra.

4. The point that arises for determination in this revision is whether the provisions of Exceptions 8 and 9 to Section 499, I. P. C. are satisfied.

5. For a proper appreciation of the question that arises for determination, it is useful and necessary to consider Section 499, I. P. C. and Exceptions 8 and 9 to it, which read thus:

"Section 499, I. P. C.: Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputations concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted to defame that person.

* * * * *

Eighth Exception : It is not defamation to refer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.

Ninth Exception : It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person or for the public good."

6. Whoever by words makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said to defame that person. If the person accused of defamation establishes that the imputations are true and they were made for the public good, he is not liable for defamation under Exception 1. Any accusation made in good faith by any one against any person to persons, having lawful authority over that person with regard to the subject-matter of accusation, does not amount to defamation under Exception 8. Any imputation by any one made in good faith on the character of another with a view to protect his interests or that of any other person or in public good, is not defamation under the 9th Exception to Section 499, I.P.C. Under Section 52 of the Indian Penal Code, 'good faith' is defined as anything done with due care and attention. Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention under Section 52 of the Indian Penal Code. Under General Clauses Act, a thing is deemed to be done in 'good faith' if it is in fact done honestly, whether it is done negligently or not. But the definition given under S. 52 of the Indian Penal Code would govern the cases arising under the Indian Penal Code. In the matter of the petition of Shribo Prasad Pandah (1879) 1 L R 4 Cal 124, it was observed that the proper point to be decided in considering the question of good faith is not

"whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed and had reason after due care and attention to believe that such allegations were true."

In the case of *Emperor v. Abdool Wadood Ahmed*, (1907) 1 L R 31 Bom 293 a Division Bench of the Bombay High Court observed that

"good faith requires not indeed logical infallibility, but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question."

In *Anthoni Udayar v. Velusami Thevar*, AIR 1948 Mad 469, Rajamannar J. as his Lordship then was, ruled thus :

"There cannot be any rule of thumb to determine in particular case whether an imputation is made in good faith or not. Good faith is relative to a great extent and must be determined by the circumstances under which the imputation was made, the social status

and level of education of the person making the imputation and his reasoning capacity. That the allegations contained in the statements made by the petitioner are not established to be true is not tantamount to an absence of good faith. Imputations must be so reckless that good faith must be deemed to be totally absent.

In *Harbhajan Singh v State of Punjab* AIR 1966 S C 97 the learned Chief Justice Gajendragadkar laid down the law in clear terms thus at page 103:

"Thus it would be clear that in deciding whether an accused person acted in good faith under the Ninth Exception it is not possible to lay down any rigid rule or test. It would be a question to be considered on the facts and circumstances of each case. What is the nature of the imputation made, under what circumstances did it come to be made, what is the status of the person who makes the imputation, was there any malice in his mind when he made the said imputation, did he make any enquiry before he made it, are there reasons to accept his story that he acted with due care and attention and was satisfied that the imputation was true? These and other considerations would be relevant in deciding the plea of good faith made by an accused person who claims the benefit of the Ninth Exception."

7 Under S 105 of the Indian Evidence Act the burden of proving that the case of the accused comes within any of the general exceptions in the Indian Penal Code is upon him. It is the fundamental doctrine of criminal law relating to onus of proof that the prosecution must establish all the ingredients of the offence with which the accused was charged, by independent evidence for convicting the accused irrespective of the fact whether the accused is able to adduce evidence bringing his case within any one of the exceptions or not. The nature and the extent of the onus of proof that lies on the prosecution to prove the guilt of the accused is absolute and it stands on a different footing from the kind and nature of proof expected of the accused person to bring his case within any one of the exceptions pleaded by him. The prosecution has to establish the guilt of the accused beyond all reasonable doubt whereas it is enough for the accused to bring his case within any one of the exceptions if he succeeds in proving a preponderance of probability. This fundamental doctrine of criminal law was emphasized by Viscount Sankey in *Woolmington v Director of Public Prosecutions* 1935 A C 462 who observed that no matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England

and no attempt to whittle it down can be entertained. This view was also emphasized by Duff J in *R v Clark* (1921) 61 S C R 608 and Lord Halsbury in *Sodeman v R*, (1968) 2 All E R 1188. In *AIR 1966 S C 97* at p 102, the Supreme Court observed thus:

The onus on an accused person may well be compared to the onus on a party in civil proceedings and just as in civil proceedings the Court trying an issue makes its decision by adopting the test of probabilities so must a Criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him.

In the light of the aforesaid principles of law relating to the onus of proof of good faith, let me examine the question whether the case of the accused is brought within either Exception 8 or Exception 9 to S 499 I P O. The contention of the complainant relying upon the decisions of the Kerala High Court in *Chandrasekhara v Karthikeyan*, AIR 1964 Ker 277 and *R Sankar v State* AIR 1959 Ker 100 that mere creation of doubt regarding truth of statement is not sufficient to prove Exception 8 or Exception 9 of S 499 I P O, unless the statements are proved beyond reasonable doubt to be true is untenable as the principle laid down in this regard by the Kerala High Court in the aforesaid decisions, is no longer good law.

7A To bring the case of the accused herein within Exception 8 to S 499 I P O it should be established that the accusations were made to the person who is in authority over the person against whom the complaint was made and in good faith. Where the lawful authority, to whom the accusations are made has some jurisdiction in the matter they are privileged, whether such jurisdiction be immediate or ultimate but where the authority ~~has no jurisdiction~~ has no jurisdiction at all over the subject matter of the complaint it is then no more privileged than if it had been published to any other man. In the present case, the accused in his capacity as the Secretary of the All India Postal Employees Union Class III Kurnool Division has sent up the memorandum to the Director General of Posts and Telegraphs admittedly the lawful authority over the person with respect to the subject matter of the accusation, bringing to his notice certain acts of omission and commission on the part of one P Subrahmanyam the then Superintendent of Post Offices Kurnool and one of the instances of his commission was to appoint the complainant in preference to many other deserving candidates to the post of the Wireless Inspector.

8 The contention of the complainant that the memorandum has not only been submitted

to the Directors General, Posts and Telegraphs, Hyderabad but a wide publicity has been given to a number of other persons, as without substance. The complainant himself has admitted in his evidence that the memorandum has been published in the bulletin and circulated only amongst members of the Union, Kurnool Division and it is clear from the very document that it is intended only for the members and hence it cannot be said that there was any unauthorised publicity given to the accusations in the instant case.

9. With regard to the other ingredient of good faith, it has to be seen from the material on record, how far the accusations are found to be true. The allegations, though appear to be four, all of them, in my view, are only different phases of one aspect relating to character. Admittedly, he was indebted as his salary was attached under a Court decree. The Court below erred in thinking that the accused has not proved the complainant to be heavily indebted and that he was declared to be unfit to hold any position to handle cash. The question of heavy indebtedness is a relative term which differs from person to person. A person having property worth one lakh of rupees may not be considered to be heavily indebted, if he owes to others a sum of ten thousand rupees; whereas a person with a large family of ten members to be maintained, who is drawing a salary of Rs. 200/- or Rs. 250/- per month, if indebted to an extent of Rs. 1,000/- or more, can certainly be considered to be a person heavily indebted. In the instant case, the salary of the complainant at the relevant time was about Rs. 200/- per month and admittedly he has four children by the first wife and five children by the second wife, both the wives living, and he was indebted to a tune of more than Rs. 1,000/-, and his salary was attached. He could not pay the decretal amount of Rs. 600/- till 9 months after attachment of his salary. Prohibition officers visited his house. The evidence discloses that the income was insufficient for the maintenance of his large family. There is no evidence on record to show that P. V. 1 has any substantial properties of his own. In such circumstances, it must be inferred that he is heavily indebted, taking into consideration his official and financial status and the other circumstances in the case.

Under R. 94 of the Posts and Telegraphs Manual No. II, no official, who is seriously indebted, shall be appointed to any position of trust in which he will have access to or handle cash or valuables. The strict adherence to the aforesaid rule by the appointing authority, is not only fair and proper but is in the large interest of good administration of the Welfare State. The accused who is the Secretary of

the Union, might have thought that the complainant, being heavily indebted and his salary being attached by a Civil Court, has made himself unfit to work in a cash counter where he has to deal with cash and valuables. With regard to the last allegation that he is used to intemperate habits, the evidence on record when read with the report of the Circle Inspector, amply justifies the accusation of the accused. Hence, on a consideration of the entire facts and circumstances, I hold that the accused has established the allegations made against the complainant in the memorandum submitted to the Director-General, Posts and Telegraphs, Hyderabad, the lawful authority, to be true. Even assuming, without admitting, that the accused did not establish the truth of the allegations beyond reasonable doubt, I must say that he has discharged the onus of proof by proving the preponderance of probability of the accusations preferred by him with an honest and bona fide belief on the information available to him, as true, against the complainant to the Director-General, Posts and Telegraphs, Hyderabad, the lawful authority.

There is no malice or ill-will against the complainant, whose name also was not mentioned. The accusations were mainly directed against the Superintendent of Posts Offices about his acts of omission and commission, and the appointment of the complainant as Wireless Inspector by the Superintendent of Post Offices was one such act of commission which was brought to the notice of the higher authority. On the facts and in the circumstances, I hold that the accused has made the accusations under good faith against the complainant to the lawful authority and established the same in bringing his case within Exception 8 to S. 499, I. P. C.

10. There remains to be seen whether on the facts and in the circumstances, the provisions of Exception 9 to S. 499, Penal Code are satisfied in the instant case. To bring the case within Exception 9 to S. 499, Penal Code, it must be established that the imputations made by the accused relate to the character of the complainant with due care and attention and not recklessly, in the interest of himself or any other person or for public good. There is no definition of the expression "character" in Exception 9. The expression "character" of a person is of very wide import. The interest which the accused seeks to protect either himself or any other person by making imputations on the character of the complainant may pertain to political, religious, economic, social or personal matters. Proof of some special interest is only required when the imputation is made for the protection of the person who

makes the statement or of any other person but when the matter is one of the public interest the only ingredient necessary to be proved is good faith. If the allegation is true irrespective of the fact whether good faith is proved or not the accused is protected by the exception.

All departments of the Government are matters of public interest. The bona fide fair and constructive criticism of the members of the public in a democratic country made with due care and attention on the character and conduct of the Government Public Officials of the Executive when they overstep their limits in the discharge of their public duties is privileged and such criticism or comment would not amount to defamation as it was made with good faith and intended for general public good. In *Blake v Pilford* (1852) 1 Mood & R 198 even a false statement by a member of the public regarding an official to his officer was held to be a privileged one in England. Where the matter is one of the public interest the only thing necessary to be established by the accused is good faith. In case where it is one of any other interest the other ingredient also will have to be proved.

11 Mr Padmanabha Reddy strenuously urged that the imputations 1 to 8 except the 4th relate to expression of facts but they do not relate to the expression of opinion regarding character and the imputations must fully be established to be true and the accused will not be entitled to the benefit of the Exception 9 if the imputations are partly true and partly untrue and that they were not made for the protection of their rights or others but only to expose the Superintendent of Post Offices.

12. To appreciate the point it is necessary to consider the meaning of the expression 'character' in Exception 9 to S 499 Penal Code. 'Character' is not defined either under the Indian Penal Code or under the General Clauses Act. According to Webster's New International Dictionary, 'character means "An attribute quality esp a trait or characteristic which serves as an index to the essential or intrinsic nature of a person" reputation, repute is a man's character for truth and veracity a description delineation or detailed account of the qualities or peculiarities of a person'.

13 According to Law Lexicon of British India character means estimation of a person by his community, particular qualities impressed by nature or habit on a person which distinguish him from others. Character lies in the man it is the mark of what he is it shows itself on all occasions reputation de-

pends upon others and it is what they think of him. According to Oxford Dictionary, "character means collective peculiarities sort style reputation good reputation, description of person's qualities testimonial, status." The Model Code of Evidence defines character as the 'aggregate of a person's traits including those relating to care and skill and their opposites.' Just as cause of action means a bundle of facts character is an expression of very wide import which takes in all the traits special and particular qualities impressed by nature or habit which serve as an index to the essential intrinsic nature of a person. Character also includes reputation but character and reputation are not synonymous.

14 In this context it is necessary to consider whether the imputations in the instant case relate to the character of the complainant or not. In my opinion all the four allegations are nothing but different phases of an imputation on the character of the complainant. The sum and substance of all the allegations is that the complainant is not a man of good character and conduct who did not deserve to be appointed in preference to the other deserving candidates as the Wireless Inspector by the then Superintendent of Post Offices. Kurnool. This imputation on the character of the complainant is certainly made by the accused in his capacity as the Secretary of the Union for the protection of the other deserving employees of the Postal Department and at large finally for the public good. The appointment of the complainant by the then Superintendent of Post Offices is a public act purported to have been done by him for the public good. Every citizen is entitled to have an honest and constructive criticism whenever justified or necessary on the facts and in the circumstances with a view to have proper and deserving persons being appointed, which ultimately results in public good. The appointment of deserving persons who bear good character and conduct for any public office is certainly for the good administration of the country and in the general public interest.

In my opinion the allegations in the memorandum amount to an imputation on the character of the complainant made by the accused in good faith in the interests of other better qualified employees of the Department and for the general public good. There is absolutely no malice. Good faith has to be inferred in each case from the facts of that case. There is nothing on evidence to show that there is lack of good faith on the part of the accused. In short on the facts and in the circumstances of the case I have no hesitation to hold that on the information available to him as the Secretary of the Union, the petitioner, after taking due care and caution and

under an honest and bona fide belief that the allegations were true, keeping in view the interests of the other deserving and better qualified employees of the Postal Department and the general public good at large, has made the impugned imputations on the character of the complainant, in the memorandum submitted by him against Subrabmanyam, the then Superintendent of Post Offices, Kurnool Division to the Director General, Posts and Telegraphs, Hyderabad. Hence I must hold on the facts and in the circumstances of the case that the accused acted in good faith and satisfied all the ingredients of Exception 9 to S. 499, Penal Code.

15. In the result, the conviction and sentence awarded by the Courts below on the accused-petitioner are set aside and the accused-petitioner is acquitted. The amount of fine, if already paid, is directed to be refunded.

Revision allowed.

1970 Cri. L. J. 89 (Vol. 76, C. N. 24)

(CALCUTTA HIGH COURT)

N. C. TALUKDAR, J.

Kalipada Trivedi, Petitioner v. Madhusudan Bhattacharjee, Opposite Party.

Criminal Revn. No. 752 of 1967, D/ 28-11-1968.

Criminal P. C. (1898), S. 244 — "May issue summons" — Summons procedure followed — Prosecution witnesses examined, cross-examined and discharged — More than five months later defence applying for re-calling prosecution witnesses for further cross-examination — Order allowing defence to examine prosecution witnesses as defence witnesses made — Order though not per se illegal, is improper. (1908) 13 Cal WN (PC) 370, Foll.

(Para 5)

Cases Referred: Chronological Paras (1908) 13 Cal WN 370: 36 Ind App 9.

Kishori Lal v. Chumal

4

J. M. Banerjee, for State.

ORDER — This Rule is against an order dated 14th July, 1967, passed by Shri Amitabha Dutta, Additional Sessions Judge, 24-Parganas, in Criminal Motion No. 88 of 1967 refusing to make a reference to this Court under S. 438 of the Code of Criminal Procedure against an order dated 4th May, 1967, passed by Sri D. K. Roy, Magistrate, 1st Class, Barrackpore, in Case No. C 2119 of 1964 permitting

T. 518/65

the accused-opposite party to examine two prosecution witnesses as defence witnesses

in connection with the case pending under S. 279 of the Indian Penal Code.

2. The facts leading on to the present Rule are short and simple. The complainant-petitioner's daughter Kumari Monika Trivedi, aged about 7 years was run over by the accused-opposite party's motor car No. WBA 1600 on the 26th October, 1963 at Panhati. It was the Nabami Puja day. The prosecution alleges that the car was being driven rashly and negligently and while attempting to overtake a lorry in front of the said car it swerved to the right of the road and came down from the metalled portion of the road to the kutcha portion of the road dashing thereby against the girl who fell down unconscious and was removed to hospital. The occurrence had taken place at about 5.30 p. m. The girl was taken to the Sagar Dutta Hospital where she was given first aid and then she was sent to the Calcutta Medical College Hospital where she remained confined for a considerable period of time. The case thereafter has had a chequered history. The police started a case against the accused but the accused was discharged after a final report on 25-4-64. The instant case thereafter was filed by the complainant-petitioner under S. 279/338 of the Indian Penal Code and after a judicial enquiry summons was issued under S. 279 of the Indian Penal Code and the present case was started and tried in the Court of Shri D. K. Roy, Magistrate, 1st Class, Barrackpore. In course of the trial, three witnesses were examined, cross-examined and discharged on 27-7-66 including P. Ws. 2 and 3 Nakul and Bholanath. Thereafter on 10-1-67 the accused-opposite party was examined under S. 342 of the Code of Criminal Procedure. At that stage the defence filed an application for recalling P. Ws. 2 and 3 for further cross-examination. The said petition was rejected and the trying Magistrate fixed 3-3-67 for defence witnesses and arguments. On 3-3-67 while rejecting the prayer filed on behalf of defence for time, the trying Magistrate observed that the procedure in the present case was summons procedure whereunder the defence was not entitled to cross-examine the prosecution witnesses later. The witnesses having been discharged, the trying Magistrate held that such a direction to allow them to be examined as defence witnesses would prejudice the complainant. An application in revision, however, was taken against the said order before the Sessions Judge who was pleased to direct the trying Magistrate to proceed with the case in the light of the observations made by him holding inter alia that the trying Magistrate should allow the two prosecution witnesses to be examined as defence witnesses. The matter came back to the trying Magistrate who thereafter

took the unusual step of seeking a verbal clarification of the order of the Sessions Judge from the Sessions Judge himself. It is passing strange that a Magistrate in his enthusiasm would go to that extent. However the trying Magistrate after being satisfied with the clarification of the order dated 18th April, 1967 from the Sessions Judge passed his impugned order dated 4th May 1967. For the purpose of this case however I need not pinpoint the impropriety of the aforesaid procedure and leave it at that. The trying Magistrate there after in the light of the observations made by the Sessions Judge ordered on 4.5.67 inter alia as follows:

Accordingly the matter is settled. To 57/67 for D We and argument. Accused as before."

A motion was taken from the said order to the Sessions Judge for making a reference to this Court under S. 438 of the Criminal P. O. and the same was rejected. These orders have been impugned and form the subject matter of the present Rule.

3. Mr Kalpada Trivedi, who appeared in person has submitted in the first place that the procedure adopted by the trying Magistrate is a procedure which is unknown to law vitiating the proceedings thereby. Mr Trivedi contended in the second place that in any event the impugned order is an improper order prejudicing the complainant petitioner very much.

4. Mr J. M. Banerjee Advocate appearing on behalf of the State has supported the Rule and has submitted that even though the direction as ultimately given by the trying Magistrate permitting the accused-opposite party to examine two of the prosecution witnesses as defence witnesses may not be per se illegal, but in the facts and circumstances of the case it was quite improper, causing prejudice to the complainant-petitioner. Mr Banerjee has submitted in this context that it is pertinent to consider that the procedure in question was summons procedure and it was incumbent upon the accused opposite party to have cross examined the prosecution witness immediately after the examination in chief. That opportunity was open to the accused opposite party and in fact was availed of by him so far back as on the 27th July 1966. The application for recalling the said witnesses as defence witnesses is very much belated and is not ultimately justified by the facts and circumstances of the case. Mr Banerjee has in this context referred to the case of *Kishori Lal v Chuni Lal* (1908) 18 Cal W N (P C) 870 and pinpointed the observations of Lord Atkinson who delivered the judgment of the Court at p. 374 as follows:

"As to this last matter, it would appear from the judgment of the High Court that in India this is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness and thus give the counsel for each litigant the opportunity of cross examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance."

While respectfully agreeing with the observations made by their Lordships of the Judicial Committee I find further that the facts here are somewhat different as in the instant case the persons who are sought to be examined as defence witnesses are the prosecution witnesses themselves and not merely the parties to the proceeding.

5. Nobody appeared on behalf of the accused opposite party.

6. Having heard the learned Advocate appearing on behalf of the respective parties and on going through the record I find that there is considerable force behind the submissions of Mr Trivedi, as supported by Mr J. M. Banerjee appearing on behalf of the State. I will not go to the length of holding that the procedure that was ultimately adopted by the trying Magistrate on the second occasion, namely on 4.5.67 is a procedure which is per se illegal but in the facts and circumstances of the present case the said order is ultimately improper. A reference to the order sheet would show that in this case where summons procedure was being followed all the three prosecution witnesses were examined, cross examined and discharged on the 27th July, 1966. It was only on 10.1.67 very much after 27.7.66 that the defence could file a petition for recalling two of the prosecution witnesses for further cross examination. The impugned order as passed on the 4th May, 1967 by the trying Magistrate allowing two of the prosecution witnesses as prayed for, namely P. Ws. 2 and 3 to be examined as defence witnesses is therefore an order which is not proper and sustainable. The matter has dragged on unnecessarily and unreasonably for quite a long time and instead of creating unnecessary clouds over the points at issue which are very short and simple it is expedient in the interests of justice that the matter should be determined at the earliest opportunity. The prosecution is as much a limb of the Court as the defence is and justice demands that equal

opportunities should be given to both and none should be unreasonably prejudiced.

7. In the result, I make the Rule absolute; set aside the impugned orders and direct that the matter may go back to the Court below for being tried in accordance with law and expeditiously.

8. The records are to go down as early as possible.

Petition allowed.

1970 Cri. L. J. 91 (Vol. 76 C. N. 25)

(GOA, DAMAN AND DIU J. C'S COURT)

V. S. JETLEY, J. C. AND R. S. BINDRA, A.J.C.

Vaijanath Hanumanth Sanadi and another, Appellants v. The State, Respondent.

Confirmation Case No. 1 of 1967 and Criminal Appeal No. 20 of 1967, D/- 24-4-1969.

(A) Penal Code (1860), S. 302—Sentence—Normal sentence—Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963), S. 7 (2) Proviso—Reference of death sentence—Difference of opinion between two judges—No third judge—Death sentence imposed by Sessions Judge stands confirmed. (Criminal P. C. (1898), S. 378.)

Per V. S. Jetley, J. C.—The supreme crime should carry the supreme penalty, unless there are any mitigating circumstances to justify the lesser sentence of imprisonment for life. (Para 28)

Per R. S. Bindra, A. J. C.—There is no sanction of law for the proposition that the sentence of death is the normal punishment for the offence of murder or that the lesser sentence of imprisonment for life is an exception to be imposed only if there are some extenuating circumstances. (Para 40)

Held, there being no third Judge to resolve the difference of opinion, the sentences imposed by the Sessions Judge were confirmed in accordance with the proviso to S. 7 (2) of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963. (Para 45)

(B) Evidence Act (1872), S. 5—Evidence is not sufficient to constitute corroboration if it is such as itself requires corroboration. (Per V. S. Jetley, J. C.). (Para 29)

(C) Criminal P. C. (1898), S. 374—High Court is not bound in law to go by discretion exercised by Sessions Judge in matter of sentence on reference made to it: AIR 1957 S C 469, Rel. on. (Per R. S. Bindra A. J. C.). (Para 40)

(D) Evidence Act (1872), S. 3—Accused person is entitled to benefit of reasonable doubt in matter of sentence as in matter of conviction: Ratanlal's 'The Law of Crimes' 21st Edn. p. 806 Ref. (Per R. S. Bindra, A. J. C.) (Para 43)

Cases Referred: Chronological Paras

(1965) AIR 1965 S C 202 (V 52):

(1965) 1 Cri L J 228, Masalti v.

State of Uttar Pradesh

41

(1965) AIR 1965 S C 1467 (V 52):

1965 (2) Cri L J 539, Babu v. State

of Uttar Pradesh

41

(1969) AIR 1969 All 501 (V 50):

(1969) 2 Cri L J 481, Jan Mohammad

v. State

39, 41

(1968) AIR 1968 Andh-Pra 249 (V 50):

1968 (1) Cri L J 738, In re A.

Koteswara Rao

39

(1958) AIR 1958 All 746 (V 45):

1958 Cri L J 1266, Satya Vir v.

State

39

(1957) AIR 1957 S C 469 (V 44):

1957 Cri L J 586, Jumman v. State

of Punjab

39

(1955) AIR 1955 S C 216 (V 42):

1955 Cri L J 572, Pandurang v.

State of Hyderabad

41

(1959) AIR 1959 All 200 (V 40):

1959 Cri L J 555, Mool Chand v.

State

41

(1938) 40 Pun L R 542, Gorakh v.

The Crown

43

(1931) AIR 1931 Lah 538 (V 18): 32

Cri L J 1083, Sher Singh v. Em-

peror

42

(1924) AIR 1924 Rang 179 (V 11):

ILR 1 Rang 751, Mi Shwe Yi v.

Emperor

43

U. B. Surlikar (for No. 1) and G. S. Marathe (for No. 2), for Appellants, S. Tamba, Govt. Pleader, for the State.

R. S. BINDRA A. J. C.—Two persons, namely, Vaijanath Hanumanth Sanadi and Krishna Hema Ohorlekar, were tried on charges relevant to the murder of one Sidappa Velgathi on the night of 25th of October 1965. Vaijanath was charged under Sections 302 and 201 of the Indian Penal Code and convicted on both the counts. He was sentenced to death on the charge under Section 302 I. P. O. No separate sentence was proposed for the conviction under Section 201 I. P. C. Krishna was charged under Section 302 read with Section 114 I. P. C. and under Section 201 I. P. C. He was acquitted of the first charge but convicted under the latter and sentenced to five years' rigorous imprisonment. Each of the accused having felt aggrieved with his conviction and sentence has come up in appeal and this judgment will dispose of both the

appeals. This judgment will also deal with the reference made by the learned Sessions Judge under Section 807 of the Criminal Procedure Code for confirmation of the death sentence imposed on Vaijanath.

223 (After narrating the facts and discussing the evidence the learned Judge proceeded.)

24 In para 40 of his judgment the learned Sessions Judge has expressed the opinion that a murder on the spur of moment actuated by anger, jealousy, pride or sense of honour and the like may indicate the infliction of the lesser of the two penalties prescribed for offence of murder. I think the case in hand falls in that category. I have therefore decided to decline the reference made by the learned Sessions Judge for confirmation of the sentence of death and on accepting the appeal of Vaijanath in the matter of sentence only impose on him the sentence of imprisonment for life.

23 I think the sentence imposed on the other accused is also excessive in the context that he has been acquitted of the charge of murder. If he had no hand in the murder of Sidappa I have serious doubts if he could have voluntarily agreed to drag the dead body of Sidappa to a place inside the jungle. Vaijanath having effectively wielded the axe at the spot and taken the life of Sidappa he could hold away over all those present at the scene. He, to cite an instance, made Basawa and Shanta stop crying or running. Likewise he could dictate Krishna to help him in disposing of the dead body. Therefore, Krishna cannot be said to have been an altogether free agent in the matter of disposal of the dead body. Hence I think a sentence of two years rigorous imprisonment would meet the ends of justice and I sentenced him accordingly.

25 Subject to the reductions in the sentences of the two accused in the manner indicated above the appeals fail and are hereby rejected.

27 V S JETLEY, J C — The problem is the familiar one of getting rid of a husband forever in order to have sexual relations with his wife without any hindrance. Basawa, wife of the deceased, was the object of infatuation on the part of the appellant Vaijanath, a bachelor. She was having sexual relations with him. She appears to be a woman of an easy virtue seeking sexuality elsewhere. In most cases it is gratuitous to search a man's mind for motives other than the age-old desire for lust, greed, passion and revenge. The murder of the deceased in this case was due to the lust of the flesh and the lust of the eye. The motive behind the murder is clear of which

convincing evidence has been given by the prosecution.

28 The case is terrible. It is therefore necessary that it should be approached in as calm a frame of mind as humanly possible. Death is doubtless disabling and also terrifying in the highest degree but a criminal must be treated to his just deserts. There is often a tendency to think too much of the criminal and not enough of the victim. The supreme crime should carry the supreme penalty, unless there are any mitigating circumstances to justify the lesser sentence of imprisonment for life. It is not open to us to give or withhold at pleasure the sentence of death in murder cases.

29 I agree that the evidence — direct and circumstantial — proves the prosecution case beyond any reasonable doubt that the deceased was murdered by the appellant Vaijanath. His conduct apart from other things supplies the corroboration required for example his false defence of alibi coupled with the evidence of opportunity. I would not regard Basawa as an accomplice but she is a highly interested witness whose evidence cannot safely be acted upon in absence of necessary corroboration. Shanta may not be an interested witness but even so it is desirable to seek corroboration. It is well settled that the evidence is not sufficient to constitute corroboration if it is such as itself requires corroboration. As will appear from the judgments of the learned Sessions Judge and my learned brother the evidence of Basawa and Shanta receives corroboration from independent sources and therefore has been rightly accepted. There are a number of circumstances that supply sufficient corroboration of the truth of what they testify. They are mentioned in these judgments.

30 In para 48 of his judgment the learned Sessions Judge observed that the murder was committed by the appellant Vaijanath "for a purely base and sordid motive and with utmost treachery. He then went on to add that there was 'calculation, deliberation and callousness on his part. He found no mitigating circumstances and therefore sentenced him to death. In para 28 and 21 of his judgment my brother has given reasons why the lesser sentence of imprisonment for life is called for. It is not necessary to repeat those reasons. It may be added that the appellant had the blade of his hatchet sharpened by Krishna Lohar, a blacksmith by occupation, before the murder. He carried the hatchet in a cloth bag and like Death dogged the footsteps of the deceased after ascertaining from him his movements prior to the departure of the deceased his wife Basawa, Shanta and

the appellant Krishna for Sanvordem, on the fateful day. He was not asked by Tayava Hirematha, Shanta's mother, to follow Shanta because she gets fits of giddiness. He gave a false excuse to the deceased about his sudden and unexpected arrival when he met the appellant Krishna, the deceased, Bassawa and Shanta. He came prepared to kill the deceased. The ways of murderers are strange and mysterious. There is no method or logic in their madness. They do not count blows when they kill. When and where they kill is a matter which is not always guided by reason. According to Bassawa, they were not asleep when Shanta had a fit of giddiness. Shanta deposed that when she had this fit, she, the appellant Vaijanath and the appellant Krishna were asleep but she could not say whether they were fast asleep. She also deposed that the deceased was sleeping at that time. Shanta could be certain about her own sleep but not about the sleep of others. The deceased immediately helped her to inhale smoke and she regained consciousness. Speaking for myself, I do not attach much importance to this "sleep incident". The murder took place at about 10.00 p. m. With respect, I submit, that there is no legal justification for holding that "the assault was made on the spur of the moment because of some immediate cause for excitement". Conjectures, however well founded, are not substitute of legal proof but when they are not based on evidence they are to be ignored. The defence suggestion that the deceased wanted to molest Shanta was categorically denied by her and, if I may say so with respect, it is not open to us to draw conjectures and surmises Shanta's testimony is straightforward and convincing in this respect, as on the incident of murder. I have no hesitation in agreeing with the learned Sessions Judge that the assault was premeditated and cruel.

31. The deceased was attacked from behind by the appellant Vaijanath when he, the appellant Krishna, Bassawa and Shanta were sitting in a circle. The deceased was given two hatchet blows and he collapsed. His head was later severed from his body and thrown at some distance. It was the hand of the appellant Vaijanath that finally snuffed the life of the deceased out of his helpless body. The manner of carrying out the murder by the appellant Vaijanath is so brutal and sordid that, in my opinion, there could be no other just sentence except that of death. I would therefore accept the reference made by the learned Sessions Judge for confirmation of the sentence of death imposed on the appellant Vaijanath and dismiss his appeal in its entirety under S. 423 of the Code of Criminal Procedure.

32. I also venture to differ from my learned brother in so far as the sentence of 5 years' rigorous imprisonment imposed by the learned Sessions Judge on the appellant Krishna under S. 201 of the Penal Code, is concerned. Probably, no system leaves so wide a discretion to the Judge in the matter of sentence as the Penal system followed in our country but even so, this discretion has to be judiciously exercised. Discretion, when applied to a Court, means sound discretion guided by law. The proved facts are that along with the appellant Vaijanath, he dragged the body of the deceased for some distance in the jungle and thereafter, there is strong reason to believe that he was present when the head of the deceased was severed from his body and thrown at some distance. The blood-stained dhoti and the blood-stained shirt of the deceased were removed from his body but there is no evidence as to who removed them. According to Shanta the appellant Krishna removed the wooden handle of the hatchet from the blade and threw it at some distance from the place of the murder. He also threw the chappals of the deceased on their way back to Talaulim mines. He and the appellant Vaijanath threatened her and Bassawa that they should not disclose what had happened. It is true that there is no legal evidence of his complicity in the murder, as pointed out by the learned Sessions Judge, but it may not be wide of the mark to say that he and the appellant Vaijanath "are the birds of the same feather flock together". He knew that the deceased had been murdered. I may perhaps hesitate to convict him simply because he assisted the appellant Vaijanath in dragging the body of the deceased from the place of murder to some other place in the vicinity but when the head was severed and later thrown in a jungle at a distance of about 100 yards from the body, and further, when according to Shanta, the chappals and the wooden handle of the hatchet were thrown by him at different places and he was also present when the appellant later threw the turban of the deceased in a small stream, did he not by these acts of commission and omission cause the evidence of the offence of murder to disappear with the intention of screening the appellant Vaijanath from legal punishment under this section? I would answer this question in the affirmative. The chappals and the wooden handle of the hatchet were discovered by the police in consequence of information given by him in police custody and, therefore, the statement made by him on this discovery is admissible under Section 27 of the Evidence Act. He is as sturdy and stout as the appellant and it is somewhat difficult to believe that he did not voluntarily drag the body of the deceased. In his state-

ment under Section 342 of the Criminal Procedure Code, it is not his defence that he was an unwilling agent. His defence of alibi is as false as that of the appellant Vaijanath. It may be added that he did not disclose the murder which took place on 25th August until he made a statement before the Magistrate on 1st December 1965. This statement is regarded as inadmissible by the learned Sessions Judge for the reasons mentioned by him. It is to be read as a whole and when so read it is of an exculpatory nature where guilt is denied. Therefore it cannot be regarded as a confession or even an admission. A statement recorded in the form of question and answer may be a better way of ascertaining the voluntary character of confession than a statement recorded in a narrative form. An admission made by a person whether amounting to a confession or not, cannot be split up and part of it used against him. An admission must be used either as a whole or not at all. The learned Sessions Judge exercised his discretion reasonably in the matter of sentence. I would therefore hesitate to interfere with the sentence of 5 years R I passed by him. This sentence does not seem to be excessive. In this view of the matter the conviction and sentence imposed are maintained and the appeal of the appellant Krishna is also dismissed.

33 R S BINDRA A J C — I have gone through the judgment prepared by my learned brother and which he was kind enough to send me from Panjim for my perusal. I want to add a few words to the judgment which I had prepared on 24th of April 1969, while at Panjim.

34 35 [After going through and commenting upon evidence the learned Judge proceeded.]

39 I entirely endorse the observation of my learned brother that it is not open to the Judges to give or withhold at pleasure the sentence of death in murder cases. However I have not found any legal sanction for the assumption that the supreme crime should carry the supreme penalty unless there are mitigating circumstances to justify the imposition of lesser of the two penalties prescribed for the offence of murder. In the case of A Koteswara Rao In re AIR 1963 Andh Pra 249 it was observed by a Division Bench of A P High Court that the theory that when there are no extenuating or mitigating circumstances it is incumbent upon the Court to impose the sentence of death stems from the assumption that the sentence of death is the normal punishment for the offence of murder and the lesser sentence of imprisonment for life is the exception and that this view was founded on sub section (5) of S 367,

Criminal Procedure Code as it stood before it was amended in 1955. The result of the amendment the High Court held, is that the Court is now allowed full discretion to award the sentence of death or the lesser sentence of imprisonment for life for the offence of murder. That being the legal position at present, the High Court pointed out the view that the extreme penalty is the normal sentence and the mitigated sentence is the exception does not hold water. It can no longer be said the High Court observed further that death is the normal punishment for murder and the view formerly held by the Courts in India that it is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but he should ask himself whether there are reasons for abstaining from doing so has lost its validity. Correct approach to the question the High Court concluded, is that upon a conviction for murder the Judge should ask himself the question: Are there any aggravating circumstances in this case which imperatively call for the exaction of the extreme penalty? If in a given case there are such circumstances it is the bounden duty to award the capital sentence in the larger interests of society. If, on the other hand, circumstances of an aggravating nature are absent in a given case the Judge would be justified in imposing the lesser of the two punishments prescribed for the offence of murder. The mere fact that a human life has been taken cannot in itself be an aggravating factor calling for the extreme penalty for the simple reason that if death is not caused with the requisite intention or knowledge the offence would not amount to murder. These observations of the Andhra Pradesh High Court are in line with the view taken by the Allahabad High Court in the case Satya Vir v State, AIR 1958 All 746. I entirely agree with the proposition enunciated by the two High Courts.

In the case of Jan Mohammad v State AIR 1963 All 501, it was canvassed on behalf of the State that once the Sessions Judge has exercised his discretion in the matter of sentence, the High Court should not interfere with that discretion unless it finds that it was arbitrarily exercised. The Allahabad High Court refused to subscribe that proposition. It was of the opinion that while considering a case submitted to it under S 374 Criminal P. O., the High Court is not precluded from coming to its own conclusion on the review of evidence on record and on a consideration of the circumstances of the case and then exercising a discretion of its own based on its own inferences and conclusions in respect of the sentence. It was observed further that it is not the requirement of law that the High Court cannot award under S 376, Criminal P. O.,

the lesser punishment of life imprisonment and cannot refuse to confirm the sentence passed by the Sessions Judge unless it arrives at a finding that the Sessions Judge had arbitrarily exercised his discretion on non-judicial grounds. In support of this view reliance was placed on the case, *Jumman v. State of Punjab*, AIR 1957 SC 469. The Supreme Court held in this case that on a reference under S. 374, Criminal P. C., the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death.

40. It would follow from the above discussion that the High Court is not bound in law to go by the discretion exercised by the Sessions Judge in the matter of sentence on a reference made to it under S. 374, Criminal P. C., nor there is any sanction of law for the proposition that the sentence of death is the normal punishment for the offence of murder or that the lesser sentence of imprisonment for life is an exception to be imposed only if there are some extenuating circumstances. I had held in my judgment prepared on 24th of April 1969, that I was not convinced that the assault made on Sidappa was pre-meditated or pre-planned and that some well-established features of the prosecution evidence suggested that the assault was made on the spur of moment because of some immediate cause of excitement. The additional pieces of evidence brought out by me in this part of the judgment, in my humble opinion, reinforce those conclusions. Therefore, despite the firm opinion expressed by my brother that a case has been made out for exacting the extreme penalty of death, I am unable to nod assent.

41. In the case of Jan Mohammad, AIR 1968 All 501 (Supra), Srivastava J., followed the practice adopted by Raghubar Dayal J. in *Mool Chand v. State*, AIR 1958 All 200, that in the case of difference of opinion between the Judges in the matter of sentence it is usual not to impose the death penalty unless there are compelling circumstances. In *Pandurang v. State of Hyderabad*, AIR 1955 SC 216, the Supreme Court held that when appellate Judges, who agree on the question of guilt, differ on that of sentence, it is usual not to impose the death penalty except when there are compelling reasons. I am cognizant of the observations made by the Supreme Court in *Babu v. State of Uttar Pradesh*, AIR 1965 SC 1467, that the principle adopted in *Pandurang's* case, AIR 1955 SC 216 (Supra) cannot be raised to the pedestal of a rule for that would leave the sentence to the determination of one Judge to the exclusion of the other. However, in my opinion by this observation the principle adopted in *Pandurang's*

case was not set at naught, and I believe that it still constitutes a relevant consideration whether one or other of the two punishments prescribed for the charge of murder should be imposed. The point to emphasise respecting the facts of *Babu's* case is that there was no difference of opinion between the Judges of the High Court in the matter of sentence and as such the sentence of death was upheld by the Supreme Court on reconsideration of the whole matter. I have not been able to reconcile myself to the view expressed by my learned brother that there are any compelling reasons in the instant case for imposition of the extreme penalty. It was held in the case of *Masalti v. State of Uttar Pradesh*, AIR 1965 SC 202, that in murder appeal or reference the High Court has to deal with the matter carefully and to examine all relevant and material circumstances before unholding the conviction and confirming the sentence of death. All arguments urged by the appellants and all material infirmities pressed before the High Court must be scrupulously examined and considered before the final decision is reached. It is in the light of these wise observations that I have come to the conclusion on consideration of all the material on record and the arguments addressed at the bar that in the present case sentence of imprisonment for life would meet the ends of justice.

42. A Division Bench of the High Court at Lahore held in the case of *Sher Singh v. Emperor*, AIR 1931 Lah 588, that where the origin of what took place before the deceased was assaulted is in obscurity the extreme penalty of the law is not to be imposed. There, as in our case, it was not positively established what had led to the fatal assault made on the deceased. It is correct that Shanta has denied that the deceased had made indecent overtures towards her just before he was assaulted, but such suggestions made during her cross-examination cannot be lightly dismissed in the background provided by the prosecution story that the deceased had an eye on Shanta and Shanta had illicit connections with the accused Krishna. Krishna has undoubtedly been acquitted of the murder charge, but it would not be surprising that an attempt made by Sidappa to molest Shanta on the night of occurrence was frowned upon by Krishna and that fact led to an assault by Vaijanath on Sidappa. One out of three men pursuing two women had either to bow out or to be wiped out to secure the women to the other two men. It can bear repetition to state that if Vaijanath had planned to murder Sidappa he could have achieved his object by making a surprise assault on the latter when he was proceeding along with others on way to Talaulim after it had gone dark, or when he (Sidappa) was

asleep before Shanta was taken ill. Hence I feel convinced that the murderous assault on Sidappa is attributable to some flare up just at the scene of occurrence and not pursuant to a pre conceived plan.

43 At page 806, Twenty first edition of Ratanlal's The Law of Crimes it is mentioned on the authority of two cases of *Mr Shwe Yi v Emperor* ILR 1 Rang 751 (AIR 1924 Rang 179 and *Gorakh v The Crown* (1938) 40 Pun L R 542 that an accused person is entitled to the benefit of a reasonable doubt in the matter of sentence as in the matter of conviction. I think this is a sound proposition in law. Since in the instant case I have grave doubts on the point that Vajjanath had pre planned the murder of Sidappa and since the contention of the defence that murder had been committed on the spur of moment cannot be lightly dismissed, the benefit in the matter of sentence must go to Sidappa.

44 What appears to have weighed with my learned brother in maintaining the sentence of 5 years rigorous imprisonment imposed on Krishna are the facts that it was the latter who had thrown away at odd places certain articles removed from the person of the deceased and the bundle of articles by Vajjanath in murdering Sidappa and that he (Krishna) had thereby caused the disappearance of evidence relating to the offence of murder. This conclusion is deducible from the sentence in the middle of para 32 beginning with the words 'I may perhaps hesitate to convict him'. In para 38 of the judgment I have shown that the statement of Basawa belies the testimony of Shanta that those articles had been thrown away by Krishna. Basawa made the definite averment that the articles had been cast away by Vajjanath. She did not mention the name of Krishna at all in that connection. Hence I see no ground to reconsider my view that Krishna deserves not more than 2 years rigorous imprisonment.

45 ORDER — There being no third Judge to resolve the difference of opinion the sentences imposed by the learned Sessions Judge on the appellants Vajjanath and Krishna are confirmed in accordance with the proviso to S 7 (2) of the Goa Daman and Diu (Judicial Commissioner's Court) Regulation 1963. This order is announced to the prisoners and their counsel.

Appeals dismissed

1970 Cr L J 98 (Vol 76, C N 28)

(GOA, DAMAN & DIU J C S COURT)

V S JETLEY, J C

Cruz Fernandes, Applicant v The State, Respondent

Criminal Revision Appeal No 8 of 1969
D/ 142 1969

(A) Criminal P C (1898), S 397 (1) — Accused sentenced on same day to two separate terms of imprisonment in two separate trials — Offences in both trials similar in nature — Magistrate, in exercise of discretion, directing subsequent sentence to run concurrently with sentence passed in previous case — Exercise of discretion, held, was proper.

Where the accused is sentenced to two separate terms of imprisonment in two separate trials on the same day for offences similar in nature the Magistrate can validly exercise his discretion vested in him under S 397 (1) Criminal P C by directing subsequent sentence to run concurrently with sentence passed in previous trial. (Para 8)

For S 397 (1) to take effect it is not necessary that a person is undergoing the sentence in jail. The principle is that the sentence passed should operate and take effect immediately on conviction and cannot be postponed. Section 397 (1) as understood in its plain sense contemplates a sentence anterior in time which a person is undergoing and also a subsequent sentence on a subsequent conviction. The accused, therefore, must be deemed to have undergone the sentence passed in the previous trial from the moment he was sentenced. (Para 8)

(B) Criminal P C (1898), S 439 — Revision — Order in favour of petitioner — He cannot be said to be aggrieved — Hence, revision does not lie. (Para 4)

Applicant in person

ORDER — This is a revision petition filed by the petitioner from jail praying for the reasons mentioned therein that the order passed by the learned Sessions Judge in appeal against the conviction and sentence imposed on him by the learned Magistrate be set aside as that order is not in conformity with the provisions of law.

2 The material facts are that the petitioner was convicted on his own plea of guilty, under Ss 487 and 481 I P C, in Criminal Case No 170/P/69 to undergo rigorous imprisonment for 8 months and to pay a fine of Rs 100/ and in default of payment to undergo further rigorous imprisonment for 1 month. In this case the learned Magistrate passed

an order that this sentence should run concurrently with the sentence he had imposed in criminal case No. 168/P/68. In case No. 168/P/68, the petitioner was also convicted on his own plea under Ss 457 and 381 of the I P. C. and sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 100/- and, in default of payment of fine, to undergo rigorous imprisonment for 1 month more. This case was disposed of by him same day as case No. 170/P/68. It appears through an error the petitioner filed an appeal in the Court of Sessions contending that the sentence imposed on him in criminal case No. 168/P/68, should be made to run concurrently with the sentence imposed in criminal case No. 170/P/68. This error seemed to have misled the learned Sessions Judge into considering this contention on merits. The order passed by the learned Magistrate in criminal case No. 170/P/68 was clear enough and this error committed could have been avoided. The provisions of S. 397 (1) of the Code of Criminal Procedure can be relied upon in support of the validity of the two sentences imposed by the learned Magistrate. This section to the extent it is material for the present purpose, provides that when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence.

3. The learned Magistrate did direct that the subsequent sentence passed on the same day in criminal case No. 168/P/68 should run concurrently with the sentence passed in criminal case No. 170/P/68. He exercised the discretion vested in him. This discretion is to be judicially exercised. Each case has to be considered on its own facts and circumstances, the decisions in other cases being illustrative. There is no such discretion vested in him under S. 397 (2), and for obvious reasons. This provision operates of its own accord. Section 397 (1) does not say that it is only when a person is already undergoing a sentence of imprisonment in jail that it will have effect, but not otherwise. The principle is that the sentence passed should operate and take effect immediately on conviction and cannot be postponed. This is understandable. The provisions of S. 35 of the said Code are clearly inapplicable to the facts of this case. That section visualizes sentences in cases of conviction of several offences at one trial. There were two trials in the case under consideration and, therefore, S. 397 (1) could properly be invoked, it contemplates more

than one trial. The learned Magistrate exercised his discretion under this provision presumably because the two offences in both cases were of a similar nature. This discretion does not seem to have been improperly exercised. The petitioner must be deemed to have undergone the sentence passed in criminal case No. 168/P/68 from the moment he was sentenced. Section 397 (1) does not say that the sentence of imprisonment already undergone shall be on a different day and not on the same day. It has to be understood in its plain sense. It contemplates a sentence anterior in time which a person is undergoing and also a subsequent sentence on a subsequent conviction.

4. This is a case of one error leading to another. The appeal and the revision did not really lie for the simple reason that the petitioner was not aggrieved. The order was in his favour. A person is aggrieved when an order operates to his prejudice. The relief sought by him before the learned Sessions Judge and in this Court was already granted to him by the learned Magistrate. In this view of the matter, the revision petition is not maintainable and is accordingly rejected. The order of the learned Magistrate which is in favour of the petitioner shall operate and have effect.

Revision dismissed

1970 Cri. L. J. 97 (Vol. 76, C. N. 27)
(GUJARAT HIGH COURT)

N. G. SHELAT, J.

Shantilal Ratnaji, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 788 of 1967, D/- 10.1.1968, against judgment of S. J. Panchmahals at Godhra, D/- 18.8.1967

Penal Code (1860), Ss 96, 100 — "Free fight" — What it is and in what circumstances such defence is not available, stated — (Words and Phrases — 'Free fight')

In order that a party is not entitled to claim any right of private defence, there must be a free fight i.e. if two persons or two factions voluntarily and with determined intention come out to fight and in fact fight and that it is not possible to ascertain with reasonable certainty as to who was the aggressor or as to how that fight started, the rule of law, that neither side is entitled to claim any such benefit arising out of the general exceptions contemplated under S. 96 read with S. 100 of the Penal

(Only portions approved for reporting by High Court are reported here).

CM/GM/B189/69/MBR/D

Code would prevail. It is then that as to who attacked first would become immaterial AIR 1954 S O 695 and AIR 1957 S O 469 Rel on (Para 10)

Cases Referred Chronological Paras

- (1968) AIR 1968 Guj 17 (V 55) 7
Guj L R 886 1968 Cri L J 150
Pravinchandra Ramnarayan Bhatt v
State of Gujarat 7
(1966) AIR 1966 S O 97 (V 58) 1966
Cri L J 82 Harbhajan Singh v
State of Punjab 7
(1961) AIR 1961 Guj 8 (V 48) 1 Guj
L R 157 1961 (1) Cri L J 54 (2)
State v Hira Bhaga 9
(1957) AIR 1957 S O 469 (V 44) 1957
Cri L J 586 Jumman v State of
Punjab 9
(1954) AIR 1954 S O 695 (V 41) 1954
Cri L J 1746 Gajanan v State of
U P 9
(1947) 48 Cri L J 867 (Lab) Abdul
Latif v Crown 9
(1946) AIR 1946 Pat 251 (V 83) ILR
24 Pat 744 Donk Gope v Emperor 9
(1943) AIR 1943 Mad 492 (V 80) 44
Cri L J 685 In re Erasa Subba Reddi 9
(1931) AIR 1931 Lah 513 (V 18) 32
Cri L J 868, Ahmad Sher v Emperor 9
(1915) AIR 1915 Bom 218 (V 2) ILR
40 Bom 100, Emperor v Bechar Anap 9

R M Vin for Appellant H V Bakshi,
Asstt Govt Pleader for Respondent

JUDGMENT — [After considering the evi-
dence, the Judge proceeds—Ed]

* * * *

6 The fact about Francis having died on 18 67 as a result of injuries said to have been caused by the accused with a stick on his head on the previous evening is no longer in dispute. What is however, urged by Mr Vin the learned advocate for the appellant accused is that the act was committed in the exercise of his right of private defence and that way he is not guilty for the offence in question by reason of S 96 of the Indian Penal Code. His contention was that the learned Sessions Judge has not properly considered the extent of proof that any such plea raised by the accused requires and about his having not properly appreciated the evidence of the main eye-witnesses in the case. According to him the evidence of witness Ghanshyamlal Ex is clearly establishes the deceased Francis being the aggressor at the incident and it was he who came out duly armed with a stick and gave the first blow to the accused. According to him when he attempted to give another blow to him he apprehended that he would be either done to death or caused any grievous hurt that he also

gave the stick blow which hurt him on his head as a result of which he died on the next day. In those circumstances he is protected by reason of the provisions contained in S 96 read with S 97 part I and S 100 clis (1) and (2) of the Indian Penal Code. It may be also mentioned at this stage that the prosecution has attempted to prove from the evidence on record that it was a free fight between the parties and if after both of them got themselves armed with a stick and if in that mutual fight one causes injury to the other no right of private defence is available to either side and in those circumstances, the learned Sessions Judge was perfectly right in convicting him for an offence under S 304 Part II of the Indian Penal Code.

7 Before we actually go to the appreciation of evidence of the eye witnesses in the case, it may be essential to keep in mind the extent of proof which can be said to be essential for establishing any such plea of self defence falling under the general exceptions in Chapter IV of the Indian Penal Code for it is the contention of Mr Vin that much though S 105 of the Indian Evidence Act contemplates that the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence is upon the accused and the Court shall presume the absence of such circumstances the decisions have laid down that the same extent of proof as is essential for establishing an offence viz about the proof beyond any reasonable doubt in a criminal trial is not necessary and it would be enough if the accused is able to show the preponderance of probabilities that the act committed is in exercise of right of private defence. It would be enough, and will entitle him to claim the right so as to exonerate him from the act in question. It may not be necessary to refer to the various authorities and it would be enough to refer to the latest decision in the case of Harbhajan Singh v State of Punjab AIR 1966 S O 97. In that case it has been observed as follows:

'There is consensus of judicial opinion in favour of the view that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. This however is the test prescribed while deciding whether the prosecution has discharged its onus or proving the guilt of the accused. It is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where he is called upon to prove that his case falls under an Exception—

law treats the onus as discharged if he succeeds in proving a preponderance of probability. As soon as the preponderance of probability is established the burden shifts to the prosecution which still has to discharge its original onus. Basically, the original onus never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt."

Then their Lordships have said thus :

"Where an accused person pleads an Exception he must justify his plea, but the degree and character of proof which he is expected to furnish in support of the plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case. The onus on the accused may well be compared to the onus on a party in civil proceedings just as in civil proceedings the Court which tries an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold the plea made by the accused proved, if a preponderance of probability is established by the evidence led by him."

While considering, therefore, the plea raised by the accused in the present case we have to keep in mind the extent of proof which is required to establish any such plea raised out of the general exceptions contemplated in Chapter IV of the Indian Penal Code. The same view has been taken by this Court in the case of *Pravinchandra Ramnarayan Bhatt v. The State of Gujarat*, 7 Guj. L R 386 : (AIR 1968 Guj 17).

8. Section 96 of the Indian Penal Code says that nothing is an offence which is done in the exercise of the right of private defence and as provided in clause (1) of Section 97 of the Indian Penal Code, every person has a right to defend his own body, and the body of any other person, against any offence affecting the human body. Then Section 100 relates to as to when the right of private defence of the body extends to causing death. It provides as under :

"100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :—

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault ;

* * * * *

Thus, any such right would extend even to

the voluntary causing of death of any other person provided there is a reasonable apprehension of an assault and the death or grievous hurt is likely to be the consequence of such assault. Then Section 102 of the Indian Penal Code says as to when that right commences. It provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed ; and it continues as long as such apprehension of danger to the body continues. It is essential to note that it is not that any actual assault should have been committed so as to entitle the person assaulted to claim any right of private defence and it is enough if there arises a reasonable apprehension of danger from either an attempt or threat to commit any such offence. As already pointed out hereabove, the accused has got to show that such a right of private defence exists and that it was in exercise of that right he had given a blow with a stick which brought about the death of Francis on the evening of 1-3-67.

9. The contention made out by Mr. Bakshi, the learned Assistant Government Pleader for the State, is that the evidence discloses a free fight between the parties in which both of them voluntarily and with a determination to fight had indulged in fighting after getting themselves armed with sticks and if in that fight any person gets injured, he must face the consequences arising out of that act and he is not entitled to invoke the aid of any such right of private defence. That would require me to consider as to what can be called a 'free fight' and in what circumstances such a defence is not available before we go to the appreciation of the evidence in the case. Mr. Bakshi relied upon various decisions and I would refer to them in brief. In *Emperor v. Bechar Anop*, ILR 40 Bom 105 : (AIR 1915 Bom 213) it was held that the right of private defence cannot be successfully invoked by men who voluntarily, and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them. Then in the case of *Dorik Gope v. Emperor*, AIR 1946 Pat 251, it was held that where two parties come armed ready to fight with each other, the mere fact that one party strikes the other party first does not, by that reason and that reason alone, give a right of private defence of person to the members of the other party. Then I was referred to a case of *Abdul Latif v. Crown*, (1947) 48 Cri L J 367 (Lab), where it was held that where both sides take arms and go into the open to indulge in a fight, no question of the exercise of right

of self defence arises and it is immaterial whether the right is begun by one side or the other. In the case of *In re Erai Subba Reddi* AIR 1943 Mad 492 it was held as under

"Where two parties were spoiling for a fight and each person began to pick up stones and throw at the other party then the accused a party cannot plead that because the other party was also intent on beating them every blow they gave was given in self defence. Where there is a spontaneous fight between two parties each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party his own blows were given in self defence."

In the case of *State v Hira Bhai* 1 Guj L R 157 (AIR 1961 Guj 8) it was held by the Division Bench of this Court that in a mutual determined fight between two rival factions right of private defence is not available to either side. As to what is called a free fight came up for consideration by the Supreme Court in the case of *Gajanan v State of Uttar Pradesh* AIR 1954 S C 695. Their Lordships of the Supreme Court agreed with the observations made by Harrison J as to what can be called a free fight in the case of *Ahmad Sher v Emperor*, AIR 1931 Lah 518. A free fight as held in that case was

'when both sides mean to fight from the start go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders.'

Then we have another decision of the Supreme Court in the case of *Jumman v State of Punjab* AIR 1957 S C 469 where it has been laid down that where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor it will not be correct to assume private defence for both sides. Such a case will be a case of sudden fight and conflict and has to be dealt with under S 300 I P C, Exception 4.

10 It would appear from the aforesaid decisions that in order that a party is not entitled to claim any right of private defence there must be a free fight suggesting clearly that both the sides had a determined intention to fight from the start voluntarily and secondly when there is no reliable and acceptable evidence to show as to how it started and as to who was the aggressor. In other words if two persons or two factions voluntarily and with determined intention come out to fight and in fact fight and that it is not possible to ascertain with reason

able certainty as to who was the aggressor or as to how that fight started, the rule of law laid down in the various decisions that neither side is entitled to claim any such benefit arising out of the general exceptions contemplated under S 96 read with S 100 of the Penal Code would prevail. It is then that as to who attacked first would become immaterial.

We have therefore, to appreciate the evidence keeping these broad principles in mind and finding out in the first instance as to whether it is possible to ascertain as to how the scuffle started and as to who was the aggressor. If that is possible to ascertain having regard to the evidence in the case and if the act of the accused is found to have been committed in the exercise of his right of private defence he cannot be held guilty for any offence whatever.

* * * * *

Appeal allowed

1970 Cr L J 100 (Vol 76, C N 28)
(GUJARAT HIGH COURT)

V R SHAH J

Jesbingbhai Nathabhai and another Appellants v State of Gujarat, Respondent

Criminal Appeals Nos 516 and 581 of 1968
D/ 29 1968 against order of City Magistrate,
9th Court Ahmedabad in Summary Case
No 2095 of 1967

Gujarat Rice (Export Control) and Paddy (Movement Control) Order (1966) (as amended by Notification No GTH-121(A)/ECA 1146-9742 B D/- 13-10-1966), R 4—Scope—'Movement'—Meaning—Paddy transported from village in Ahmedabad district to another place in same district—Paddy passing through Ahmedabad city on the way—No contravention of R 4—(Words and Phrases—Movement)

Where paddy is transported from a village in Ahmedabad district to another place in the same district passing through Ahmedabad city on the way there is no contravention of R 4 of the Gujarat Rice (Export Control) and Paddy (Movement Control) Order (Para 1)

Rule 4 refers to moving paddy from a place outside Ahmedabad city to a place within it. Rule 4 therefore does not refer to "movement simpliciter". It refers to that kind of movement which originates at a particular place and ends at another place. The words used in R 4 hence deal only with transport and nothing else. There cannot be a transport of goods unless the goods are moved from one place to another. Even when goods are moved from

one place to another, there will necessarily be included therein movement not only from the place of origin but also through every intervening place until it reaches the place of its destination where the movement comes to an end. Rule 4 takes notice of only the initial movement from and the final movement to a place and it does not deal with the movement through the intervening places. As such, under R. 4 if the final destination of the goods is not a place in the city, there is no 'movement', even if the goods are for the time being moving over a place in the city. Therefore, when paddy is transported from a village in Ahmedabad district to another place in the same district, passing on the way through Ahmedabad city, there is no movement under R. 4 and thus there is no contravention of R. 4 in such a case. AIR 1988 Bom 43, Foll. (Para 7)

Cases Referred: Chronological Paras
(1988) AIR 1988 Bom 43 (V 25) : 39

Bom L R 1062, Emperor v. Dagadu
Shetiba

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H. M. Choksi and G. A. Pandit, for Appellant No 1, V. K. Desai, for Appellant No. 2 (in Criminal Appeal No. 516 of 1968); R. M. Vin, for Appellant (in Criminal Appeal No. 531 of 1968), Asstt. Govt. Pleader, for Respondent (in both appeals).

JUDGMENT — Criminal Appeal No. 516 of 1968 is brought by the two appellants who were original accused Nos. 1 and 2 respectively in the trial Court in Criminal Case No. 2095 of 1967. The material facts out of which this appeal arises may be shortly stated.

2 On 19th September 1967 at about 4 A.M. complainant Rhemakhhan, who is a Head Constable attached to the Monogram Chowkey was on patrol duty along with three constables including one Somabhai. When they came to a place near cross-roads adjacent to Amritlal Estate, they found one truck bearing G T D 2811 coming from O. K. Karkhana side. The truck was detained and on enquiry it was found that the truck was driven by accused No. 2. Accused No. 1 was found sitting by the side of the driver. We are not concerned with accused Nos. 4 and 5 who have been acquitted. There were 60 bags of paddy weighing more than 4200 kilograms. As neither accused No. 1 nor accused No. 2 had any pass or permit to bring the paddy bags within the limits of the city of Ahmedabad, the police seized that truck and the paddy bags therein and there. after a case was filed against the two appellants for having contravened the provisions of R. 4 of the Gujarat Rice (Export Control) and Paddy (Movement Control) Order, 1966 (hereinafter referred to as 'the Order'), as amended by the Notification No. GTH.121(A)/ECA-1146-9742-B dated October 13, 1966.

The contravention of that R. 4 in the above Order is made punishable under S. 7 of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act'), which provides not only for punishment of imprisonment and fine to the offender, but also for the penalty of the confiscation of the material in respect of which the offence is committed and of the receptacles or the conveyance in which the said material is carried. The appellant No. 1 admitted that he was in the truck, but his case was that he wanted to go to Kapadvanj and as this truck was going to Lambha he was permitted by the owner of the said truck to sit in the said truck. Appellant No. 2 stated that he was driving the truck on hire at the instance of Dasrathbhai and that he had committed no offence.

3 The learned trial Magistrate convicted each of the two appellants for the contravention of Rule 4 of the Order and he sentenced appellant No. 1 to six months' rigorous imprisonment and to pay a fine of Rs. 1,000/-, in default to suffer one month's rigorous imprisonment. He also sentenced appellant No. 2 to two months' rigorous imprisonment and to pay a fine of Rs. 500/- in default one month's rigorous imprisonment. He also ordered confiscation of the paddy as well as the truck in which the paddy was being carried. The original accused Nos. 1 and 2 have filed Criminal Appeal No. 516 of 1968 against the order of their conviction and sentence; while Criminal Appeal No. 531 of 1968 is filed by original accused No. 5 and one minor Satishbhai Jivabhai who claim to be the manager and owner respectively of the said truck, and their appeal is directed against the order of confiscation of the vehicle to the Government.

4. The admitted facts are that this truck containing bags of paddy was proceeding from the village Kuha, a place in Ahmedabad District, to Lambha, a place also in the said District. There is also no dispute that the truck was detained at the cross-roads near Amritlal Estate. This Amritlal Estate and the cross-roads where the vehicle was detained are, as stated by the prosecution witnesses, within the city limits of Ahmedabad. There is no dispute on this point also. There was admittedly no pass or permit either with accused No. 1 or accused No. 2 to transport these bags of paddy to a place in Ahmedabad. The only question that arises for decision in this appeal is whether on these facts the appellants can be said to have contravened the provisions of R. 4 of the Order. Rule 4, as amended subsequently, in so far as material for the purpose of this appeal, reads as follows:

"No person shall move, or attempt to move, or abet the movement of paddy from

one place in the Ahmedabad District excluding Ahmedabad City to any place in the Ahmedabad City whether by road, rail, water or air, except under and in accordance with a permit issued by the State Government or by the Director of Civil Supplies Gujarat State or by the Director of Food Gujarat State or by any officer authorised by the State Government in this behalf"

Rule 4 thereafter proceeds to mention certain provisos but I am not concerned with any of these provisos in this appeal. The charge mentions that the bags of paddy were "transported" from village Kuba to Ahmedabad City. The evidence of the complainant as well as witness Somabhai makes it quite clear that the truck was in actual motion when it was stopped by the complainant Rhematkhan at the cross roads near Amritlal Estate. The evidence of Somabhai makes it also clear that the truck was bound for Lambha. There is no other evidence on the record contrary to the facts stated by the witnesses as afore said. The evidence, therefore, makes it crystal clear that the truck was transporting paddy bags from Kuba to Lambha and while doing so the truck was actually moving through a portion of the City of Ahmedabad when it was stopped by the complainant near the cross roads at Amritlal Estate.

5 I will first deal with the charge actually made against the appellants. The charge is that the appellants were transporting paddy from Kuba to Ahmedabad City. So, the first question is whether in view of the facts established in this case, it can be said that the appellants transported paddy from Kuba to Ahmedabad City. This point is concluded by a decision of the Bombay High Court in the case of *Emperor v Dagadu Shetiba* 39 Bom L R 1062 AIR 1938 Bom 48. The Bombay High Court was then considering the provisions relating to the transportation of liquor under the Bombay Abkari Act (Bom V of 1878). The case dealt with the alleged transport of a certain quantity of liquor from Jogeshwari to Poona and in doing so the accused travelled by rail and the railway passed through a portion of Bombay City and the accused had to change trains at Dadar in Bombay. The accused was, therefore, charged for having transported liquor from Jogeshwari to Bombay and thus he committed an offence of importing liquor from a lower to a higher still head duty area. The question that arose for consideration of the Court in that case was whether it can be said that the accused in those circumstances committed an act of 'transporting' liquor from Jogeshwari to Bombay. Dealing with this question the learned Chief Justice speaking for the Division Bench observed as follows:

'When the Bombay Abkari Act, 1878 speaks of transport from one place to another it means transport from the starting point to the ultimate destination. It is a question of fact for the Court to determine what the destination may be. If a man comes to a place and stays there for an appreciable time—and what amounts to an appreciable time—would have to be considered in relation to the purposes of the Act. The Court might hold that that place was the destination although it appeared that the journey was to be resumed subsequently. But merely passing through a place in the course of a journey does not amount to transporting to that place.'

6 In so far, therefore, as the charge speaks of transporting the bags of paddy from Kuba to Ahmedabad City the charge obviously fails, as the prosecution evidence itself shows that the transport was from Kuba to Lambha and that the truck was merely passing through the Ahmedabad City on its way to Lambha.

7 Mr Thakar, however, pointed out that R 4 of the order does not speak of 'transport' and emphasised that the words used in R 4 refer to 'moving' paddy from one place to another and he says that whenever there is a movement of paddy from a place outside Ahmedabad City to a place inside Ahmedabad City, the contravention of R 4 is committed, if there is no pass or permit. Mr Thakar stated that the ultimate destination of that movement may be a place outside Ahmedabad City, but that would not make any difference to the interpretation of the words used in R 4. No authority was shown to me in support of this argument by Mr Thakar. It is no doubt true that the words used in the Bombay Abkari Act and the words used in R 4 of the Order are not same. The word 'transport' is used in the Bombay Abkari Act while the word 'move' is used in R 4 of the Order. In the Bombay Abkari Act the word 'transport' is defined as meaning 'to move from one place to another place'. The word 'move' is not defined in the order but R 4 refers to moving paddy from a place outside Ahmedabad City to a place within it. Rule 4, therefore, does not refer to movement simpliciter; it refers to that kind of movement which originates at a particular place and ends at another place. What is to be looked at is (i) movement from a place and (ii) movement to a place. The words used in R 4 therefore deal only with transport and nothing else. There cannot be a transport of goods unless the goods are moved from one place to another, and if goods are moved from one place to another, then there is certainly a transport of the goods. Even if the paddy bags were to be moved from one place to another there will

necessarily be included therein movement of the paddy not only from the place of origin but also movement of it through every intervening place until it reaches the final place of destination where the movement comes to an end. Rule 4 takes notice of only the initial movement from a place and the final movement to a place; and it does not deal with the movement through intervening places. In my opinion, therefore, on the facts which are not disputed and which are established by the prosecution evidence itself, there was no movement of paddy from Kuha to a place in Ahmedabad City. The movement which is restricted by R. 4 of the Order is that movement which commences at a particular point outside Ahmedabad City and which comes to an end at some place in Ahmedabad City. In other words, if the final destination of the goods which are moved is in Ahmedabad City, then there is a movement to a place in the Ahmedabad City. If the final destination of the goods which are in movement through Ahmedabad City is not a place within Ahmedabad City, then there is no movement to any place in Ahmedabad City, even if the goods were for the time being moving over a place in Ahmedabad City. In my opinion, therefore, on the facts found in this case, no offence of contravening R. 4 is committed. It is not, therefore, necessary to go into the other questions raised on behalf of appellant No. 1, namely, that he was merely travelling in that truck with the permission of the owner of that truck, or that he was not the owner of the goods.

8. Since no offence is proved to have been committed by any of the appellants, it follows that no order of forfeiture of the vehicle or the bags of paddy can be passed under S. 7 of the Act.

9. In the result, therefore, both the appeals are allowed. The order of conviction and sentence passed against the appellants Nos. 1 and 2 in Criminal Appeal No. 516 of 1968 is set aside and they are acquitted of the offence with which they are charged. Fine, if paid, should be refunded to them. Both the appellants are on bail. Their bail bonds are cancelled. The order of confiscation of the paddy bags and the truck is also set aside. The bags of paddy which are with the Government should be returned to the witness Nandkumar Chandulal Shah of Naroda to whom they belong. The truck has been already restored to the appellants in Appeal No. 581 of 1968. A bond has been taken in respect of that truck. That bond stands cancelled.

Appeals allowed.

1970 Cri. L. J. 103 (Vol. 76, C. N. 29)

(JAMMU & KASHMIR HIGH COURT)

J. N. BHAT, J.

Chidya Khan and others, Petitioners v. The State, Opposite Party.

Criminal Appns. Nos. 6, 7, 8, 10, 11, 18, 16, 17, 18, 19 to 28, 9, 13, 14, 17 and 31 of 1968, D/- 20.6.1969.

(A) Criminal P. C. (1898), S. 491—Petitions under — Points raised at time of argument not specifically raised in petitions — Petitions sent by detainees from jail where they had no legal assistance available to them — Points pure point of law and on interpretation of provisions of J. & K. Preventive Detention Act — Points allowed to be raised. (Para 1)

(B) Public Safety — J. & K. Preventive Detention Act (13 of 1964), S. 3 (1) (a) (i) — Security of State or maintenance of public order—These two bars for detention are exclusive — But they may in certain cases overlap each other—Hence they can be clubbed together in detaining one and the same individual — Activities of a particular individual may in addition to causing disturbance to public peace endanger security of State also—He can be detained for both purposes simultaneously — Maintenance of public order is a minor charge as compared with security of State. (Paras 3, 4)

(C) Public Safety — J. & K. Preventive Detention Act (13 of 1964), S. 13 (2)—Modify meaning—(Words and Phrases—“Modify”).

The word “modify” in sub-section (2) of Section 13 of the Act does not at all indicate that it is used in the sense of reduction of the period, modification may be by reducing the term, it may be by changing the place of detention or by providing further amenities or curtailing them. There is no technical definition of the word modify in the Act. Case law discussed. (Para 5)

(D) Public Safety — J. & K. Preventive Detention Act (13 of 1964), Ss. 14, 3 (2)—Government can modify or revoke an order passed by itself as also an order passed by officers mentioned in S. 3 (2) —S. 14 gives a wide power to Government namely notwithstanding that the order has been made by any officer mentioned in sub-s. (2) of S. 3 — Notwithstanding clearly means ‘even if and not’ only ‘if.’ (Para 6)

(E) Public Safety— J. & K. Preventive Detention Act (13 of 1964), Ss. 14, 13

GM/HM/D 27/69/LGO/B

(2) — 'Government — Power vested in Government can be exercised by Chief Minister—Order of an individual Minister concerning his portfolio will be deemed to be order of Government—Chief Minister being in charge of Home portfolio represents Government so far as affairs of law and order are concerned and his decision on any such matter will be considered to be decision of Government — Further, under Rules of Business orders of Government are to be authenticated by secretary concerned — Hence affidavit of Home Secretary is sufficient on behalf of Government AIR 1950 E P 162, Rel on (Para 7)

(F) Public Safety — J & K Preventive Detention Act (13 of 1964), Ss 8 proviso and 13A — Proviso interpretation of — Grounds of detention to be supplied to a person detained in every other case except in case of detention with a view to prevent him from acting in any manner prejudicial to security of state — (Civil P C (1908), Pre — Interpretation of Statutes—Proviso)

The general principle underlying the interpretation of a proviso is to take out a particular class of cases from the general language of the main enactment and its effect is confined to those very cases. A proviso which is in fact and in substance a proviso can only operate to deal with a case which but for it would have fallen within the ambit of the section to which the proviso is a proviso. Case law discredited (Para 8)

All that the proviso to S 8 means is that grounds have to be supplied to a person detained in every other case except where he is detained with a view to preventing him from acting in any manner prejudicial to the security of the State. Therefore as far as the detention of the persons with a view to preventing them from acting in any manner prejudicial to the security of the State is concerned the Government is perfectly at liberty to withhold the grounds from them in the public interest. But the detaining authority was bound to disclose or communicate the grounds of detention to the detainees under the first part of Section 8 of the Act so far as maintenance of public order is concerned. Failure to communicate the grounds to the detainee when he is in law entitled to be told about the grounds renders the detention illegal. The facts may not be and need not be mentioned but the ground has to be. The grounds are the basis of the allegation and the facts are the evidence

upon which the allegations are based. Case law discredited (Para 9)

(G) Public Safety—J & K Preventive Detention Act (13 of 1964), Ss 3 (1) (a) (i) and 8 — Detention — Satisfaction has to be of detaining authority — Court cannot substitute its own opinion, so far as satisfaction is concerned, for opinion of detaining authority unless it is proved that order of detention is liable to be set aside on other ground AIR 1951 Assam 14 & A I R 1950 Mad 162, Rel on (Para 9)

(H) Public Safety — J & K Preventive Detention Act (13 of 1964), Ss 3 (1) (a) (i) and 8 — S 3 (1) (a) (i) interpretation of — Detention for preventing detainee from acting in any manner prejudicial to security of State and also for maintenance of public order — Failure to supply grounds of detention — Whole order of detention is illegal

The legislature has used two different and definite expressions which are separated by the word 'or' in Section 8 (1) (a) (i) namely preventing a person from acting in any manner prejudicial to the security of the State or the maintenance of public order. No superfluity is to be attributed to the legislature. The legislature is presumed to have laid down what it intended and each word or expression or provision in an enactment has to be given due weight and its right place (Para 10)

The liberty of a citizen is one of the fundamental rights enshrined and guaranteed under the Constitution of India. Therefore any attempt on the part of the Executive to in any way curtail or interfere with the liberty of a citizen should be put down with a heavy hand. (Para 11)

Where the persons were detained for preventing them from acting in any manner prejudicial to the security of State and also for the maintenance of public order but the grounds of detention were not supplied to them, the whole order held was illegal (Para 11)

The detainees have been deprived of making a representation as no grounds have been communicated to them and therefore it cannot be ruled out that the detention is unconstitutional and uncalled for. They might have established the detaining authority that there was no ground so far as the maintenance of public order was concerned. In these circumstances even if the order of detention preventing them from acting in any manner prejudicial to the security of the State is concerned, is unconstitutional the reason for their detention without giving them the ground for such detention is unjustified and illegal so far their detention

for reasons of public order was concerned. The latter defect affects the former detention order also which are akin and allied to each other. (Para 11)

(I) Public Safety — J. & K. Preventive Detention Act (13 of 1964), Ss. 3 (1) (a) (i) and 8—Detention for security of State and also for maintenance of public order — Detention orders signed by Home Secretary — Orders served on detenus expressly saying that the Home Secretary considers it against public interest to disclose grounds of detention — Orders held were illegal and the detenus could not be detained any longer on ground of such orders — Home Secretary has no locus standi in himself to pass or consider any order of detention. (Para 12)

Cases Referred: Chronological Paras

- (1968) W. P. No. 111 of 1968 D/ 10.
10.1968 (SO), Sampat Prakash v. State of Jammu & Kashmir 5
(1961) AIR 1961 S C 1519 (V 48) : 1962-1 S O R 688, Puralal Lakhanpal v. President of India 5
(1956) AIR 1956 S C 197 (V 43) : 1955-2 S C R 1101: 1956 Cri L J 421 (2), P. L. Lakhanpal v. State of Jammu & Kashmir 5
(1951) AIR 1951 Assam 14 (V 38) : 52 Cri L J 68, Kehu Ram v. Govt. of Assam 8
(1951) AIR 1951 Cal 194 (V 38) : 51 Cri L J 1569, Safaiulla Khan v. Chief Secy. to the Govt. of West Bengal 9
(1951) AIR 1951 Simla 157 (V 38) : 52 Cri L J 17, Bakhtawar Singh v. The State 9
(1950) AIR 1950 Bom 45 (V 37) : 51 Bom L R 718, Broach Co-operative Bank Ltd., Broach v. Commr. of Income Tax, Bombay Mofussil 8
(1950) AIR 1950 E P 162 (V 37) : 51 Cri L J 599, Gyanendra Kumar v. The Crown 7
(1950) AIR 1950 Mad 162 (V 37) : 51 Cri L J 525, M. R. S. Mani v. Dist. Magistrate, Mathurai 8
(1949) AIR 1949 All 148 (V 36) : 50 Cri L J 214 (FB), Dargadas v. Rex 9
(1948) AIR 1948 Bom 334 (V 35) : 49 Cri L J 465 (FB), In re, Rajdhar Kulu Patil 9
(1944) AIR 1944 P C 71 (V 31) : 71 Ind App 113, M. and S. M. Rly. Co. Ltd. v. Bezawada Municipality 8
(1933) AIR 1933 Oudh 491 (V 20) : 10 Oudh W N 1041, Mt. Raj Rani v. Dwarka Nath 8
(1919) AIR 1919 P C 31 (V 6) : ILR

48 Mad 146. 2) Cri L J 593, Annie Besant v. A. G. of Madras 8
(1909) 1909 A C 57 : 78 L J K B 124, Local Govt. Board v. South Stoneham Union 8

M. A. Beg, for Petitioners; Advocate General for the State.

ORDER — I have heard the learned counsel for the parties at length. Mr. Beg's, the learned counsel appearing for the 19 petitioners' argument is manifold and each aspect of his argument will be considered separately. Mr. Raina's objection was that Mr. Beg should not be permitted to argue all the points that he has raised because these points were not specifically raised in the petitions. There is much weight in what Mr. Raina says; but it has to be kept in view that the petitions were sent by the detenus from Jail where they had no legal assistance available to them. Moreover as the petitions have been argued on pure points of law and on the interpretation of the different provisions of the Jammu and Kashmir Preventive Detention Act, 1964 (hereinafter referred to as 'the Act') I think I should not deny the detenus the privilege of considering all the arguments raised by their learned counsel. Therefore, I heard Mr. Beg, the learned counsel for the petitioners, at length.

2. Another preliminary objection raised by Mr. Raina, was that under the Constitution of India Art. 35-C an exception has been made in the case of State of Jammu and Kashmir. This Art. 35.C reads as under :

"No law with respect to preventive detention made by Legislature of the State of Jammu and Kashmir whether before or after the commencement of the Constitution (Application to Jammu & Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said Order, except as respects things done or omitted to be done before the expiration thereof."

This period of 5 years has extended from time to time and the Act is in force now upto 1974. But this point does not arise in this case because Mr. Beg has not challenged the vires of the Act in his argument before me but he has assumed the Act as constitutional and has attacked the orders of detention under the very provisions of the Act itself.

3. Mr. Beg started his argument with the observation that under S. 8 of the Act, there are different circumstances under which a person can be detained. This section is divided into two main sections (a) and (b). Under (a) (i) the grounds of detention can be security

of the State or the maintenance of public order and under (b) (ii) the maintenance of supplies and services essential to the community. It is common ground that neither (a) (ii) nor subsection (b) of section 8 applies to the facts of these cases. Mr Beg's argument is that the grounds of security of State and the maintenance of public order cannot be clubbed together in the case of a single individual. The scope of the application of these two provisions namely (i) security of the State and (ii) the maintenance of public order is entirely different and any single individual cannot be detained for both these grounds simultaneously. He emphasised the point that when detention is ordered on the ground of security of the State no grounds need be given if the detaining authority so thinks fit. In the case of maintenance of public order the grounds for detention have to be supplied. Therefore according to him the detention order of those persons in whose cases both grounds have been simultaneously given are liable to be set aside on this ground alone.

The argument is no doubt original but in my opinion has not much force behind it. I agree with the learned counsel that these two grounds namely the detention for the purpose of security of the state and for maintenance of public order are different in their meaning and connotation. The word 'or' has not to be read as 'and'. He has argued that when the words of a statute are clear no artificial or strained construction should be permitted. The word 'or' should not be interpreted as 'and'. It is no doubt true that the cardinal rule of interpretation of statutes is that when the language of the statute is clear no attempt should be made to take recourse to external aids, and the law should be applied as it is expressed by the legislature because the legislature is presumed to be rational and there is always a presumption against redundancy. But all this is not necessary in this case because in spite of the argument of the learned Advocate General I agree that the legislature envisaged two different categories under S 8 (a) and they have separate scope for application. The security of the State is a graver reason than maintenance of public order or I should say maintenance of public order is a minor charge as compared with the security of the State.

A person may behave in such a manner as to deliver speeches or indulge in other activities in inciting people to violence or preaching communalism which may result in disturbance of public order. In this case if somebody is detained his detention can be justified on the score of maintenance of public order. If on the other hand the activities of such a man assume such proportions as for instance joining with

an enemy or acting in concert with the designs of an enemy the field of his activities becoming so wide as to endanger the security or the sovereignty of the State his acts can be deemed as a menace to the security of the State. I have given only a simple illustration but cases can be conceived where disturbance to the public order can be the result of a variety of acts committed by an individual. Similarly there can be many actions on the part of an individual which affect the security of the State for which his detention may become necessary under the Act. Therefore I agree with the learned counsel for the detenus that these two bars for detention are exclusive but they may in certain cases overlap each other because the activities of a particular individual may in addition to causing disturbance to the public peace endanger the security of the State also.

4 I am not impressed with the argument of Mr Beg that these two grounds maintenance of public order and security of the State cannot be clubbed together as he has put it in detaining one and the same individual it must be either one or the other. Cases can be conceived in which the activities of a person fall under the category of breach of peace as well as endanger the security of the State. In such a case a person can be detained for both such reasons. This would be exactly when a person is charged of different offences, he can be tried for different offences during the same trial subject to the limitations regarding joinder of charges. Similarly if it is thought necessary to detain a person both for preventing him from acting in any manner prejudicial to the security of the State and the maintenance of public order he can be detained for both these purposes simultaneously.

5 Mr Beg has made three categories of the petitioners. In category (a) he has placed the following eight petitioners viz. Gula Mir Gulab Khan, Chidya Khan, Motwali, Nakhai Saif u Din, Ghulam Nabi, Mohammad Yaqub and Mohammad Maqbool. In category (b) he has included the following eleven persons namely Ghulam Nabi Khan, Ghulam Mohammad Koul, Ghulam Mohd. Noor u Din, Ghulam u Saqlain, Altaf Ali, Ghulam Jeelan, Hakim Mohammad Yasuf, Ghulam Mohammad Yattoo, Masood Ahmad and Nazir Ahmed and in the last category (c) comprises four persons Mohammad Maqbool, Ghulam Khan, Saif u Din and Chidya Khan (these four persons also figure in Category (a)). The arguments that apply to category (a) do to some extent apply to the detenus in categories (b) and (c). The main arguments regarding petitioners of category (a) addressed by Mr Beg are that the detention orders show that detention of these detenus

has been extended from time to time. For instance let us take the case of Gulla Mir. Gulla Mir was first detained under the Defence of India Rules. By Government Order No. ISD-145 of 1968 dated 5-1-1968 he was for the first time detained under the Act while he was in detention. He was asked to make his representation by means of a further order No. ISD-250 of 1968 dated 12-1-1968 and his case was considered by the Board. The Board tendered its advice by means of its D. O. No. PDA-121/68 dated 3-6-1968. This detention order was confirmed by the Government by means of order No. ISD-585 of 1968 dated 26-6-1968.

A further Government Order No. ISD-76 of 1969 dated 23-4-1969 was communicated to this detenu wherein the Government considered it necessary to continue his detention beyond 29-4-1969, the date on which his detention would come to an end and they modified their earlier order dated 5-1-1968 under sub-s. (1) of S. 14 of the Act and ordered his detention upto the expiry of the Act or a maximum period of two years from the date of his detention, whichever would be earlier. Mr. Beg argued that the Government had no such power. According to him the word 'modify' indicated or connoted reduction and not extension. For this he drew support from the language of S. 13 (2) of the Act itself. This sub-section reads as under:

"Nothing contained in this section shall affect the power of the Government to revoke or modify the detention order at any earlier time."

He argued that when a word had been used in a particular Act, the same meaning should be given to that word throughout that Act and it would not be permissible to interpret or understand the word in different senses in the different sections of the same Act.

The word 'modify' clearly in sub-s. (2) of S. 13 of the Act indicated that the modification would be towards reduction of the period and therefore the order of the Government in interpreting the word 'modify' by extending the term of the detention of the detenu was illegal.

This argument in my opinion has no force. The word 'modify' according to the dictionary meaning out of the many meanings assigned to it, means 'to make a basic or important change in to change the form or properties' of for a definite purpose'. Furthermore this word has been the subject of so much comment in different rulings of the Supreme Court pertaining to this very State when the provisions of Art. 370 of the Constitution of India were interpreted. It was first considered in *P. L. Lakhanpal v. State of Jammu and Kashmir*,

(1955) 2 S C R 1101 : (AIR 1956 SC 197) and then again in *Puranlal Lakhanpal v. President of India*, (1962) 1 S C R 688 at p. 692 : (AIR 1961 SC 1519 at p. 1621) and lastly in *Writ Petn. No. 111 of 1968, Sampat Prakash v. State of Jammu and Kashmir*, D/- 10-10-1968 (SC) wherein it has been held that :

"... We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that State. If, therefore, the power is given to the President to efface in effect any provision of the Constitution altogether in its application to the State of Jammu and Kashmir, it seems that when he is also given the power to make modifications that power should be considered in its widest possible amplitude. If he could efface a particular provision of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir. It seems to us that when the Constitution used the word "modification" in Art. 370 (1), the intention was that the President would have the power to amend the provisions of the Constitution if he so thought fit in their application to the State of Jammu and Kashmir."

It further held that :

"Thus, in law, the word "modify" may just mean 'vary' i.e. amend, and when Art. 370 (1) says that the President may apply the provisions of the Constitution to the State of Jammu and Kashmir with such modifications as he may by order specify, it means that he may vary (i.e. amend) the provisions of the Constitution in its application to the State of Jammu and Kashmir. We are, therefore, of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Art. 370 (1) and in that sense it includes an amendment. There is no reason to limit the word "modification" as used in Art. 370 (1) only to such modification as do not make any "radical transformation."

Further even under the Constitution as is clear from the above remarks the word "modify" has to be given the amplest connotation including radical transformation. The word "modify" in sub-s. (2) of S. 13 of the Act does not at all indicate that it is used in the sense of reduction of the period, modification may be by reducing the term, it may be changing the place of detention or by providing further amenities or curtailing them. There is no technical definition of the word "modify" in the Act. This argument cannot at all help the petitioners.

6 The second argument of Mr Beg was based on S 14 of the Act. He said that the Government could only revoke or modify the order passed under subs (2) of S 8 of the Act. Subs (2) of S 8 empowers the following officers to pass the order of detention:

(a) Divisional Commissioners

(b) District Magistrates

Therefore according to Mr Beg the power of Government would be limited to revoke or modify the orders passed by these two officers only and not passed by the Government itself. In the first place it would look strange that the Government could revoke or modify an order passed by some subordinate officer but would be powerless to do the same when the order was passed by it. The Government is definitely a superior authority to the officers mentioned therein. Apart from this implied fallacy in the argument of Mr Beg the language of S 14 is very clear. It says leaving aside the portion dealing with s 21 of the General Clauses Act that

a detention order may at any time be revoked or modified by the Government notwithstanding that the order has been made by any officer mentioned in subs (2) of S 8. It gives a wider power to the Government namely notwithstanding that the order has been made by any officer mentioned in subs (2) of S 8. The plain language suggests that the Government has power to modify or revoke an order passed by itself as also an order passed by the officers mentioned in subs (2) of S 8. Notwithstanding clearly means even if and not 'only if'. This is a very clear provision and the argument of Mr Beg has no force in it.

7 Allied with this part of the argument Mr Beg argued that the power was vested in the Government and not in the Chief Minister because the Chief Minister did not constitute the Government. In this behalf he referred to the Webster's dictionary meaning of the word Government which is

the body of persons that constitutes the governing authority of a particular unit or organization as (a) the official collectively comprising the governing body of a political unit and constituting the organization as an agency (a world in which Government are highly and effectively resolved to work together.—F D Roosevelt)

The word Government has not been defined in the Constitution of India or in our Constitution. Ours is a parliamentary democracy. The responsibility of the ministers is joint and several. They function collectively as well as individually. Any order of an individual minister concerning his portfolio will be deemed

to be an order of the Government. The same principle is laid in the Rules of Business also. The Chief Minister is in charge of the Home portfolio. He represents the Government so far as the affairs of law and order are concerned and his decision on any such matter will be considered to be a decision of the Government. He has applied his mind and then passed the relevant order. Under the Rules of Business further the orders of the Government are to be authenticated by the Secretary concerned of the particular department. In this case the affidavit of the Home Secretary is sufficient on behalf of the Government and he is the proper person to swear an affidavit in this behalf. Reference may be made in this behalf to AIR 1950 E P 162. Therefore even this argument of Mr Beg fails. As such the petitions of the petitioners of Category (a) fail and are liable to be dismissed but the cases of four petitioners viz Mohd Majbool Ghulam Khan Saifuddin and Chidya Khan fall in Category (c) also. The cases of their detention will be considered under that category also no matter that they are not entitled to be released on the arguments advanced for them as being contained in category (a).

8 The cases of eleven detainees of Category (b) were argued on the following basis namely that these people were detained both with a view to preventing them from acting in any manner prejudicial to the security of the State and the maintenance of the public order. Different orders in the case of different detainees under this category were passed. Subsequent to these initial orders of detention they were further informed by different orders to the effect that in pursuance of S 8 read with S 18A of the Act the said detainees are informed that it is against the public interest to disclose the facts or to communicate to them the grounds on which their detention orders have been made. Under S 8 of the Act the grounds of detention have to be disclosed to the person who is affected by the order and the maximum time provided for communicating the grounds of detention to such a person is ten days from the date of detention. He has to be afforded the earliest opportunity of making representation to the Government against the order but there is a proviso added to this section which reads as under

Provided that nothing in this sub-section shall apply to the case of any person detained with a view to preventing him from acting in any manner prejudicial to the security of the State if the authority making the order by the same or a subsequent order directs that the person detained may be informed that it would be against public interest to communicate to him the grounds on which the detention order has been made.

Mr. Beg laid much emphasis on the scope of a proviso. He referred to page 45 of Bindra's Interpretation of Statutes. The function of a proviso has been discussed in a number of authorities and this Court also has had occasion to discuss the scope of a proviso in many cases but the general principle underlying the interpretation of a proviso is to take out a particular class of cases from the general language of the main enactment and its effect is confined to those very cases. See AIR 1944 P C 71, Halsbury Laws of England 2nd Ed., Vol 91, para 605 at page 484, AIR 1950 Bom 45. As was said in *Annie Besant v. A. G. of Madras*, I L R 43 Mad 146 : (AIR 1919 P C 31) "there is no magic in the words of a proviso." Its only effect is to place a limitation on the principal enactment. See AIR 1938 Oudh 491. Lord Macnaughten in *Local Government Board v. South Stoneham Union*, 1909 A C 57, remarked that "I think the proviso is a qualification on the enactment which is expressed in terms too general to be quite accurate." A proviso which is in fact and in substance a proviso, can only operate to deal with a case which but for it would have fallen within the ambit of the section to which the proviso is a proviso.

I do not think that this academic discussion about the scope of the proviso should detain us. All that the proviso to S. 8 of the Act means is that if a person is detained with a view to preventing him from acting in any manner prejudicial to the security of the State the detaining authority may refuse to disclose the grounds of the detention if it would be in his opinion against the public interest to communicate to him the grounds of his detention. So in other words it means that grounds have to be supplied to a person detained in every other case except where he is detained with a view to preventing him from acting in any manner prejudicial to the security of the State. Applying this principle to the concrete facts of the cases of the petitioners contained in category (b), it is understandable that the detaining authority in these cases, the Government, did not think it fit in the public interest to communicate to the detenus the grounds of their detention so far as the security of the State was concerned. This the detaining authority had the power to do and in spite of the forceful argument of Mr. Beg I think this is the only simple, plausible and rational interpretation of this proviso. Therefore so far as the detention of these persons with a view to preventing them from acting in any manner prejudicial to the security of the State is concerned, the Government is perfectly at liberty to withhold the grounds from them in the public interest. It is very well settled that the satisfaction has to be of the detaining autho-

rity and the Court, unless it is proved that the order of detention is liable to be set aside on some other ground, cannot substitute its own opinion, so far as the satisfaction is concerned, for the opinion of the detaining authority. Reference may be made to AIR 1951 Assam 14 and AIR 1950 Mad 162.

9. But the detaining authority was bound to disclose or communicate the grounds of detention to the detenus under the first part of S. 8 of the Act, so far as maintenance of public order is concerned. That has admittedly not been done in this case or in other words no grounds have been communicated to the detenus for detaining them for causing disturbance to the public order. The learned counsel for the State, Mr. Raina, relied on sub.s. (2) of S. 8 of the Act which is in the following words.

"Nothing in sub.s. (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose." The learned Advocate General argued that the Government was well within its rights in not disclosing the facts which in these cases meant the grounds for their detention to the detenus as in the opinion of the detaining authority such a disclosure was against the public interest. But I am afraid, this is an argument without any substance. In the first place this sub-section lays down that the detaining authority can refuse to disclose the facts if in the public interest it is necessary to do so. But facts are entirely different from grounds.

In my opinion this is exactly against the case of a charge. If a charge is framed against an accused person, the basic matter of his having committed an offence is disclosed in the charge. All those facts which have led the Magistrate or the Judge to that conclusion need not be and are not mentioned in the charge. Similarly there may be hundred and one facts or acts committed by an individual which collectively may afford a ground for his detention. The facts may not be and need not be mentioned but the ground has to be. The grounds are the basis of the allegation and the facts are the evidence upon which the allegations are based. In this view I am supported by a Division Bench authority of the Calcutta High Court reported as AIR 1951 Cal 194. Therefore the detention of these detenus of category (b) is invalid so far as the second reason of their detention namely maintenance of public order is concerned. Authorities need not be cited for the proposition of law that failure to communicate the grounds to the detenu, when he is in law entitled to be told about the grounds, renders the detention illegal. Reference may be made

to AIR 1949 All 148 (FB) and AIR 1948 Bom 384 (FB). Even vague grounds have been held to be sufficient to invalidate the detention. See AIR 1951 Simla 157.

10 The learned Advocate General in the first place argued that the reason of maintenance of public order is included in the reason of detention as envisaged in the security of the State. This argument has not at all impressed me as I have pointed out earlier. Besides the Legislature has used two different and definite expressions which are separated by the word or in S. 8 (1) (a) (i) namely preventing a person from acting in any manner prejudicial to the security of the State or the maintenance of public order. Mr Beg has rightly argued that no superfluity is to be attributed to the Legislature; the Legislature is presumed to have laid down what it intended and each word or expression or provision in an enactment has to be given due weight and its right place.

11 An attempt was made by Mr Raina to advance an alternative argument and that was if the detention is good without disclosure of grounds so far as the security of the State is concerned, no benefit can accrue to the detainees even if their detention on the ground of the maintenance of public order for want of supply of grounds is bad because the detenus can be detained on the first cause alone; the second ground can be safely ignored. But I am not impressed with this argument because in the first place the detenus have been denied the right given to them under the law to know the grounds of their detention so far as their detention for maintenance of public order is concerned. The liberty of a citizen has been encroached upon and he is put behind the bars without a fair trial without an opportunity of allowing him to be defended in a proper trial. *Mr Beg has rightly argued that the liberty of a citizen is one of the fundamental rights enshrined and guaranteed under the Constitution of India. Therefore any attempt on the part of the Executive to in any way curtail or interfere with the liberty of a citizen should be put down with a heavy hand.* Secondly if the detenus had been given the grounds of their detention for the maintenance of public order, they would have made a representation against their detention. They might have shown such strong reasons as would compel the detaining authority to change their mind so far as their detention is concerned at least under the head of the maintenance of public order. This maintenance of public order has an intimate connection with the security of the State; the learned Advocate General tried to call it a species under the genus security of the State.

Even if that argument is not accepted in toto the detenus may bring to the notice of the detaining authority facts which would make them change their mind about their whole detention. Thirdly the detaining authority may think of releasing the detenus so far as the detention under the public security is concerned. But at the same time it may be still apprehensive about their activities disturbing the public order. Therefore the detenus have been deprived of making a representation as no grounds have been communicated to them and therefore it cannot be ruled out that the detention is unnecessary and uncalled for for they might have satisfied the detaining authority that there was no ground so far as the maintenance of public order was concerned. In these circumstances even if the order of detention preventing them from acting in any manner prejudicial to the security of the State is concerned, is unassailable the reason for their detention without giving them the ground for such detention is unjustified and illegal so far their detention for reasons of public order was concerned. The latter defect affects the former detention order also which are akin and allied to each other. In my opinion the whole order of detention is illegal and therefore the detention order of these eleven persons of category (b) is bad in law and they have to be set at liberty.

12 Now I take category (c) dealing with the cases of four persons namely Mohammad Maqbool Ghulam Khan Salf u-din and Chidya Khan. From the affidavits of the Home Secretary it would appear that they have been detained for preventing them from acting in any manner prejudicial to the security of the State and maintenance of public order. It is the case of the State that their order was passed by the Government; the Chief Minister was satisfied about their activities which resulted in the orders of their detention. The learned counsel appearing for the petitioners Mr Beg presented four original orders served on these people signed by the Secretary to Government Home Department. These are cyclostyled copies and in the orders which were handed over to the detenus the important words are

" You are hereby informed that your detention was ordered on grounds specified in the Annexure appended hereto which also contained facts relevant thereto except those which I consider to be against the public interest to disclose "

In the file preserved by the Government instead of the word I the word Government has been substituted. Mr Beg made a very long and forceful argument on this account. He argued that the original orders are those

which are produced by him, which were properly signed by the Home Secretary and were given to the detenus concerned. The Home Secretary was not one of the authorities mentioned in the Act who could pass such an order nor did he figure anywhere in the scheme of the Act in his individual capacity. The authorities who were competent to pass an order of detention were either the Government, the Divisional Commissioner or the District Magistrate. According to him there had been tampering with the records by the Government may be after these petitions were filed. Records have been tampered with, argued Mr. Beg, forgeries committed and to crown all this, false affidavits have been sworn by no less an official than the Home Secretary himself.

Such a state of affairs discloses rather a serious situation portraying absolute chaos and playing with the liberty of the subject and throwing to wind all rules and canons of decency. He suggested that proper proceedings should be initiated against the concerned officers for forgery, tampering with the records and perjury. The learned Advocate General replied that the orders were actually passed by the Government, it is only through some clerical mistake that the word "I" instead of the "Government" appears in the orders served upon the detenus. The whole mistake was a bona fide one, the Home Secretary had sworn an affidavit that it was the Chief Minister, in-charge of the Home portfolio, who was satisfied and it was on his satisfaction that these people had been detained. Without making that much of the comment as the state of affairs deserves, the legal position that emerges is whatever be the intention of the Government or whatever may have happened behind the back of these detainees they are served with an order which is not in accordance with law. They have been explicitly told that the Home Secretary considers it against public interest to disclose the grounds of their detention. The Home Secretary as such, as remarked earlier, has no locus standi in himself to pass or consider any order of detention. The orders served on these four detenus are clearly therefore, illegal and they cannot be any longer detained on the ground of such orders. These four petitioners also deserve to be set free.

13. The cases of the remaining three detenus Kaka Ram, Mohd. Akbar and Mohd. Yaqub do not disclose any defect on which their orders of detention can be quashed. Their petitions are therefore dismissed.

14. The result is that the petitions of Mohammad Maqbool, Gulab Khan, Saif-u-Din, Chidya Khan (category (c) and Ghulam Nabi Khan, Ghulam Mohammad Koul, Ghulam

Mohammed, [Noor-u-din, Ghulam-u-Saqain, Altaf Ali, Ghulam Jeelani, Hakim Mohammad Yusuf, Ghulam Mohammad Yatoo, Masood Ahmad and Nazir Ahmed (of category (c)) are accepted and they shall be set at liberty immediately. The petitions of the rest of the petitioners namely Gula Mir, Mutwali Naki, Mohammad Yaqoob, Ghulam Nabi, Kaka Ram, Mohd. Akbar and Mohd. Yaqub stand dismissed. The petitions of Khaliq Guru and Jahan-gir Khan have become infructuous as it is stated that these two petitioners have been since released, according to the affidavit of the Home Secretary.

Order accordingly.

1970 Cri. L. J. 111 (Vol. 76, C. N. 30)
(MYSORE HIGH COURT)

M. SADASIVAYYA, J.

Chinnaya Chettiar, Petitioner v. State of Mysore, Respondent.

Criminal Revn. Petn. No. 276 of 1968, D/- 28-7-1968.

Criminal P. C. (1898), Ss. 107, 112 — Preliminary order under S. 112 — Past misconduct of person proceeded against — Not sufficient to justify order — Magistrate must be satisfied that likelihood of breach of peace exists.

A Magistrate cannot proceed under S. 107 of the Criminal P. C. to make a preliminary order under S. 112 thereof merely on the past misconduct of the person sought to be proceeded against. There must be information of a nature which convinces him that there is likelihood of a breach of the peace. (Para. 3)

When, therefore, on the face of it the preliminary order does not show that the Magistrate was of the opinion that there was a likelihood of the breach of the peace being caused, the preliminary order cannot be sustained. (1963) 1 Mys L J 260, Rel. on.

(Para 4)

Cases Referred : Chronological Paras.

(1966) 1966-1 Mys L J 260 : (1966) 6 Law Rep 7, Dodde Gowda v. State of Mysore 8

(1940) AIR 1940 Mad 23 (V 27) : 50 Mad L W 668 (FB), In re, Muthuswami Chettiar 8

K. Shivashankar Bhat, for Petitioner, G.M. Rego for State Public Prosecutor, for Respondent.

ORDER :— This revision petition is directed against a preliminary order dated 10-6-1968 made by the Sub-Divisional Magistrate, Maoga-

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lore under S 112 Criminal P O The petitioner in this Criminal Revision Petition was respondent No 8 in that preliminary order By that preliminary order the present petitioner (along with others shown as the respondents in that order) has been called upon to show cause as to why he should not be ordered to execute a bond in a sum of Rs 1 000 and to furnish two sureties each in a like sum for keeping peace for a period of one year

2 The main contention which has been urged by Mr K Shivashankar Bhat learned advocate appearing for the petitioner is that the said preliminary order merely makes a citation of certain past incidents and that it does not contain any material on the face of it to show that the Magistrate had formed an opinion that there was sufficient ground for proceeding under S 107 Criminal P O

3 So far as the present petitioner is concerned the only fact which had been cited against him is that the petitioner was a noted rowdy who was the head of a gang which had taken active part in the communal trouble in Mangalore and was responsible for acts of hooliganism

The preliminary order has been read out before me by the learned counsel It would appear from the citation in that preliminary order that information had been laid by the Circle Inspector of Police Mangalore Circle before the Magistrate that from the incidents which had taken place on the 18th 19th and 20th April 1968 there was the likelihood of the respondents committing breach of the peace But as contended by Mr Shivashankar Bhat there is nothing in this preliminary order to show that on the said information which had been placed by the Circle Inspector of Police the Magistrate formed an opinion that there was sufficient ground for proceeding under S 107 of the Criminal P O In the absence of material to show that the Magistrate had formed such an opinion he could not proceed under S 107 of the Criminal P O to make a preliminary order under S 112 of the Criminal P O When on the face of it the preliminary order does not show that the Magistrate was of the opinion that there was sufficient ground for proceeding under S 107 of the Criminal P O that order stands vitiated In a decision of this Court which has been reported in 1966 1 Mys LJ 260 Dodde Gowda v State of Mysore Saathch J after referring to a Full Bench decision of the Madras High Court AIR 1940 Mad 23 has stated as follows

The said decision states that action taken under S 112 Criminal P O constitutes a judicial act and therefore the Magistrate

should not act arbitrarily There must be information of a nature which convinces him that there is likelihood of a breach of the peace It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation While there must be something more than the past misconduct of the persons proceeded against to justify a notice being served upon him the Code does not require the information to show the particular act which is in contemplation at the time The Magistrate must be satisfied that there is a likelihood of a breach of the peace What will satisfy him must depend on the particular facts of the case

Therefore there must be something more than mere past misconduct of the person sought to be proceeded against and the Magistrate must be satisfied that there is a likelihood of the breach of the peace

4 In the absence of any material on the face of that preliminary order to show that the Magistrate had been satisfied that there was a likelihood of the breach of the peace being caused by the present petitioner the preliminary order in so far as it relates to the petitioner cannot be sustained This revision petition is allowed and the preliminary order is set aside

Revision allowed

1970 Cri L J 112 (Vol 78 C N 31)
(MYSORE HIGH COURT)

H HOMBE GOWDA, C J AND C HONNIAH J
State of Mysore, Complainant Appellant
v Abdul Hameed Khan, Accused—Respondent
Criminal Appeal No 423 of 1967, 11/ 54
1968

Criminal P C (1898), S 344—Warrants to secure attendance of witnesses issued at the instance of prosecution—Police neither serving them nor returning them to Court—Witnesses absent on due date—Prosecution asking for further adjournment on ground that police was otherwise busy—Prosecution held, not diligent and Magistrate justified in refusing further adjournment and pronouncing decision on available evidence

(Paras 2 and 3)

G M Rego for State Public Prosecutor for Appellant M M Jagirdar, for Respondent

JUDGMENT — This appeal filed by the State under Section 417 Criminal P C

LL/OM/F882/68/NYR/B

as directed against the judgment of the First Class Magistrate, Aurad in C. C. No. 47/2 of 1967 on his file. The learned Magistrate acquitted the respondent who was charged and tried for an offence punishable under Section 304-A of the I. P. Code.

2. The case of the prosecution is that on 9-2-1967 at about 5 p. m. the respondent was driving a bus bearing No. MYI 3185 from Kusnoor to Bidar in a rash and negligent manner and dashed against a cart driven by the deceased Maharudrappa and as a result of this collision Maharudrappa died on the spot and therefore, the respondent was liable to answer a charge for an offence under Section 304-A of the I. P. Code. Though the incident took place on 9-2-1967, charge-sheet against the respondent was placed on 25-5-1967. No witnesses were in attendance and therefore at the instance of the prosecutor the case was adjourned to 25-7-1967. On that day, that is, 25-7-1967, one witness was present in Court and he was examined. He did not support the case of the prosecution. The prosecutor prayed for issue of warrants to four other witnesses pleading his inability to bring them to the Court. The Court issued bailable warrants and posted the case to 18-8-1967. On 18-8-1967, no witness for the prosecution was present. The bailable warrants that were issued at the instance of the prosecutor were handed over to the police for service. The Police neither served them on the witnesses nor returned the warrants as unserved. The learned Magistrate refused to grant an adjournment to the Prosecutor and closed the case and on the evidence adduced entered acquittal in favour of respondent. It is the correctness and legality of this judgment that is challenged in this appeal.

3. It is clear from the narration of facts above that the prosecution was not at all diligent. Once the Prosecutor prayed for warrants and secured them it was the duty of the prosecution to serve the warrants on the several witnesses and bring and examine them in court. The explanation offered by the prosecution that because the Police were otherwise busy, they could not serve the warrants against the several prosecution witnesses, is far from satisfactory. In these circumstances, we are of the opinion that the learned Magistrate was perfectly justified in refusing to grant an adjournment to the prosecution and proceeding to pronounce the judgment on the material placed on record. We do not find any reason to interfere with the order of acquittal passed by the learned Magistrate. This appeal, therefore, fails and the same is dismissed.

Appeal dismissed.

1970 Cri. L. J. 113 (Vol. 76, C. N. 32)
(ORISSA HIGH COURT)

A. MISRA, J.

G. A. Natarajan, Appellant v. Republic of India, Respondent.

Criminal Appeal No. 48 of 1967, D/- 1.5.1969.

Anti-Corruption Laws (Amendment) Act, (1967), S. 2 (1) (b), (2) and (3)—Trial started under provisions of Prevention of Corruption Act (1947) as it stood prior to deletion of S. 5 (3) by 1964 Amending Act—Appeal against conviction pending on 5-5-1967 when 1967 Amending Act came into force—Appellate Court has to remand case for retrial under S. 2 (3) irrespective of whether provisions of S. 5 (3) of old Act were observed or not in the trial. (Para 3)

R. N. Misra, for Appellant, Government Advocate, for Respondent.

JUDGMENT:—The appellant has filed an application for setting aside the conviction and sentence and remanding the case for fresh disposal to the Court below, in view of the provisions enacted in the Anti-Corruption Laws (Amendment) Act, 1967. The judgment in this case convicting the appellant was delivered on 29-4-67 and the appeal before this Court was filed on 1-5-67. The Anti-Corruption Laws (Amendment) Act came into force on 5-5-67. Therefore, it is urged that under sub-s. (2) and (3) of S. 2 of the said Amending Act, 1967, this case has to be remanded for retrial.

2. Learned Government-Advocate, while not disputing the statements of fact, contends that the judgment of the Special Judge shows that the appellant was prosecuted and convicted keeping in view sub-s. (3) of S. 5 of the 1947 Act as it stood before its deletion under the 1964 Amending Act. To such a case, the provisions of the 1967 Amending Act on which reliance has been placed by learned counsel for appellant will not apply.

3. On a consideration of the relevant provisions, in my opinion, the contention of learned Government-Advocate cannot be accepted and the prayer of appellant must be sustained. The trial in this case started under the provisions of the Prevention of Corruption Act, 1947 as they stood prior to the amendment in 1964. By the 1964 Amending Act, S. 5 (3) was deleted and in its place sub-s. (1) (e) was substituted. Section 2 (1) (b) of the 1967 Amending Act lays down that notwithstanding any judgment or order of any Court, sub-s. (3) of S. 5 as it stood immediately before the commencement of the 1964 Act, shall

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apply and shall be deemed always to have applied to and in relation to trials of offences punishable under sub s (2) of S 5 of the 1947 Act pending before any Court immediately before such commencement Sub section (2) of S 2 permits the accused to demand in pending cases that the trial should proceed from the stage at which it was immediately before the commencement of the 1964 Act and it is obligatory on the Court to comply with this demand Sub section (3) provides for removal of doubts relating to appeals and revisions against any judgment, order or sentence pending immediately before the commencement of the 1967 Amending Act as well as those filed after such commencement The present case comes under the former category The appeal was filed on 1 5 67 and was pending immediately before the commencement of the 1967 Amending Act In such cases, the provision is that any Court where such appeal or application for revision is pending shall remand the case for trial in conformity with the provisions of this section The said provision makes no reference as to the manner in which the trial Court has dealt with it or if the trial Court had proceeded on the basis of sub s (3) of S 5 of the old Act Therefore this appeal clearly comes within the aforesaid provision and has to be remanded for re trial in conformity with the provisions as laid down in the Amending Act

4 Hence, I allow the appeal, set aside the conviction and sentence and direct that the case be remanded to the Special Judge for trial and disposal in conformity with the provisions contained in the 1967 Amending Act

Appeal allowed

1970 Ori L J 114 (Vol 76, C N 33)

(ORISSA HIGH COURT)

G K MISRA AND S ACHARYA, JJ

Dwarika Misra Appellant v State, Respondent

Criminal Appeal No 124 of 1966 D/ 5 12 1968 against order of S J, Bolangir Kala handi, D/ 815 1966

Penal Code (1860) Ss 96, 97, 302, 34 and 149 — In a free fight there exists no right of private defence (Evidence Act (1872), S 105).

When there is a free fight, that means when both the parties come determined to fight without there being corresponding rights of private defence no party is entitled to the protection of law Each party and the members thereof are responsible for the illegal acts caused by them In a case where the facts reveal a free fight between two or more groups

of persons and a person dies of injuries received in such a fight and out of the six accused five are acquitted the prosecution must establish beyond reasonable doubt that the accused who was not acquitted caused the injuries on the deceased so as to be responsible therefor Held that the prosecution failed to prove this (Obiter If the five accused were not acquitted all or some of them could have been convicted under S 302/34 or S 302/149 I P O) (Paras 4 and 5)

J K Mohanty, for Appellant Standing Counsel for Respondent

G K MISRA J — The appellant has been convicted under S 302 Penal Code and sentenced to imprisonment for life Originally 6 accused persons stood trial under Ss 302/34 and 302/34, Penal Code 5 of them have been acquitted

2 The prosecution case may be stated in brief The deceased Balaram Satpathy Dukkhyam (P W 8) and Ananda (P W 10) are the sons of Sudam Satpathy (P W 11) The accused are all agnates There is no dispute that there is long standing family trouble between the Misras and the Satpathys 19 8 65 was a Janmastami day It appears that the appellant had purchased some meat from the deceased, but had not paid the price In that fateful morning the deceased asked for the money This led to some altercation By then the father of the deceased was going to the temple to do Puja The cloth of the appellant touched Sudam This also led to some trouble Both these matters led to a serious quarrel ultimately

The Misras who are the accused, came with lathis and Katuas and assaulted the prosecution party P Ws 8, 10 and 11 and accused Ganannath, Madan Ghasi and Dwarika got ample injuries Ghasi is alleged to have given a fatal stroke on the head of the deceased with a lathi The deceased retreated some steps Then the appellant gave a blow as a result of which the deceased fell down Thereafter he went on indiscriminately assaulting him with a wooden Katua (M O 1) The deceased died some time after

In the defence the prosecution story as to how the quarrel originated is not challenged The plea taken is that there was a free fight on either side and the accused were entitled to right of private defence

The learned Sessions Judge held that the death of the deceased was homicidal There was a free fight between the parties but that the appellant was not entitled to right of private defence of body inasmuch as he exceeded his right of private defence by causing the death of the deceased

3. Mr. Mohanty for the appellant does not dispute that the death was homicidal. The Doctor (P. W. 17) held the postmortem examination. He found 7 external injuries. Out of these, injuries 1 to 4 were oblique cutting wounds on different parts of the head. In his opinion, injury No. 1 was the fatal injury and all the injuries were antemortem in nature and caused by some cutting like weapon. On the Doctor's evidence there cannot be any escape from the conclusion that the death was homicidal.

4. Mr. Mohanty frankly stated that it was not possible for him to support the conclusion of the learned Sessions Judge that the appellant was entitled to set up the plea of right of private defence in a case where the finding is that there was a free fight between the two parties. The concession is well founded. When there is a free fight, that means, when both the parties come determined to fight without there being corresponding rights of private defence, no party is entitled to the protection of law. Each party and the members thereof are responsible for the illegal acts caused by them. There is therefore no question of any exercise of right of private defence on the finding recorded that there was a free fight which is not assailed by the learned Standing Counsel.

5. The only argument available to Mr. Mohanty in a case of this nature is whether the prosecution has established beyond reasonable doubt that the appellant caused the injuries on the deceased so as to be responsible therefor. The positive prosecution evidence on this head is unfurled by Ajatna Padhan (P. W. 1) who is the immediate front-door neighbour, in front of whose house admittedly the occurrence took place. He says that Ghasi Misra at first gave a lathi stroke on the head of the deceased. When the deceased was retreating the appellant gave a blow with the Katua as a result of which he fell down. Thereafter the appellant indiscriminately went on assaulting, and as a result thereof the deceased succumbed to death. The wooden Katua (M. O. I) is stated to be the Katua that was held by the appellant.

This was sent to the Doctor (P. W. 17) for his opinion as to whether the cutting injuries 1 to 4 could be caused by M. O. I. The Doctor clearly expressed the opinion that M. O. I. cannot cause such injuries. We ourselves examined the Katua M. O. I. Though it is used for the purpose of digging earth, its edge is not sharp. It is somewhat thudding. We are also satisfied that the cutting injuries could not be caused by the Katua M. O. I. which, according to the prosecution, was in the hand of the appellant and was used as the weapon of offence against the deceased. If this is the

ultimate conclusion, the entire prosecution case implicating the appellant must fail. On this evidence we cannot come to the conclusion that the injuries on the deceased were caused by the appellant. The appellant is therefore entitled to the benefit of doubt and must be acquitted.

6. Government has filed no appeal so far as the other five accused are concerned. If Government had filed an appeal, then on the finding that there was a free fight and the deceased died as a result of Katua strokes given by some of the accused, all or some of the accused could have been convicted under S. 302/34 or 302/149, Penal Code. Once the 5 accused have been acquitted, the appellant cannot be convicted unless the prosecution establishes beyond reasonable doubt that the appellant was responsible for the death of the deceased. There can be hardly any doubt that the deceased died as a result of assault on him given by some of the accused. But in view of the finding recorded by the learned Sessions Judge and the order of acquittal already made, against which there is no appeal, the appellant cannot be convicted for causing the death of the deceased.

7. For the aforesaid reasons we set aside the order of conviction and sentence passed by the learned Sessions Judge and acquit the appellant. The appeal is allowed and the appellant be set at liberty forthwith.

8. ACHARYA, J. — I agree.

Appeal allowed.

1970 Cri. L. J. 115 (Vol. 76, C. N. 34)
(PATNA HIGH COURT)

B. N. JHA J.

Ayodhya Prasad Tewari, Petitioner v. Hopal Manjhi and others, Opposite Party.

Criminal Revn. No. 1552 of 1967, D/- 31-1-1969, from order of Magistrate, Bhagalpur. D/- 14-6-1967.

Criminal P. C. (1898), Ss. 146, 145—Proceeding under S. 145—Reference to Civil Court—Before ordering reference to Civil Court, Magistrate must apply his mind to the case of the parties and to the evidence, both documentary and affidavit—AIR 1965 Pat 411, Foll. (Para 6)

Cases Referred : Chronological Paras
(1965) AIR 1965 Pat 411 (V 52) 1965
B L J R 97 : 1965 (2) Cri L J 527,
State of Bihar v. Hari Mishra 6, 7
(1962) AIR 1962 Pat 468 (V 49) : 1962
BLJR 267, Shreedhar Thakur v.
Kesho Sao 6, 7

GM/HM/D148/SSG/D

(1962) 1962 (2) Or L J 577 1962

B L J R 105 Chandradip Singh v

R B B Verma

7

K K Sinha, Nagendra Prasad Singh No 2 and Bachoo Prasad Singh, for Petitioner, S Samsur Rahman and S Nurul Varis for Opposite Party.

ORDER — This application by the second set of second party in a proceeding under S 145 of the Code of Criminal Procedure is directed against the order of the Magistrate dated the 14th June 1967 declaring the possession of the first party. The disputed lands appertain to khata Nos 124 and 171 of village Raigachola Barmanas police station Pirpainty, district Bhagalpore. The lands of khata Nos 124 and 171 belonged to Sheikh Ishaque and Sheikh Ismail who were the occupancy raiyats in respect of the aforesaid lands. Under khata No 124 there were several sikmi tenants at the time of the record of right. It is not necessary to give them in detail. Lands of khata No 171 originally belonged to one Sarwang Manjhi as raiyat who sold them to Sheikh Ishaque and Sheikh Ismail by virtue of a registered sale deed. It may be mentioned that before the purchase by Sheikh Ishaque and Sheikh Ismail they were the usufructuary mortgagees of the said lands.

2 The case of the members of the first party is that they are heirs of the different sikmidars who were in possession of the lands and they have been cultivating and dividing the crops with the maliks. As regards the lands of khata No 171 their case is that after the sale the purchasers gave the lands to Sarwang Manjhi on batar and after the death of Sarwang Manjhi his heirs have been coming on in possession of the lands and dividing the crops with Sheikh Ishaque and Sheikh Ismail.

3 The case of the petitioner is that the sikmidars recorded under khata No 124 died and after their death the lands came in khas cultivating possession of Sheikh Ishaque and Sheikh Ismail and since then they have been coming on in peaceful possession of the same. With regard to the lands of khata No 171, his case is that after the purchase by Sheikh Ishaque and Sheikh Ismail the lands remained in their khas cultivating possession and the lands were never given to Sarwang Manjhi on batar. The petitioner purchased the lands of khata Nos 124 and 171 by virtue of a registered sale deed dated the 8th April 1961 from the heirs of Sheikh Ishaque and Sheikh Ismail and since then he has been coming on in peaceful possession of the same. His case further is that there was no apprehension of a breach of the peace. A false report of the apprehension of a breach of the peace was sent in the name of

the Up-panch and on that a proceeding under S 144 of the Code of Criminal Procedure was drawn up which was subsequently converted into a proceeding under S 145 of the Code.

It may be mentioned that in the Court below the said Up-panch filed an affidavit denying to have filed any such application before the Sub-divisional Magistrate informing him that there was an apprehension of a breach of the peace in respect of the disputed lands. His case further is that Mohammad Hussain, the first set of the second party, was a dismissed servant of the maliks Sheikh Ishaque and Sheikh Ismail and being dissatisfied he set up the Manjhi first party to claim the lands as heirs of the recorded sikmidars and he has himself falsely claimed the lands on the basis of settlement from Sheikh Ishaque and Sheikh Ismail. The petitioner further asserts that after his purchase he sold some of the lands to the third party who are in possession of the said lands. Mohammad Hussain first set of the second party as stated above, claimed the entire disputed lands on the basis of oral settlement from the raiyats i.e. from Sheikh Ishaque and Sheikh Ismail. The members of the third party claimed possession in respect of certain lands on the basis of their purchase from the petitioner.

4 The parties filed written statements and adduced evidence in support of their respective claims. The learned Magistrate referred the matter to the Subordinate Judge Bhagalpore who held possession of the first party by his judgment dated the 9th May, 1967, and accordingly the Magistrate Bhagalpore declared possession of the first party by his order dated the 14th June 1967. Hence this application by the second set of the second party, Mohammad Hussain, the first set of the second party has not moved this Court against the aforesaid order.

5 Learned counsel for the petitioner raised several contentions before me. He contended that the Magistrate erred in law in referring the matter to the civil Court without applying his mind to the written statements and evidence filed by the parties and therefore the whole order of reference was invalid and subsequent proceedings thereafter were also invalid in law. He also challenged the judgment of the Subordinate Judge who decided the question of possession on reference on the ground that the learned Subordinate Judge failed to consider the documents filed by the petitioner. It was further contended that the learned Subordinate Judge wrongly construed that the lands of khata No 171 were sikmi lands as the lands of khata No 124. It was further contended that the learned Subordinate Judge failed to consider the fact that

the heirs of the sikmidars had no concern after the death of the recorded sikmidars as sikmi rights were not inheritable.

Besides that, it was contended, that none of the members of different sets of first party came to file affidavit in support of their respective claims of possession which supported the case of the petitioner that it was Mohamad Hussain, first set of second party who had set up the 1st party and was fighting out the case on behalf of the first party. Learned Counsel also drew my attention to the fact that Murli Manjhi was sikmidar in respect of plot Nos. 524, 526, 549 and 755 of khata No. 124. Bishwanath Manjhi son of Murli filed an affidavit supporting the possession of the petitioner and disowning his own interest and possession in respect of those lands. One Suphal Manjhi filed an affidavit on behalf of the first party that the aforesaid Bishwanath Manjhi was not the son of Murli Manjhi but a son of his brother Murli. The Subordinate Judge decided the case on the affidavit of Suphal Manjhi that Bishwanath is not the son of Murli Manjhi who filed an affidavit on the 9th July, 1965 in support of the petitioner's case.

But the learned Subordinate Judge overlooked the fact that an affidavit was filed by Suphal Manjhi on the 16th April, 1966 to the effect that he never filed any affidavit in favour of the first party, stating therein that Bishwanath is not the son of Murli Manjhi. He asserted that Bishwanath who filed the affidavit in support of the petitioner is the son of Murli Manjhi. He further contended that the learned Subordinate Judge had simply made a catalogue of the affidavits filed on behalf of the parties. He submitted that a number of affidavits of boundary witnesses have been filed in support of the case of the petitioner but the learned Subordinate Judge has not considered the contents of those affidavits nor has he given any reason for rejecting them. Hence learned counsel for the petitioner submitted that the entire judgment of the learned Subordinate Judge is vitiated on account of the several infirmities stated above. In view of the order which I propose to pass in this case it is not necessary for me to consider whether the judgment of the learned Subordinate Judge is vitiated on those grounds or not because, in my opinion, the whole order of reference is bad in law and must be set aside.

6. The learned Subdivisional Magistrate while referring the matter to the civil Court, passed the following order on the 15th July, 1966:

"The record has been perused by me. After perusal of the same I am of the view that it is a complicated matter which I am unable to

decide as to which of the parties were in possession when the proceeding had been started over the subject matter of dispute in this proceeding. The subject matter of dispute continues to be attached under S. 145 (4), Criminal P. C.

Statement of facts concerning cases of all parties have been put up in their written statements. Documents and affidavits have also been filed which are on the record.

With this observation the record is referred to the civil Court of competent jurisdiction under S. 146 (1), Criminal P. C. for necessary recording of findings under S. 146 (1-A), Criminal P. C. Parties to appear in the said Court on 28-7-66."

The order of reference shows that the magistrate has not applied his mind to the case of the parties nor to the evidence, both documents and affidavits, filed by them in support of their respective cases. Therefore, it is quite clear that the Magistrate has shirked his responsibility in referring the matter to the civil Court. It was observed by this Court in the case of *State of Bihar v. Hari Mishra*, 1965 B L J R 97 : (AIR 1965 Pat 411) as follows :

"It would appear that the Magistrate has no unrestricted powers to make a reference at his option as and when he likes to do so. It is obligatory on him that upon making any reference, he must try to form his own independent opinion as to possession and it is only when, on a consideration of the evidence adduced before him in the form of affidavits or documents, he is unable to decide which of the party was in possession or is of opinion that none of the parties was in possession, that he may attach the property and refer the case to the civil Court of competent jurisdiction for its decision and while so doing he must have to draw up a statement of the facts of the case and forward the record to the civil Court. It is then that the civil Court is clothed with the jurisdiction to decide the question of possession after perusing the evidence already given before the Magistrate and taking such further evidence as may be produced before it by the parties. The civil Court, however, is not to pass any final order but it will only transmit its decision to the Magistrate, who, as provided in sub-s. (1 B) of S. 146 has to pass an order in conformity with the decision of the civil Court. A Magistrate cannot shirk his responsibility and refer any proceeding to the civil Court without first applying his mind to the facts of the case. It was pointed out by a Division Bench of this Court in *Shreedhar Thakur v. Kesho Sao*, 1962 B L J R 267 at p. 272 : (AIR 1962 Pat 468 at p. 471).

'A Magistrate cannot take recourse to S 146 (1) merely for the purpose of shifting his own responsibility. It is only when either of the two contingencies mentioned in the sub-section arises, that he can refer the case to the civil Court.'

In that case the matter came before this Court on a reference made by the Munsif Magistrate as to whether the order of reference was bad in law or not. It was held in that case that the order of reference was incompetent and in such a circumstance any decision that may be given by the civil Court or even taking fresh evidence before it would be surely without jurisdiction.

7 Learned counsel for the opposite party drew my attention to the cases of Ohandradip Singh v R B B Verma 1962 B L J R 105 ((1962) 2 Ori L J 577) and 1962 B L J R 267 (A I R 1962 Pat 468). It was contended that in those cases the order of reference was not held incompetent on that ground. In the former case the judgment of the civil Court was set aside on different grounds and in the latter the whole proceedings were quashed on the ground of incompetency of the reference as well as on the ground of vagueness in the proceedings. In my opinion the present case is fully covered by the Division Bench decision in the case of 1965 B L J R 97 (A I R 1965 Pat 411) referred to above, and the order of reference in such circumstances, is bad in law and must be set aside.

8 For the reasons stated above the application is allowed, the order of reference passed by the Magistrate on the 15th July, 1966 referring the matter to the civil Court and consequently the judgment of the learned Subordinate Judge dated the 9th May, 1967 and the order of the Magistrate dated the 14th June 1967 passed on the basis of the said judgment are hereby set aside. The case is remitted back to the Sub divisional Magistrate Bhagalpore who will place this case before some Munsif Magistrate for disposal according to law. It will be, however open to the parties to raise all possible contentions there as they may think proper.

Application allowed

1970 Cri L J 118 (Vol 78, C N 35)

(PATNA HIGH COURT)

M P VERMA, J

Ramayan Bhagat and another, Petitioners
v The State Opposite Party

Criminal Revn No 108 of 1967, D/
208 1968 against decision of 2nd Addl S J,
Chapra D/ 31 1967

Criminal P C (1898), Ss 403 (2), 235 (1) & (2) — Essential Commodities Act (1955), S 7 — Accused found in illegal possession of rice bags — Bags seized and kept in custody of neighbour — Removal of bags by accused from such lawful custody — Separate trials under S 395, Penal Code and S 7 of Essential Commodities Act are valid.

Section 403 (2) does not militate against the view contained in S 235 (1) of the Code. When there is a series of acts connected together so as to form the same transaction different acts committed in course of the same transaction may give rise to different offences. In other words the acts are different and necessarily the facts which amount to the acts must be different, though the different offences arising out of the different acts may form the subject matter of separate charges in one trial and that does not mean that either the facts or acts are identical. Where both the offences are distinct the rule of double jeopardy or autrefois acquit does not apply and the same person can be tried twice for the two offences. This has no relation to the rule regarding admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court at a previous trial. (Para 6)

Thus the prosecution of the accused under S 7 of the Essential Commodities Act for having been in possession of rice in excess of the prescribed limit on a lapsed licence is not illegal merely because he was previously prosecuted and convicted for dacoity in removing the said bags after seizure from lawful custody. AIR 1965 S C 87 & AIR 1958 S C 415, Disting. (Para 6)

Cases Referred Chronological Paras
(1965) AIR 1965 S C 87 (V 52) — (1965)

1 Ori L J 120 Manipur Administration, Manipur v Thokchom Bira Singh 4

(1956) AIR 1956 S C 415 (V 48) — 1956
Cri L J 805 Pritham Singh v State of Punjab 4

Thakur Prasad Ramji Saran and Arjun Prasad for Petitioners Ram Narayan Tewari, for Opposite Party

ORDER — There are two petitioners who have been found guilty under S 7 of the Essential Commodities Act and sentenced to undergo rigorous imprisonment for 18 months and further to pay a fine of Rs 500/- each, in default to suffer further rigorous imprisonment for three months each. Along with the two petitioners, some other persons were also convicted by the Munsif Magistrate First Class Gopalganj, but on appeal to the Second Additional Sessions Judge Chapra those other persons were acquitted and the conviction was

maintained only as regards these two petitioners as stated above.

2. The facts of the case relating to the present petition may be summarised as follows: In the District of Saran there is a Block at Bhorey which is also a police station. On the 7th August, 1964 there was a staff meeting in the office of the Block Development Officer of Bhorey where it was discussed that some members of the Bharat Sewak Samaj had informed the Block Development Officer that Ramayan Bhagat and others were in the habit of smuggling food-grains from Bihar to U. P., and the Block Development Officer asked his staff to be vigilant about it. On the very next day i.e. on the 8th August, 1964, the Supervisor, Rajbanshi Prasad (P. W. 4) detected that two carts containing rice bags (18 bags on one and 5 bags on the other) were being driven by two persons. The Supervisor thereafter directed the cartmen to accompany him to Bhorey police station and the carts proceeded for some distance in that direction. Meanwhile, it is alleged that petitioner Ramayan Bhagat came there and forced the cartmen not to go towards the police station. This created some confusion and meanwhile many persons collected there as also a police constable. Some Mukhias also intervened in the matter and at their instance the 18 bags of rice were kept in charge of Ramayan Bhagat who granted a receipt (Ext. 1) for the same. At that very time he had produced 4 cash memos standing in the name of different persons, and informed the Supervisor that he had purchased those bags in the name of four different persons and the sale was to be done in his own village. On the 11th August, 1964, the Block Development Officer, got some confidential information that Ramayan Bhagat had kept some concealed bags of rice in the houses of different persons of his own village as well as the neighbouring village and so he made a raid of those houses. From the houses of Mokhtar Mian, Nabijan and Ramjan Mian he recovered four bags of rice from each house. Thereafter the house of Ramayan Bhagat was also searched and 16 full bags of rice and two bags containing some rice were also recovered. These three Muslims admitted that the bags recovered from their houses had been kept by Ramayan Bhagat. The Block Development Officer then entrusted 12 bags of rice to P. W. 3, Birbahadur Singh, but on the 12th August, 1964 Birbahadur Singh reported to the Block Development Officer that Ramayan Bhagat and five others raided his house and forcibly removed those 12 bags of rice. The matter was reported to the police on the 14th August, 1964 by the Block Development Officer as a result of which a case under S. 395 of the Indian Penal Code was started against

both these petitioners and some others. That case ended in conviction of Ramayan Bhagat only under S. 380 of the Indian Penal Code by the appellate Court and the rest of the accused were acquitted. On the basis of the report filed by the Block Development Officer an another case under S. 7 of the Essential Commodities Act was started against these two petitioners and under S. 8 of that Act against other accused persons. In this case these two petitioners were convicted and sentenced to undergo rigorous imprisonment and pay fine as stated above, but the lower appellate Court acquitted the remaining accused who had been convicted by the learned Magistrate. As against this order of conviction the present petition has been filed.

3. Mr. Thakur Prasad, learned counsel for the petitioners has urged only two points before me. His first contention is that the second trial was in violation of the provisions of S. 403 of the Code of Criminal Procedure. The second point raised by him is that these petitioners have been sufficiently harassed by now, because Ramayan Bhagat has already undergone the punishment of jail for one year in the previous case and so a lenient view concerning the sentence should be taken.

4. As regards the first point he has drawn my attention to the case of Pritam Singh v. State of Punjab, AIR 1956 S C 415. In this case the petitioners had been tried for an offence under S. 19 (f) of the Arms Act (as then stood) and acquitted and secondly they along with others were put on trial for an offence under S. 302/34 of the Indian Penal Code. In the latter case they were convicted. Their Lordships of the Supreme Court observed that the maxim '*res judicata pro veritate accipitur*' is no less applicable to criminal than to civil proceedings. Thus an acquittal of an accused in a trial under S. 19 (f), Arms Act, is tantamount to a finding that the prosecution had failed to establish the possession of certain revolver by the accused as alleged. The possession of that revolver was a fact in issue which had to be established by the prosecution before he could be convicted of the offence under S. 19 (f). That fact was found against the prosecution and could not be proved against the accused in the subsequent proceedings between the Crown and him, under a charge of murder. This view was reiterated in the case of Manipur Administration, Manipur v. Thokchom Bira Singh, reported in AIR 1965 S C 87. It was stated therein that the rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res

judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of S 403 (2). The rule is not the same as the plea of double jeopardy or autrefois acquit. The rule thus relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court at a previous trial. He also referred to Art 20 (2) of the Constitution which lays down that no person shall be prosecuted and punished for the same offence more than once.

5 The learned State Counsel has urged that the decisions of these case laws do not cover the facts of the present one S 403 (1) of the Code of Criminal Procedure lays down

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S 236 or for which he might have been convicted under S 237"

Under sub-s (2) a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S 235, sub-s (1). There are several illustrations appended to S 403 and a careful study of those illustrations reveals the exact position. On a close examination of the various sub-sections of S 403 of the Code of Criminal Procedure and on a consideration of the principle behind the section as a whole it seems very clear that the section in effect intends to lay down that generally no accused shall be tried for the offence for more than once arising out of the same set of facts. Under sub-s (1) of S 235 of the Code different offences as contemplated do not arise out of the same set of facts though they do arise in one series of acts so connected together as to form the same transaction, that is to say, that when there is a series of acts connected together so as to form the same transaction different acts committed in course of the same transaction may give rise to different offences. In other words the acts are different and necessarily the facts which amount to the acts must be different, though the different offences arising out of the different acts may form the subject matter of separate charges in one trial and

that does not mean that either the facts or acts are identical. So in my opinion S 403 (2) does not militate against the view contained in S 235 (1) of the Code.

6 Applying these principles to the facts of the present case it must be held that these petitioners have not been tried and convicted for the same offence twice over. The former case related to a case of dacoity and the start of the case was from that point at which these bags had been kept in the custody of Bir Bahadur Singh. But the offence under the Essential Commodities Act started much earlier, that is to say when it was noticed that these petitioners not being licensees were in possession of more rice than the prescribed limit. In the report of the Block Development Officer it is mentioned that Ramayan Bhagat was holding an old licence and had not renewed the licence for the last three or four years. The receipts which he had produced before the Block Development Officer showed that he had purchased 28 bags of rice out of which 5 bags were not accounted for. In the circumstances, the evidence is also not the same though some identical witnesses might have been examined. I am told there were 12 witnesses in the previous Sessions Court and 7 witnesses were examined in the present case before the learned Munsif Magistrate. Out of these seven witnesses only four are common. Moreover those witnesses do not speak anything about the occurrence of dacoity or snatching away of the rice bags. In the charge I find that it is for storing 48 bags of rice whereas in the former case we were concerned only with 12 bags of rice which were alleged to have been taken away. From these discussions it is apparent that both the offences are distinct and so the same persons could be tried twice for these two offences. The rule of double jeopardy or autrefois acquit does not apply to the facts of the present case. That being so the first contention raised by learned counsel must be ruled out of consideration.

7 I would then come to the second point which has been urged before me on behalf of these petitioners. Petitioner No 1 Ramayan Bhagat has already undergone a sentence of one year's rigorous imprisonment, because of his conviction under section 380 of the Penal Code which had been confirmed by the High Court. In the present case also he was, I am told in jail for ten days. So taking these facts into consideration I think the sentence passed against him may be suitably reduced. In his case, therefore, the period of jail punishment is reduced to the period already undergone but he will pay the fine imposed on him.

8. The case of the other petitioner, Ram Prasad Bhagat, who is the brother of petitioner No. 1, stands on a somewhat different footing. He had been tried in the previous case, but was acquitted. In this case he has been found guilty along with his brother with whom he is residing. He has already undergone some detention in jail, say about ten days. In the circumstances of the case, therefore, I reduce his sentence also to the period already undergone while maintaining the penalty of fine imposed on him.

9. With this modification in the sentence, this petition is dismissed.

Petition dismissed.

1970 Cri. L. J. 121 (Vol. 76, C. N. 36)
(PUNJAB & HARYANA HIGH COURT)

GOPAL SINGH, J.

Surinder Singh Kairon, Petitioner v. D. Subramaniam, Income Tax Commissioner, Delhi, Respondent.

Criminal Misc. No. 1467-M of 1968, D/- 21-1-1969.

Criminal P. C. (1898), S. 526—Transfer of case pending in Court of Judicial Magistrate to Court of Session—High Court has power to transfer.

The provisions of Section 526 leave no doubt that there inheres in the High Court power to transfer a case from a subordinate Criminal Court to another subordinate Criminal Court of co-ordinate jurisdiction or superior jurisdiction. (Para 10)

Under Section 526, High Court has power to transfer a case to the Court of Session although the case sought to be transferred is pending in the Court of a Judicial Magistrate. (Para 9)

The accused in the first instance avoided to accept service and later on after having accepted service adopted dilatory tactics to delay the disposal of cases, by taking adjournment after adjournment on one pretext or the other through the influence over the judicial Magistrate:

Held, that the facts and circumstances of the cases fully called for transfer to the Court of superior jurisdiction, namely, the Sessions Court. Considering the influence which the accused has exercised upon and also taking into account his conduct in manoeuvring to secure the sympathy of the Judicial Magistrate, it would not be difficult for the accused to make another Judicial Magistrate to toe the line of his wishes and secure his sympathies for the disposal of the complaints being delayed. (Paras 7, 10)

Considering that the cases were not of any extraordinary public importance nor any difficult and intricate questions of law were involved in them, these were not fit cases for transfer to the High Court on the original side. (Para 6)

Kuldip Singh, for Petitioner, K. L. Arora, with B. S. Gupta, for Respondent.

ORDER.—Criminal Miscellaneous Application No. 1467 of 1968 under Section 526 of the Criminal Procedure Code has been filed by Surinder Singh Kairon against the Commissioner of Income-tax, Delhi. Criminal Miscellaneous Application No. 8-M of 1969 and Criminal Miscellaneous Application No. 9 M of 1969 have been filed under the same section by the Commissioner of Income-tax, Delhi against Surinder Singh Kairon. Surinder Singh Kairon in his application has prayed for the complaint cases filed by the Commissioner of Income-tax against him under Section 277 of the Income-tax Act, 1961 being transferred to some Court at Chandigarh. The Commissioner of Income-tax in his application, has prayed that the cases be transferred to the High Court.

2. The facts leading to the making of these applications are as follows. On October 11, 1963, Surinder Singh Kairon, assessee-accused, filed a return pertaining to the assessment year 1962-63 showing income of Rs. 1,41,060. Enquiry into the cases was held by the Income-tax Officer, Central Circle, Delhi. On March 1, 1965, the accused appeared and admitted that he had not shown income of his two concerns, namely, National Motors and Elite Cinema. On March 6, 1965, he filed a revised return for Rs. 3,93,279. Assessment of the accused was made. Similarly, in the return pertaining to the assessment year 1963-64, the accused did not show full income from his business. Later on he filed revised return showing larger income. On July 27, 1966, two complaints under Section 277 of the Income-tax Act for making false statements in respect of his income in his said two returns were filed. Both these complaints were filed on behalf of the Commissioner of Income-tax, Delhi, against the accused. Attempts were made to effect service on the accused, but to no avail.

3. On November 8, 1966, the accused made an application to the Commissioner of Income-tax under S. 279 of the Act for composition of the claim of assessment made against him. In that application, he referred to the pendency of the above referred to two complaints in the Court of Shri R. K. Shinghal. Thus he knew that the complaints were pending against him.

4. Finding that the accused was deliberately avoiding and evading to accept service and

to appear in Court, orders under S 87 of the Criminal P O, for the issue of proclamation against him and under S 89 of the Code for attachment of his property were passed. On 8.11.1967 the accused sent a telegram to the Court communicating about his inability to appear on that date. His counsel, however, appeared in Court on that date. He gave an undertaking that he would produce the accused on 8.12.1967, the next date fixed in the case. The accused did not appear on that date. The undertaking given was not honoured. Eventually, the accused appeared in Court on 11.3.1968. He was released on bail on execution of bond with one surety in the sum of rupees one thousand and the case was adjourned to 16.4.1968 for evidence of prosecution being re-ordered. The accused was absent again. An application supported by a medical certificate was received from him. The Court granted him exemption from personal appearance in Court.

8 On 8.5.1968 there was made an application on behalf of the accused that the cases had been compromised and the claim of the Income tax Department settled. The cases were adjourned for reply to the application and arguments thereof to 30.5.1968. Reply to the application was filed on behalf of the Department. The arguments were not heard. The case was adjourned for arguments to 27.6.1968. Neither the accused nor his counsel appeared in Court on that date. A telegram was again received from the accused for the cases being adjourned. The Court cancelled his bail and forfeited his security. Notice was issued to his surety under S 514 of the Criminal P O, to show cause on 9.7.1968 as to why the amount of security should not be recovered from him. Bailable warrants were issued to the accused to appear on that date. On 9.7.1968 neither the accused nor his surety turned up. On that date, the Court passed the order that the accused was avoiding appearance in Court to delay the disposal of the cases and directed for issue of non-bailable warrants for his arrest. On 22.7.1968 the accused appeared.

He was released on fresh bail bond with one surety in the sum of rupees five thousand. The case was adjourned for arguments in the above mentioned application to 6.8.1968. In the proceedings against the previous surety, the trial Court took the view that the absence of the accused was not intentional and there was no need for the surety being proceeded against. Thus the proceedings against the surety were dropped. When the cases came up for arguments on the above application on 6.8.1968 an application was made by the accused to the Court saying that the accused intended to move the High Court for transfer

of these cases from Patiala to Chandigarh. Although the accused undertook to do so, no application for transfer was filed for a period of four months. The application under S 526 of the Criminal P O, was made in the High Court on behalf of the accused on 4.12.1968 on the ground that it would be convenient for him if these cases could be tried at Chandigarh. The Commissioner of Income tax also filed two applications for transfer to the High Court of the two complaint cases pending before the trial Court at Patiala.

6 Both the complainant and the accused want that the cases be transferred to Chandigarh. The prayer of the complainant is that they be transferred to the High Court on the original side whereas the accused has prayed that the cases be transferred to some Court at Chandigarh. Considering that the cases are not of any extraordinary public importance nor any difficult and intricate questions of law are involved in them, these are not fit cases for transfer to the High Court on the original side.

7 The above referred to course of proceedings and conduct of the accused in the first instance in avoiding to accept service and later on after having accepted service in adopting dilatory tactics to delay the disposal of cases, shows that he had been seeking adjournment after adjournment on one pretext or the other. He attained the end of postponing the commencement of the trial of these cases by the above referred to dilatory ways and means presumably in co-operation or league with the presiding officer of the trial Court. But for the favourable inclination shown by the presiding officer in acceding to the requests made on behalf of the accused from time to time for adjournment of the cases the object of delaying their disposal would not have been achieved by the accused. Under the circumstances there is every justification for these cases being transferred from the trial Court and entrusted to some other Court for disposal. The accused has himself prayed for the cases being transferred to some Court at Chandigarh. His counsel, however, wants that these cases be tried by some Judicial Magistrate at Chandigarh. Considering the influence which the accused has exercised upon and also taking into account his conduct in manoeuvring to secure the sympathy of the Judicial Magistrate at Patiala, it will not be difficult for him to make another Judicial Magistrate at Chandigarh to toe the line of his wishes and secure his sympathies for the disposal of the complaints being delayed.

8 The complaints were filed as long ago as July 27, 1966. Two years and six months have rolled by and the trial of the complaints

has not as yet commenced. There is reasonable apprehension in the mind of the complainant that the accused, who is the son of late Shri Partap Singh Kairon, Chief Minister, Punjab, will approach and exercise influence upon the presiding officer of the transferee Court of a Judicial Magistrate because of his wide contacts. There is every likelihood of subordinate Court of the status of a Judicial Magistrate being again approached and influenced by the accused. To obviate the necessity, which might be occasioned for another order of transfer from the Court of a Judicial Magistrate at Chandigarh, if the cases are now transferred to it for trial, I think it expedient and proper to transfer the cases to the Court of the Sessions Judge at Chandigarh.

9. The counsel for the accused raised an objection against the transfer of the cases to the Court of the Sessions Judge at Chandigarh on the ground that if the cases are transferred to his Court, the accused would be deprived of the right of appeal against the judgment of his conviction, if any recorded against him and thus remedy available to him would be lost. Under S. 526 of the Criminal Procedure Code, High Court has power to transfer a case to the Court of Session although the case sought to be transferred is pending in the Court of a Judicial Magistrate. The relevant portion of S. 526 of the Code pertaining to the power to so transfer a case is reproduced below:

"(1) Whenever it is made to appear to the High Court:

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate to the High Court,

* * * *

it may order.....that any particular case or appeal or class of cases or appeals be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction."

10. The above reproduced relevant portion of the provisions of S. 526 leaves no doubt that there inheres in the High Court power to transfer a case from a subordinate Criminal Court to another subordinate Criminal Court of co-ordinate jurisdiction or superior jurisdiction. As explained above, the facts and circumstances of the cases fully call for their transfer to the Court of superior jurisdiction, namely, the Sessions Judge at Chandigarh. In order that a fair and impartial trial of these cases may be had, I order that they be transferred to the Court of the Sessions Judge at Chandigarh.

11. There has already been inordinate and unnecessary delay in the disposal of these

cases. The Sessions Judge will bring to bear upon their trial sense of expedition which they deserve. This will avoid protraction of their trial. In course of trial, adjournment be granted only if it is unavoidably necessary to do so. The parties will appear before the Sessions Judge on February 14, 1969. Their counsel have been informed accordingly.

Order accordingly.

1970 Cri. L. J. 123 (Vol. 76, C. N. 37)
(ALLAHABAD HIGH COURT)

S. D. SINGH J.

Municipal Board, Chandausi, Complainant,
Appellant v. Angan, Accused, Respondent.

Criminal Appeal No. 155 of 1965, D/- 7-11-1967, against order of Magistrate 1st Class, Moradabad, D/- 23-11-1964.

(A) Prevention of Food Adulteration Act (1954), S. 12—Purchaser of article of food, purporting to act as food inspector, sending article for analysis to public analyst without payment of fees—If State does not care to recover prescribed fees from him and public analyst sends report of analysis without payment of any fees that would not make report inadmissible in evidence or otherwise vitiate proceedings. (Para 5)

(B) Prevention of Food Adulteration Act (1954), Ss. 20, 12, 11—Sample of article of food taken by private purchaser under S. 12—Filing of complaint under main clause of S. 20 (1) is not prohibited.

Section 20 (1) of the Prevention of Food Adulteration Act, 1954 does not lay down that a complaint may be made under that sub-section only when the procedure prescribed under S. 11 of the Act has been followed by the Food Inspector himself. The procedure prescribed under S. 11 is to some extent made applicable even to the taking of a sample of article of food by a private purchaser under S. 12. If to that extent the provisions of Ss. 11 and 12 of the Act have been complied with there is nothing in the Act to prohibit the filing of a complaint under the main clause of S. 20 (1) even in case the sample of the article of food is taken by a private purchaser under S. 12: AIR 1934 Cal 858 and AIR 1937 Cal 60, Rel. on.

(Para 6)

Cases Referred: Chronological Paras
(1937) AIR 1937 Cal 60 (V 24): 38

Cri L J 745, Manindra Nath Banerjee v. Jyotish Chandra 6

(1934) AIR 1934 Cal 858 (V 21): 86

Cri L J 372, Sawai Ram Agarwala v. Emperor 6

IL/AM/E309/68/MBR/B

V K Gupta for Appellant, P B Salamat, for Respondent

JUDGMENT—This is a State appeal against an order of the Bench Magistrate, First Class Moradabad by which the present respondent Angan was acquitted in a case under S 7 read with S 16 of the Prevention of Food Adulteration Act (No XXXVII of 1954)

2 The respondent is a dealer in milk. A sample of his milk was taken by the Food Inspector I P Apan on 24th September 1963 and when the sample of milk was examined it was found to be deficient in fat contents by about 17 per cent and in non fatty solids by about 2 per cent. The respondent was then prosecuted by the Medical Officer of Health of Municipal Board Chandauli, as aforesaid.

3 During the hearing of the case against the respondent it was urged that Sri I P Apan was not qualified to be appointed a Food Inspector under S 9 of the Prevention of Food Adulteration Act, 1954 (hereinafter called the Act) read with R 8 of the Rules framed there under. This contention found favour with the learned Bench Magistrates with the result that the respondent was acquitted and hence this appeal by the State.

4 Section 9 of the Act empowers the State Government to appoint Food Inspectors having the prescribed qualifications. Under R 8 of the Rules framed under the Act the State Government has prescribed the qualifications for a Food Inspector. The qualifications of Sri I P Apan who was appointed Food Inspector on 30th March 1963 could fall only under Cl (8) of R 8 aforesaid. When his qualifications were challenged in cross-examination, he tried to bluff the Court and to pose as if he had all the qualifications which are prescribed for appointment of a person as a Food Inspector but when the point was pressed in cross-examination, he had to admit though in a round about manner, that he did not possess the required qualifications. Sri I P Apan's statement is from that point of view full of perjury and it is a little surprising that the Bench Magistrates did not think of prosecuting him under S 198 of the Indian Penal Code. If he had been appointed Food Inspector without possessing the required qualifications it was not probably so much of his fault as of those who made the appointment, but all the same he should not have debased himself in the witness box by stating facts which were not correct—which were not only not correct but were false to his knowledge. In examination-in-chief he made a wonderful statement that he was a qualified Food Inspector according to a certain G O. That G O to which reference was made by him is No 4575/XVLI 1783 1952 dated 1st

November 1952. It only refers to the further training of these Sanitary Inspectors who did not have the required qualifications and permits the unqualified Sanitary Inspectors to continue on their posts as a stop gap arrangement. This G O has nothing to do with the qualifications of a Food Inspector which qualifications are prescribed by R 8 of the Prevention of Food Adulteration Rules 1955.

Under the Proviso to Cl (8) of R 8 an unqualified person could be appointed Food Inspector within a period of four years from the date of the commencement of the Act and under the second Proviso to the same clause a person so appointed as Food Inspector within the period of four years could be allowed to hold his post even after the expiry of that period if the State Government was satisfied that he continued to possess adequate knowledge and competence as Food Inspector. The appointment of Sri I P Apan was made on 30th March 1963 while the Prevention of Food Adulteration Act 1954 came into force on 1st June 1955. The appointment was therefore, after the expiry of the period of four years and since Sri I P Apan ultimately admitted in his cross examination that by the time of his appointment or even by the time the sample of milk was taken by him he had not acquired the required qualifications his appointment as Food Inspector was definitely against the provisions of law and consequently invalid. Sri I P Apan could not, as such exercise any of the functions of a Food Inspector.

5 The milk for the purpose of being tested under the Act was purchased by Sri I P Apan on 24th September, 1963, on which date he was not a validly appointed Food Inspector and the sample could not as such be taken by him under S 11 of the Act. S 12 of the Act however empowers even a private citizen to purchase milk for being sent to the Public Analyst. That section reads:

"12 Purchaser may have food analysed. Nothing contained in this Act shall be deemed to prevent a purchaser of any article of food, other than a food inspector from having such article analysed by the public analyst on payment of such fees as may be prescribed and from receiving from the public analyst a report of his analysis."

Under the section as it stands a purchaser of any article of food other than a Food Inspector may have such article analysed by the public analyst on payment of such fees as may be prescribed and receive a report of such analysis. Even if, therefore Sri I P Apan was not a Food Inspector properly so called he was a purchaser of an article of food who could purchase the milk from the respondent and have

it sent to the Public Analyst for analysis. It is true that when a private purchaser sends an article of food for analysis to the public analyst, he has to pay such fees as may be prescribed for the purpose, and in this case since Sri I. P. Apan was purporting to act as a Food Inspector no fees may have been paid by him, but that is a matter between the State and the purchaser of the article of food. If the State does not care to recover the prescribed fees from him and the Public analyst sends the report of the analysis without payment of any fees, that would not make the report inadmissible in evidence or otherwise vitiate the proceedings.

6. The next question for consideration in the case is whether a Magistrate could take cognizance of an offence under the Act under sub-s. (1) of S. 20. Sub-s. (1) of S. 20 aforesaid reads:

"20. Cognizance and trial of offences :

(1) No prosecution for an offence under this Act shall be instituted except by, or with the written consent of, the State Government or a local authority or a person authorised in this behalf by the State Government or a local authority :

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in S. 12, if he produces in Court a copy of the report of the Public analyst along with the complaint."

The prosecutions under the Act are normally launched under sub-s. (1) aforesaid by or with the written consent of the State Government or a local authority or a person authorised in this behalf by the State Government or a local authority. But even a purchaser of the sample of an article of food under S. 12 may prosecute the vendor under the proviso to sub-s. (1) aforesaid if he produces in Court a copy of the report of the Public Analyst along with the complaint. In this particular case the complaint was made not by Sri I. P. Apan who could as I have said earlier, be regarded as a private purchaser under S. 12 of the Act, but by "the Medical Officer of Health and Food Inspector" whose name it is difficult to decipher from the record. It was not the contention of the respondent that the Medical Officer of Health had not the authority to file the complaint against him. What was urged before me during the hearing of this appeal was that if the sample of the article of food is taken by a private person under S. 12 of the Act only he can file a complaint under the proviso to sub-s. (1) of S. 20 and not the Medical Officer of Health as Food Inspector.

I do not, however, think there is anything in the Act which prohibits a complaint being

filed under the main clause of S. 20 of the Act even in cases where the article of food may have been purchased as a sample by a private purchaser under S. 12. Sub-s. (1) of S. 20 does not lay down that a complaint may be made under that subsection only when the procedure prescribed under S 11 of the Act has been followed by the Food Inspector himself. The procedure prescribed under S. 11 is to some extent made applicable even to the taking of a sample of article of food by a private purchaser under S 12. If to that extent the provisions of Ss. 11 and 12 of the Act have been complied with, there is nothing in the Act to prohibit the filing of a complaint under the main clause of sub-s. (1) of S. 20 even in case the sample of the articles of food is taken by a private purchaser. This was also the view taken in two Calcutta cases, *Sawai Ram Agarwala v. Emperor*, A I R 1934 Cal 558 and *Manindra Nath Banarji v. Jyotish Chandra Datta* A I R 1937 Cal 60. These two decisions were under the Bengal Food Adulteration Act, 1919, and the relevant provisions thereof are not before me, but the principle which was followed in the two cases would be applicable to the facts of this case. In those cases samples were taken by the Sanitary Inspector who was not authorised to act as such under the relevant provisions of the Bengal Act. It was held that the person who held the post of Sanitary Inspector could take the samples and send them to public analyst for examination as a private individual.

7. A case under the Prevention of Food Adulteration Act (37 of 1954) and relating to the very same Inspector, Sri I. P. Apan, came up before Ramabhadran, J. in Criminal Appeal No. 2482 of 1964. He too took the view that the Food Inspector as a private individual was not debarred from taking the sample and submitting the same to the Public Analyst and that on the basis of that report and the complaint filed by the Medical Officer of Health the Court was within its jurisdiction in taking cognizance of the offence.

8. It was pointed out by the learned counsel for the respondent that the sample of milk was not sent to the Analyst by Sri I. P. Apan but by the Medical Officer of Health. The report of the Public Analyst however indicates that the sample was received by him from "the Food Inspector c/o the Medical Officer of Health, Municipal Board, Chandausi." The report thus distinguishes between the Food Inspector and the Medical Officer of Health and since it was Sri I. P. Apan who was holding the post of Food Inspector though, as I have said earlier, the appointment was invalid, it can easily be inferred that the sample was

sent by him and not by the Medical Officer of Health

9 It was contended by the learned counsel for the respondent that if this is the view I take in this case there is no other question of law or fact which would require further consideration as the sample of milk which was sent to the Public Analyst was sold by the respondent and found to have been adulterated, which makes the provisions of S 7 read with S 16 of the Prevention of Food Adulteration Act applicable

10 It was urged that in passing the sentence a lenient view may be taken and to some extent that is possible. The sample of food was taken on 24th September 1963 and the case against the respondent has been hanging for over 4 years. I therefore, consider it a fit case in which a substantial sentence of imprisonment may not be awarded

11 The appeal is allowed. The respondent Angan is convicted under section 7 read with S 16 (1) (i) of the Act and is sentenced to pay a fine of Rs 50/. In default of payment of fine he will undergo one month's simple imprisonment. One month's time is allowed for payment of fine

Appeal allowed

1970 Cri L J 125 (Vol 76 C N 38)

(GOA, DAMAN & DIU J C's COURT)

V S JETLEY, J C

Dharma and others, Appellants v The State, Respondent

Criminal Appeal No 4 of 1969, D/ 12 3 1969

Penal Code (1860) Ss 304 Part II, 34 and 149 — Accused charged under S 304 Part II read with S 34 or S 149, alternatively — Duty of trial Court pointed out — Distinction between Ss 34 and 149, explained

Where the accused are charged under S 304 Part II read with S 149 or in the alternative under S 304 Part II read with S 34 it is the duty of the trial Court to decide whether the alleged assault resulting in death of the deceased was committed by the accused or any one of them in prosecution of the common object or in furtherance of the common intention and whether the accused formed an 'unlawful assembly' with the common object of assaulting the deceased. Moreover if on the facts proved the provisions of Ss 34 and 149 are not attracted then in order to bring home guilt to the accused it is necessary for the prosecution to prove which

of the accused was liable for the death of the deceased (Para 2)

"Common intention" required by S 34 and "common object" set out in S 149, though they sometimes overlap, are used in different senses and should be kept distinct. If the common object which is the subject matter of the charge under S 149 does not necessarily involve a common intention, then the substitution of S 34 for S 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under S 149 would be the same if the charge were under S 34 the failure to charge the accused under S 34 could not result in any prejudice and in such cases the substitution of S 34 for S 149 might be held to be a formal matter. There is no such broad proposition of law that there can be no recourse to S 34 when the charge is only under S 149. Consequently it is necessary to see whether the assault was one which developed on the spot or, in the alternative whether the requirements of S 34 and S 149 are satisfied (Case law discussed) (Para 2)

Cases Referred Chronological Paras

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|---|---|
| (1965) Ori Appeal No 85 of 1964,
D/ 12 2 1965 (SO) Maruti Bhiva
Kamble v State of Maharashtra | 2 |
| (1958) AIR 1958 SC 672 (V 45) 1959
SOR 496 1958 Ori L J 1251 B N
Srikantiah v State of Mysore | 2 |
| (1956) AIR 1956 SC 518 (V 43) 1956
SOR 288 1956 Ori L J 929, Sukha
v State of Rajasthan | 2 |
| (1955) AIR 1955 SC 216 (V 42) 1955
Ori L J 572, Pandurang v State of
Hyderabad | 2 |
| (1954) AIR 1954 SC 204 (V 41) 1954
SOR 504 1954 Ori L J 580 Karnail
Singh v State of Punjab | 2 |
| (1954) AIR 1954 SC 708 (V 41) 1954
Ori L J 1757 Kripal v State of U P | 2 |
| (1945) AIR 1945 P C 118 (V 82) 72
Ind App 148 46 Ori L J 689 Mahbub
Shah v King Emperor | 2 |
| M P Shukre with R B Kolwalkar, for
Appellants L O Gama, Public Prosecutor, for
the State | |

JUDGMENT — This is an appeal directed against the judgment passed by the learned Sessions Judge Panjam dated 31st December 1968, whereby he convicted the appellants under S 304 Part II of the Penal Code and sentenced each of them to undergo one year's R I and a fine of Rs 150 each and in default of payment of fine to undergo R I for 45 days. The learned Sessions Judge also directed that out of the fine paid, a sum of Rs 800 may be paid to the mother of the

deceased, Vittal Naik. The appellant felt aggrieved by this judgment and accordingly preferred this appeal. The State also moved this Court for enhancement of the sentence imposed on the appellants in accordance with the provisions of S. 489 (1) Criminal P. C.

2. Mr. Kolwalkar, learned counsel for the appellants, has taken me through the evidence of prosecution witnesses Govind Naik (P. W. 2), Mahadev Naik (P. W. 3), Krishna Naik (P. W. 4) and the medical evidence of Dr. Carlos M. Lopes (P. W. 5), Dr. Jose Sarto Menezes (P. W. 6) and Dr. Roberto Sando Dias (P. W. 7). A perusal of the judgment would show that the requirements of Ss. 84 and 149 read with the provisions of S. 304, Penal Code were not considered by the learned Sessions Judge. As will appear from the charge at page 18 of the paper book, the five appellants were charged under S. 304 Part II read with S. 149, Penal Code or, in the alternative, under S. 304 Part II read with S. 84 of the Penal Code.

Section 84 provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. What is necessary for the prosecution to prove in this case is whether the alleged assault resulting in the death of the deceased was in furtherance of the common intention of all the appellants and, if this is so, then each one of them would be liable for this criminal act in the same manner as if it were done by him alone. Section 149 provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. Section 141 defines an "unlawful assembly". This section, to the extent it is material for the present purpose, provides that an assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is to commit a criminal offence (see clause (3)).

The question which has not been considered in this case by the learned Sessions Judge, if I may say so with respect, is whether the alleged assault resulting in death of the deceased was committed by the appellants or any one of them in prosecution of the common object or in furtherance of the common intention. Did the appellants form an "unlawful assembly" with the common object of assaulting the deceased. The distinction between Section 84 and Section 149 has been explained by their Lordships of the Supreme Court in a number of

decisions. The Supreme Court refuted the contention of the learned counsel for the appellant, that only a pre-arranged plan will suffice to attract Section 84 I. P. C. "Mubhub Shah v. King Emperor", 72 Ind. App 148 : (AIR 1945 P. C. 118), Pandurang v. State of Hyderabad, AIR 1955 S. C. 216, 'Kirpal v. State of U. P.', AIR 1954 S. C. 706 cited in Maruti Bhiwa Kamble v. State of Maharashtra, Cr. A. No. 85 of 1964 S. C.). It follows from these decisions that a pre-arranged plan is not an indispensable requirement of the application of Section 84. A common intention may develop suddenly depending upon the facts of each case. In B. N. Srikantiah v. State of Mysore, (1959) S. C. R. 496; (AIR 1958 S. C. 672) the Supreme Court observed that common intention is a question of fact and is to be gathered from the acts of the parties. The conduct of the appellants, the ferocity of the attack, the weapons used, the situs of the injuries and their nature together with the fact that there was a preconcert established that the common intention of the appellants was to murder the deceased.

In Sukha v. State of Rajasthan (1956 S. C. R. 288; (AIR 1956 S. C. 513), the Supreme Court drew a distinction between "common intention" and "common object". "Common intention" required by Section 84 and "common object" set out in Section 149, according to their Lordships, though they sometimes overlap, are used in different senses and should be kept distinct." In a case under Section 149 there need not be a prior concert and meeting of minds; it is enough that each has the same object in view and their number is five or more and they act as an assembly to achieve that object. In Karnail Singh v. State of Punjab, 1954 S. C. R. 904; (AIR 1954 S. C. 204) it was observed that it is true that there is substantial difference between Sections 84 and 149 but they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 84. If the common object which is the subject-matter of the charge under section 149 does not necessarily involve a common intention then the substitution of Section 84 for Section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under S. 149 would be the same if the charge were under Section 84 the failure to charge the accused under section 84 could not result in any prejudice and in such cases the substitution of section 84 for Section 149 must be held to be a formal matter. There is no such broad proposition of law that there can be

no recourse to Section 84 when the charge is only under Section 149

It is not necessary to refer to other decisions. In Sukha and others case 1955 S O R 288 (AIR 1956 SO 513) supra their lordships of the Supreme Court observed that when a crowd assembles and there is an uproar and people are killed and injured it is only natural for others to rush to the scene with whatever arms they can snatch. Some may have an unlawful motive but others may not, and in such circumstances it is impossible to say that they were all motivated by a common intention with prior concert. What a Court of fact should do in such a case is to find from the evidence which of them individually had an unlawful object in view or having originally a lawful object in view developed it later on into an unlawful one. The learned Sessions Judge had not discussed the question whether all the appellants or any of them individually had an unlawful object in view. Was the assault a sudden one which developed on the spot? In the alternative are the requirements of Sections 84 and 149 satisfied in the light of the aforesaid decisions of their Lordships of the Supreme Court? It is possible that the requirements of these sections escaped the attention of the learned Sessions Judge although the appellants had been charged with these offences read with Section 304 Part II.

If on the facts proved the provisions of Sections 84 and 149 are not attracted then in order to bring home guilt to the appellants it would be necessary for the prosecution to prove which of the appellants was liable for the murder, in this case assuming Section 304 Part II applies to the facts of this case. Mr. Leo Gama learned Public Prosecutor for the State, was fair enough to concede that the provisions of Sections 84 and 149 read with Section 304 Part II have not been considered by the learned Sessions Judge and that this seems to be a fit case for remanding the case to the Sessions Court with directions to consider it de novo. Mr. Shinkre for the appellants also is of the same view. This Court should have the benefit of a considered judgment from the learned Sessions Judge. The appellants Nos 1, 2 and 5 are already on bail. The remaining two appellants are in custody. As it is the conviction and the sentence recorded by the learned Sessions Judge are reversed and the case is remanded to the learned Sessions Judge for a hearing de novo in accordance with the provisions of Section 428 (b) of the Code of Criminal Procedure. The remaining two appellants are released on bail in the sum of Rs 5000/- with one surety in the like amount. They are required to appear before the Sessions Judge when called upon to

do so. The application for enhancement of the sentence is not pressed by Mr. Leo Gama learned Public Prosecutor. Order accordingly. Case remanded.

1970 Cr L J 128 (Vol 76 C N 39)
(GUJARAT HIGH COURT)

A D DESAI J

Champaklal Parbhulal Parikh, Appellant v
Natwarlal Gordhandas Gandhi and another,
Respondents

Criminal Appeal No 1044 of 1965, D/ 24.11.1967 against judgment of Magistrate First Class (Municipality) Baroda in Cr Case No 12648 of 1964

(A) Prevention of Food Adulteration Act (1954), Ss 13 (5) and (2), 7, 12 — Report of Public Analyst — Admissible under S 13 (5) and not under S 510, Criminal P C (1898) — Refusal by Court to summon and examine Public Analyst — No prejudice to accused charged under S 7 — He has no right either under Act (1954) or Criminal P C (1898) to cross examine Public Analyst

It is true that the Court has a discretion under S 13 (5) of the Act to admit the report of the Public Analyst but once his report is admitted and reliance placed upon the same used charged for committing offence under S 7, cannot be acquitted on the ground that though he had applied to the Court for cross examining the Public Analyst that opportunity was not afforded to him. It is not obligatory for the trial Court to summon and examine the Public Analyst as a witness in the Court.

(Para 8)

The report of Public Analyst is not admissible in evidence under S 510 of Criminal P C but is admissible under S 13 (5) of the Act (1954). But in view of the remedies available to accused under S 12 or S 18 (2) of the Act it cannot be said that the effect of non applicability of S 510 Criminal P C is such that the prosecution will never examine the Public Analyst as a witness in any case there by putting the accused to a great disadvantage. He can examine the Public Analyst as his witness. Moreover there is no provision either in Criminal P C or the Prevention of Food Adulteration Act, which gives right to the accused to cross examine the Public Analyst. AIR 1966 S O 128, Foll. (Paras 6, 7 & 8)

(B) Prevention of Food Adulteration Act (1954) S 11 (1) (b) — Division of sample in three equal parts — Physical act of dividing done by accused in presence of Food Inspector — No contravention of S 11 (1) (b) (Para 9)

(C) Prevention of Food Adulteration Act (1954), S. 11 (1) (a) — Issue of notice under — Accused putting his signature on it—Food Inspector taking back notice after completion of procedure under S. 11 — Taking notice back does not contravene S. 11. (Para 10)

Cases Referred: Chronological Paras
{1966} AIR 1966 S C 128 (V 53):1966

Ori L J 106, Mangaldas Raghavji v.

State of Maharashtra

{1962} AIR 1962 Bom 229 (V 49) :

1962 (2) Ori L J 466, State v.

Bhause Hanmantasa Pawar

G. A. Pandit for J. G. Shah, for Appellant;
S. M. Shah, for Respondent No. 1, H. V.
Bakshi, Asst. Govt. Pleader, for the State.

JUDGMENT — This appeal is directed against order of acquittal passed by Mr. I. D. Trivedi, Special Judicial Magistrate, First Class, Baroda, acquitting the accused of the charge of having committed an offence under S. 7 of the Prevention of Food Adulteration Act (hereinafter referred to as the Act) punishable under S. 16 of the Act.

2. The prosecution case was that the accused was a dealer in chilly powder and had his shop in Kalupura Brahman Fala in the City of Baroda. The complainant, Champaklal Parbhudas Parikh, was the Food Inspector of Baroda Borough Municipality. The Food Inspector visited the shop of the accused on October 1, 1964 at 8-80 A.M. and found that the accused was keeping approximately 40 kilos of chilly powder in a large box for the purpose of sale. The complainant called Champaklal Maneklal and Luhar Bhikhabhai Parsottam as panch witnesses and in their presence he gave the accused a notice in writing to the effect that he wanted to purchase 450 grams chilli powder for the purpose of analysis. Then the accused gave him 450 grams of chilly powder from an oil barrel. The complainant asked the accused to divide the chilly powder into three equal parts. The accused divided the powder into three parts and the Inspector put each part in a separate clean bottle. The bottles were then corked and slips bearing the signature of the accused, panchas and himself were affixed to the bottles. The bottles were then sealed and a label containing the name of the vendor, the serial number, the nature of sample and the date of collection of the sample, was affixed on each of the bottles. The complainant then took back the notice from the accused and prepared a panchnama. One of the three bottles was given to the accused, and the other was sent to Public Analyst along with a forwarding memo. He also sent to him in a separate cover, a memo of the specimen seal impres-

sion. On receipt of the report of the Public Analyst showing that the sample was adulterated and after obtaining requisite sanction the complainant filed a complaint in the Court of Special Judicial Magistrate, First Class, Baroda and the accused was charged for having committed an offence under S. 16 (1) (a) read with S. 7 of the Prevention of Food Adulteration Act.

3. The defence of the accused was that he had not committed any offence, that he was not given any notice according to law and that he was not in possession of adulterated chillies. The accused admitted that he had signed a notice given by the Food Inspector informing him that he was purchasing chilly powder for the purpose of analysis.

4. During the trial the prosecution gave a purahis stating that they did not want to lead any further evidence. The accused there- after filed an application Ex. 10 in the Court which reads as under:

"That the accused of this case most respectfully submits that the complainant has cited the Public Analyst as a witness in the case. The accused will not get any chance to cross examine if the prosecution does not examine him as his witness. Therefore, it is requested that the said witness be called and produced for the purpose of cross examination. If he is not produced for the purpose of cross examination, the accused will suffer in his defence and will not get justice in the case."

The learned trial Magistrate rejected the application and passed the following order:

"The prosecution cannot be compelled to examine the witness. The accused may examine if he so desires."

It is an admitted fact that Public Analyst was not examined in this case.

5. The learned trial Magistrate after hearing the complainant and the accused passed a final order acquitting the accused. The learned trial Magistrate came to the conclusion that in this case the report of the Public Analyst was challenged and it would not be proper to give any weight to that report, specially in view of the fact that the Public Analyst was not examined. The learned trial Magistrate also held that the complainant had not followed the procedure laid down under S. 11 of the Act for taking the sample as the sample was not taken by the complainant personally. It was for these reasons that the learned Magistrate passed an order acquitting the accused of the offence with which he was charged. It is against this order of acquittal that the complainant has filed this appeal.

6. Mr S. M. Shah appearing for the accused contended that the report of the Public Analyst was admissible in evidence under the pro-

visions of S. 510 of the Criminal Procedure Code and that the accused had given an application for examination of the Public Analyst as a witness under sub-s (2) of S. 510 of the Criminal Procedure Code, and therefore, it was obligatory for the trial Court to summon and examine the Public Analyst as a witness in the Court. The argument was that as no summons was issued to the Public Analyst and as he was not examined as a witness in this case, no reliance should be placed on the report of the Public Analyst for proving that the sample was adulterated. This argument of Mr. Shah proceeds on an erroneous assumption that the report of the Public Analyst is admissible under S. 510 of the Criminal Procedure Code. Section 510 of Criminal Procedure Code reads as under:

Section 510 (1) — Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government or the Chief Inspector of Explosives or the Director of Finger Print Bureau or an officer of the Mint upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code may be used as evidence in any inquiry trial or other proceeding under this Code.

(2) The Court may if it thinks fit, and shall on the application of the prosecution or the accused, summon and examine any such person as to the subject matter of his report.

The section refers to a document purporting to be a report of Chemical Examiner or Assistant Chemical Examiner to the Government or Chief Inspector of Explosives or Director of Finger Print Bureau or the Officer of Mint. In this case the report that the sample was adulterated was given by the Public Analyst Baroda Borough Municipality Area. Section 8 of the Act provides that the Central Government or the State Government may by notification in the Official Gazette, appoint such persons as it thinks fit having the prescribed qualifications to be Public Analyst for such local area as may be assigned to them by the Central Government or the State Government as the case may be. There is a proviso to that section with which we are not concerned in this case. Rule 6 of the Prevention of Food Adulteration Rules lays down the qualifications of the public analyst. Rule 7 lays down duties of public analyst. Sub-section (1) of S. 18 of the Act provides that the Public Analyst shall deliver in such form as may be prescribed a report to the Food Inspector of the result of the analysis of any article of food submitted to him for analysis. The form is prescribed by sub-rule (8) of Rule 7 of the Prevention of Food Adultera-

tion Rules. Sub-section (2) of Section 18 provides that the accused or the complainant may, on payment of the prescribed fee, make an application to the Court for sending the part of the sample sent to the Court to the Director of the Central Food Laboratory for a certificate and on such application being made the Court is bound to send the sample to the Director of Central Food Laboratory after following the procedure laid down in the section. The certificate issued by the Central Food Laboratory is made final and supercedes the report given by the Public Analyst. Sub-s (5) of S. 18 provides that any document purporting to be a report signed by a public analyst unless it has been superseded or any document purporting to be a certificate signed by the Director of Central Food Laboratory, may be used as evidence of the facts stated in it in any proceeding under the Act. There is a proviso to the section which makes the report of the Director of the Central Food Laboratory final and conclusive evidence of the facts stated therein. These provisions make it amply clear that the report of the Public Analyst is admissible in evidence under sub-s (5) of S. 18 of the Act. The report of the Public Analyst cannot be admitted in evidence or is not admissible in evidence under the provisions of S. 510 of the Criminal Procedure Code because the said provisions refer to the report of a Chemical Examiner or Assistant Chemical Examiner or the Chief Inspector of the Explosives or the Finger Print Bureau or an officer of Mint. Section 510 of the Criminal Procedure Code does not at all refer to the report of a Public Analyst and therefore it is obvious that the said provision cannot apply to the report of the Public Analyst. The report of the Public Analyst is not admissible in evidence under the provisions of S. 510 but is admissible in evidence under the provisions of sub-s (5) of S. 18 of the Act. This interpretation also receives support from the observations made by their Lordships in *Mangaldas Paghavi v. State of Maharashtra* A.I.R. 1968 S.C. 128. The facts in that case were that the accused were charged for selling adulterated turmeric powder. The prosecution relied upon the report of the Public Analyst for the purpose of proving that the turmeric powder was adulterated. The report of the Public Analyst was accepted by the Court and the learned trial Magistrate convicted the accused for contravention of the provisions of the Act. The case was ultimately taken by the accused to the Supreme Court. Two contentions were raised in the Supreme Court and they were (1) that the report of the Public Analyst by itself was not sufficient for the purpose of conviction of the accused persons and (2) that

the Public Analyst was not called as a witness in the case and, therefore conviction of the accused was improper. During the course of the arguments in that case the lawyer of the accused relied on the decision in *State v. Bhausa Hamantasa Pawar*, AIR 1962. Bom 229. That was the case under the Bombay Prohibition Act, 1949 and the accused was charged for being in possession of a drug which contained alcohol in contravention of the provisions of the Bombay Prohibition Act. The samples of the drug were sent for analysis to the Chemical Analyser. The report of the Chemical Analyser was relied upon by the Court for the purpose of proving that the drug contained alcohol which was in contravention of the provisions of the Bombay Prohibition Act. In the case the High Court had observed as follows:

"It is beyond controversy that, normally, in order that a certificate could be received in evidence, the person who has issued the certificate must be called and examined as a witness before the Court. A certificate is nothing more than a mere opinion of the person who purports to have issued the certificate, and opinion is not evidence until the person who has given the particular opinion is brought before the Court and is subjected to the test of cross-examination."

The Supreme Court considered these observations and said:

"It will thus be clear that the High Court did not hold that the certificate was by itself insufficient in law to sustain the conviction and indeed it could not well have said so in view of the provisions of S. 510, Criminal P. O. What the High Court seems to have felt was that in circumstances like those present in the case before it, a Court may be justified in not acting upon a certificate of the Chemical Analyser unless that person was examined as a witness in the case. Sub-s. (1) of S. 510 permits the use of the certificate of a Chemical Examiner as evidence in any enquiry or other proceeding under the Code and sub-s. (2) thereof empowers the Court to summon and examine the Chemical Examiner if it thinks fit and requires it to examine him as a witness upon an application either by the prosecution or accused in this regard. It would, therefore, not be correct to say that where the provisions of sub-s. (2) of S. 510 have not been availed of, the report of a Chemical Examiner is rendered inadmissible or is even to be treated as having no weight. Whatever that may be, we are concerned in this case not with the report of Chemical Examiner but with that of a Public Analyst. In so far as the report of the Public Analyst is concerned we have the provisions of S. 13 of the Act."

Their Lordships of the Supreme Court have observed that in the case before them, they had to consider the report of Public Analyst and not that of Chemical Examiner, and therefore, they were not concerned with the provisions of S. 510 of the Criminal P. O. They further observed that the report of the Public Analyst was admissible in evidence under sub-s. (5) of S. 13 of the Act. The aforesaid observations completely support the view I am taking viz., that the report of the Public Analyst is admissible in evidence under sub-s. (5) of S. 13 and not under S. 510 of the Criminal P. O.

7. Mr. Shah also argued that if such an interpretation is given to S. 510 of the Criminal P. O., the effect is that the accused will be put to a great disadvantage and the prosecution will never examine the Public Analyst as a witness in any case. This contention is devoid of any merits. The Act has provided that a sample of the sale be given to the accused. The accused can get the said sample analysed or make an application to the Court to send the sample before the Court to the Director of Central Food Laboratory for analysis. He can also examine the Public Analyst as his witness. It is therefore not possible, to accept this contention of Mr. Shah in view of the remedies which are available to the accused to prove his innocence.

8. As the report of the Public Analyst is admissible in evidence under sub-s. (5) of S. 13, it is obvious that the accused has no right to make an application to the Court to call the Public Analyst as a witness. There is no provision in the Act giving such a right to the accused. Moreover, even under sub-s. (2) of S. 510, the accused can make an application to the Court only to examine the Public Analyst as a witness. In this case an application was given by the accused to call the Public Analyst as a witness for the purpose of cross examination and there is no provision in Criminal Procedure Code or the Prevention of Food Adulteration Act which gives such a right to the accused. The report of the Public Analyst is admissible in evidence under sub-s. (5) of S. 13 of the Act and the Act provides that it may be used in evidence without examining the person who gives the report. In this case report of the Public Analyst clearly shows that chilli powder which was sold by the accused to the complainant was adulterated and did not conform to standard specified in the Rules. Thus the argument of Mr. Shah that the report is admissible under S. 510 of Criminal P. O., and that the Court was bound to call the Public Analyst as a witness for cross examination cannot be accepted. It is true that the Court has a discretion under

sub = (5) of S 18 to admit the report of the Public Analyst in evidence, but in this case the learned trial Magistrate did exercise his discretion and admitted the report and Mr Shah has not been able to point any reason why no reliance should be placed on the report.

9 Mr Shah then argued that in this case the provisions of S 11 of the Act have not been followed by the Food Inspector and therefore the report of the Public Analyst should not be treated as sufficient evidence to prove the guilt of the accused. The contention was that in this case the sample was not taken by the Food Inspector himself. The accused weighed 450 grams chili powder and then divided the powder into 8 equal parts. The complainant thereafter filled the powder in 8 bottles and sealed the bottles. Mr Shah therefore contended that under the provisions of S 11 it is the Food Inspector himself who has to divide the sample into three parts and fill in the bottles. In this case the physical act of dividing the sample purchased for the analysis was done by the accused in the presence of the Food Inspector and therefore there is no contravention of the provisions of the section.

10 Mr Shah then argued that in this case the complainant had taken back the notice which was given by the Food Inspector to the accused intimating him that the complainant wanted to purchase chili powder for the purpose of analysis. The evidence clearly disclosed that a notice of purchase was given by the complainant to the accused. The accused had admittedly signed the notice and thereafter procedure laid down under S 11 of the Act was followed. After the sale was completed the complainant demanded back the notice and the accused returned it. Now S 11 only requires that the Food Inspector should give a notice of purchase for analysis and that provision has been followed in this case. The argument of Mr Shah that in taking back the notice Ex 4 the Food Inspector had contravened the provisions of S 11 cannot be accepted.

11 The result is that order of acquittal passed by the learned trial Magistrate is set aside and the case is remanded to the lower Court for disposal according to law.

Case remanded

1970 Cr L J 132 (Vol 76, C N 40) =
AIR 1970 ALLAHABAD 51 (V 57 C 8)
FULL BENCH
V G OAK C J W BROOME
MATHUR B D GUPTA GYANENDRA
KUMAR M H BEG
YASHODA NANDAN
T P MUKERJEE AND
C D PAREKH JJ

Rishi Kesh Singh and others Appel-
lants v The State Respondent

Criminal Appeal No 2567 of 1964 D/-
18-10-1968

(A) Evidence Act (1872), Ss 105, 3 101 104 and 114 — Presumption under — Nature of — It only operates initially — Section 105 makes possible both kinds of acquittal one by proving plea fully and another by raising genuine doubt in the case — Line of reasoning in Parbhoo's case (AIR 1941 All 402 (FB)) Explained — Evidence as a whole (including evidence in support of general exception) creating reasonable doubt in the mind of Court as to guilt of accused — He is entitled to acquittal — Decision in Parbhoo's case, (AIR 1941 All 402 (FB)) is still good law — (Civil P C (1908) Pre — Interpretation of Statutes) — (Evidence Act (1872) Preamble, Ss 101-104 and 114) — (Evidence Act (1872) S 3 Proved "Disproved 'Not proved'") — (Words and Phrases — Reasonable doubt — 'Preponderance of probability') — (Penal Code (1860) Ss 6 96, 76 Chapter IV (General) and S 299)

Per Majority —

(Broome Mathur Gupta Parekh, Beg Gyanendra Kumar and Yashoda Nandan, JJ)

The Majority decision in Parbhoo v Emperor AIR 1941 All 402 (FB) is still good law. The accused person who pleads an exception is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused. AIR 1956 Nag 187 & AIR 1947 Bom 38 (SB) & AIR 1952 Sau 3 & AIR 1956 Sau 77 & AIR 1941 Mad 280 & AIR 1949 Nag 66 & AIR 1959 Madh Pra 203 & (1962) 2 Cr LJ 135 (Ker) held not good law in view of AIR 1964 SC 1563 & AIR 1955 Pat 209 AIR 1961 Pat 355 Commented upon. (Paras 93 26 162 176)

Per Beg J —

It is true that, where provisions of the Act are clear and unambiguous no recourse to extrinsic matter even if it consists of the sources of the codification, would be permissible. But the position is that it is not possible to fully bring out the meaning of Section 105 of the Evidence Act itself without reference to the

principles found in the sources of the Act contained in English Law. At least, the aspect of Section 105 which was raised and considered in Parbhoo's case, AIR 1941 All 402 (FB) makes it necessary to go to those sources AIR 1961 SC 493, Rel. on. (Para 119)

The concepts of 'proved', 'disproved', and 'not proved', compress a great deal of judicial wisdom with history and processes of evolution and development behind them which have not yet ended. The term 'Burden of proof' is not defined in the Act and cannot be fully understood without an exposition of its place and meaning in our procedural law as a whole. For an adequate understanding of the import of these basic concepts, Courts have to necessarily examine their sources, the context in which they were given statutory form, the purposes they were designed to serve, and the functions they actually fulfil. AIR 1965 SC 951 & AIR 1965 SC 871 & AIR 1964 SC 1230 & AIR 1958 SC 414. Foll (Para 100)

The purpose of the Evidence Act was "to consolidate, define, and amend the law of Evidence" so that inadequacies and uncertainties in this branch of our law may be removed. It is no secret that this was sought to be accomplished by basing the Act on principles and rules evolved by the judge-made Anglo Saxon law of evidence with slight modifications but without departing from its basic norms. Therefore, to these principles and rules we have to turn to find out the meanings of ambiguous expressions (Para 101)

Whenever the law places a burden of proof upon a party a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together. When there is ample evidence from both sides, the fate of the case is no longer determined by presumptions or burdens of proof, but by a careful selection of the correct version, based, no doubt, on preponderance of probabilities which has to be so compulsive or overwhelming in the case of a choice in favour of a conviction as to remove all reasonable doubt. Burden of proof and presumption may become decisive again in cases where evidence is equally balanced. Thus, their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equibalanced. Neither a burden of proof nor a rebuttable presumption can be used for excluding any evidence. That is not their function at all but of other provisions of law. (Para 103)

In fact, it is not possible to appreciate the true meaning of a number of provisions of the Act, including Section 105, without exploring the law contained in the sources of the codification. If, however, the above mentioned expositions are

kept in view, it becomes clear that the obligation of the Court to presume absence of circumstances supporting a plea is meant to operate only initially.

(Para 105)

If, for example, an accused "proves" *in-fraction of injuries* on him by the complainant in the course of the occurrence which is the subject-matter of the charge, he certainly proves some of the circumstances to support a plea of self-defence. The obligatory initial presumption against him is removed. Nevertheless, he may be convicted if the prosecution evidence proves that these injuries were indubitably caused in the exercise of a right of private defence by the complainant. But, his conviction would not be the result of any presumption under the last part of Section 105. It would follow from the superior proof given by the prosecution either direct or circumstantial or both. On the other hand, added to injuries on the person of the accused, proved to have been caused by the complainant during the occurrence, the accused may succeed in proving, even from such circumstances as an attempt of the prosecution to conceal these injuries, that there is a doubt about the veracity of the prosecution version itself and that his plea of self-defence, although not positively established, may reasonably be true. In such a case, the prosecution could not use the presumption contained in the last part of Section 105 to secure a conviction. No doubt, the prosecution will fail, in such a case, because it has failed to prove its own case beyond reasonable doubt. But, the doubt it has failed to eliminate would have been induced by "proved facts relied upon by the accused to establish the plea of an exception. The facts relied upon for proving an exception could not be automatically equated with facts disproved or disentitle the accused from getting the benefit of an exception simply because he could not fully prove, by a "preponderance of evidence", the exception pleaded. A plea taken but left in the region of "not proved" by the evidence on record may be enough, on a criminal charge, for a bare acquittal provided the doubt introduced by some proved facts and circumstances, displacing the initial obligatory presumption, is strong enough to reasonably shake the moral conviction of guilt of the accused on the charge levelled against him. This seems to be the line of reasoning underlying the majority view in Parbhoo's case, AIR 1941 All 402 (FB). It seems to be both practical and just. It accords with very firmly established principles of proof and burden of proof applicable to criminal trials in this country as well as with the provisions of the Act read as a whole. (Para 106)

Section 105 does not prevent the Court from giving the benefit of doubt altogether to an accused pleading an exception, or in

other words Section 105 makes possible both kinds of acquittal one by proving his plea fully and another by raising genuine doubt in the case. Section 105 of the Act was introduced not in order to depart from but to make our law conform to the norms of English Law of evidence on the subject. (Paras 109-122)

Parbhoo's case was not meant to accord any guidance on what reasonable doubt itself means. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating capricious indolent drowsy or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to 'separate the chaff from the grain'. It is the doubt of a reasonable astute and alert mind arrived at after due application of mind to every relevant circumstance of the case appearing from the evidence. AIR 1937 Rangoon 83 (FB) & AIR 1941 Rangoon 175 & AIR 1965 All 417 & AIR 1967 All 204 Ref. (Para 112)

Section 105 serves the purpose sometimes served by a proviso. Of course it could be looked upon as analogous to a proviso only if we view Section 6 I P C and Section 105 of the Act together. It is certainly difficult to see the purpose of Section 105 of the Act unless it is viewed in the context of Section 6 I P C. (Para 116)

Although the exceptions contained in the Indian Penal Code to which Section 105 of the Act refers are contained in separate sections yet the result of Section 6 of the Indian Penal Code could well be said to be that the exceptions were engrafted in every definition of an offence as though they formed parts of each section defining an offence. (Para 122)

While the process of balancing probabilities is common for all cases the burdens of the parties to establish their respective cases in a criminal trial are really only two in kind the higher one of the prosecution to establish its case beyond reasonable doubt and the lower one of the accused to prove his plea by a mere preponderance of probability. Neither should preponderance of probability be confounded with and reduced to the level of a reasonable doubt only nor can the principle of reasonable doubt be eliminated altogether in a criminal trial. Each of the two kinds of conclusion—proof of an exception by a preponderance of probability and reasonable doubt about guilt—reflects a different situation. As soon as a Court finds one of these two types of conclusions to be the correct one to reach in a case the other is necessarily excluded. (Para 127)

'Preponderance' literally interpreted means nothing more than an outweighing in the process of balancing however slight may be the tilt of the balance or the preponderance. There are no sufficient grounds for holding that the word has

been used in any other sense whenever it has been used. In fact the dividing line between a case of mere 'preponderance of probability' by a slight tilt only of the balance of probability and a case of reasonable doubt is very thin indeed although it is there. A case of reasonable doubt must necessarily be one in which, on a balancing of probabilities two views are possible. Such a case and only such a case would be one of reasonable doubt. A mere preponderance of probability in favour of the exception pleaded by an accused would however constitute a complete proof of the exception for the accused but a state of reasonable doubt would not. 'Complete' proof for the prosecution cannot fall short of elimination of reasonable doubt about the ingredients of an offence. If one is clear about the meaning of the terms used no misapprehensions need arise. (Para 130)

Even a literal interpretation of the first part of Section 105 could indicate that 'the burden of proving the existence of circumstances bringing the case within an exception is meant to cover complete proof of the exception pleaded by a preponderance of probability as well as proof of circumstances showing that the exception may exist which will entitle the accused to the benefit of doubt on the ingredients of an offence. The last part of Section 105 even if strictly and literally interpreted does not justify reading into it the meaning that the obligatory presumption must last until the accused's plea is fully established and not just till circumstances (i.e. not necessarily all) to support the plea are proved. Moreover a restrictive interpretation of Section 105 excluding an accused from the benefit of bringing his case within an exception until he fully proves it is ruled out by the declaration of law by the Supreme Court that there is no conflict between Section 105 and the prosecution's duty to prove its case beyond reasonable doubt. Hence the obligatory presumption at the end of Section 105 cannot be held to last until the accused proves his exception fully by a preponderance of probability. It is necessarily removed earlier or operates only initially as held clearly by judges taking the majority view in Parbhoo's case AIR 1941 All 402 (FB). (Para 153)

There is no reason why principles of public policy or consideration of consequences of taking a particular view should not affect the interpretation to be given to statutory provisions dealing with basic norms when two interpretations of a statutory provision are open. Acting in this manner would not be legislation. There is no reason why the principle of benefit of doubt deserves either on grounds of public policy or as a part of the concept of fair trial in a criminal case to be given less recognition or force in

this country. The meaning of our procedural or adjectival laws must, be determined in conformity with firmly established notions of a fair trial unless some statutory provision clearly sanctions a departure from these: (1936) 2 All ER 1138 & AIR 1966 SC 97 (102), Rel. on.

(Para 157)

In Parbhoo's case, AIR 1941 All 402 (FB) the majority of their Lordships did not lay down anything beyond three important propositions which, if not either directly or indirectly supported by decisions of their Lordships of the Supreme Court, have not been affected in the slightest degree by these decisions. These propositions are: firstly, that no evidence appearing in the case to support the exception pleaded by the accused can be excluded altogether from consideration on the ground that the accused has not proved his plea fully; secondly, that the obligatory presumption at the end of Section 105 is necessarily lifted at least when there is enough evidence on record to justify giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged, and, thirdly, if the doubt, though raised due to evidence in support of the exception pleaded, is reasonable and affects an ingredient of the offence with which the accused is charged, the accused would be entitled to an acquittal.

(Para 160)

The practical result of the three propositions stated above is that an accused's plea of an exception may reach one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man weighing or balancing probabilities carefully. These stages are firstly, a lifting of the initial obligatory presumption given at the end of Section 105; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence, and, thirdly, a complete proof of the exception by "a preponderance of probability", which covers even a slight tilt of the balance of probability in favour of the accused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This is the effect of the majority view in Parbhoo's case, AIR 1941 All 402 (FB) which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stage has not yet been dealt with directly or separately.

(Para 161)

The answer of the majority of Judges who decided Parbhoo v. Emperor, AIR 1941 All 402 (FB) is still good law. It means that in a case in which, in answer to a

prima facie prosecution case, any general exception in the Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea, he will still be entitled to an acquittal, provided that, after weighing the evidence as a whole prudently (including the evidence given in support of the plea of the said general exception), the Court reaches the conclusion that, as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of the accused beyond reasonable doubt.

(Para 162)

Per Broome, Gupta, Parekh, JJ.:-

If the material put forward by accused to prove the exception is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved and the accused will be entitled to acquittal on the ground that he has discharged the onus laid on him by Section 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the Court regarding something (e.g. mens rea in majority of cases) that is required to be proved by the prosecution in order to establish the accused's guilt the accused will be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly devoid of mens rea; and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defence, a doubt will simultaneously arise as to whether he had the mens rea that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of the doubt regarding this essential pre-requisite of the prosecution case and will be entitled to acquittal.

(Para 23)

Although the dictum in Parbhoo's case, AIR 1941 All 402 (FB) may be said to be somewhat unhappily worded, it is fundamentally correct and calls for no amendment.

(Para 26)

Per Gyanendra Kumar and Yashoda Nandan, JJ.:-

The dictum of the majority of learned Judges of this Court in Parbhoo v. Emperor, AIR 1941 All 402 (FB) is still good law. But, it may be elucidated that in a case in which any general Exception in the Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has

fully established his plea of the claimed Exception he will still be entitled to an acquittal if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general Exception) a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence with which he is charged (Para 176)

Per Mathur J —

The doctrine of the burden of proof and the nature of evidence necessary to discharge this burden in cases where the accused claims the benefit of the general exceptions in the Penal Code or of any special exception or proviso contained in any other part of the same Code or in any other law can be stated as below —

1 The case shall fall in one of the three categories depending upon the wording of the enactment —

- (i) The statute places the burden of proof of all or some of the ingredients of the offence on the accused himself
- (ii) the special burden placed on the accused does not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients and
- (iii) the special burden relates to an exception some of the many circumstances required to attract the exception, if proved affecting the proof of all or some of the ingredients of the offence

2 In the first two categories the onus lies upon the accused to discharge the special burden, and on failure he can be convicted of the offence provided that the prosecution has succeeded to discharge its general burden of proof that is to establish the case beyond any reasonable doubt

3 In cases falling under the third category inability to discharge the burden of proof shall not in each and every case automatically result in the conviction of the accused. The Court shall still have to see how the facts proved affect the proof of the ingredients of the offence. In other words if on consideration of the total evidence on record a reasonable doubt exists in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he shall be entitled to its benefit and hence to acquittal of the main offence even though he had not been in a position to prove the circumstances to bring his case within the exception. This shall be on the ground that the general burden of proof resting on the prosecution was not discharged

4 The burden of proof on the prosecution to establish its case rests from the beginning to the end of the trial and it must prove beyond reasonable doubt that

the accused had committed the offence with the requisite mens rea

5 The burden placed on the accused is not so onerous as on the prosecution. The prosecution has to prove its case beyond reasonable doubt but in determining whether the accused has been successful in discharging the onus the Court shall look into the preponderance of probabilities in the same manner as in a civil proceeding. In other words the Court shall have to see whether a prudent man would in the circumstances of the case act on the supposition that the case falls within the exception or proviso as pleaded by the accused (Para 92)

The dictum laid down in *Parbhoo v Emperor AIR 1941 All 402 (FB)* is partly erroneous and requires modification, though the decision read as a whole is in conformity with the law. The dictum can be modified as below —

In a case in which any General Exception in the Penal Code or any special exception contained in another part of the same Code or in any law defining the offence is pleaded or raised by an accused person and the evidence led in support of such plea judged by the test of the preponderance of probability as in a civil proceeding fails to displace the presumption arising from Section 103 of the Evidence Act in other words to disprove the absence of circumstances bringing the case within the said exception but upon a consideration of the evidence as a whole including the evidence given in support of the plea based on the said exception or proviso a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence the accused person shall be entitled to the benefit of the reasonable doubt as to his guilt and hence to acquittal of the said offence. Case law discussed (Para 13)

Per Minority (Oak C J and Mukerjee JJ) —

The statement of law in *Parbhoo's case (AIR 1941 All 402 (FB))* is not accurate and needs modification. Case Law Pet.

Per Oak C J —

The proposition of law laid down in *Parbhoo v Emperor AIR 1941 All 402 (FB)* has been too broadly stated and needs qualification. The true legal position is this. Whenever an accused person raises a plea based on some general exception, the burden of proof lies upon him under Section 105. That burden has to be discharged by preponderance of probabilities. So far as the accused is concerned the standard of proof is the same as the standard of proof for a plaintiff or a defendant in Civil proceedings. The accused cannot always secure an acquittal by merely creating a reasonable doubt in the mind of the Court as to whether the accused person is entitled to the benefit of

the exception or not. If the nature of the case is such that a reasonable doubt arises as regards some ingredient of the offences, the accused is entitled to an acquittal. In other cases, a reasonable doubt as regards certain exception will not entitle the accused to an acquittal.

(Para 21)

It is settled law that when the burden of proof lies upon an accused person under Section 105, that burden can be discharged by showing preponderance of probabilities. AIR 1957 SC 469 (474) and AIR 1958 SC 61 and AIR 1960 SC 7 and AIR 1962 SC 605 and AIR 1966 SC 1 and AIR 1966 SC 97 and AIR 1968 SC 702 (703), Rel. on; AIR 1943 PC 211 and AIR 1964 SC 575, Ref. This position is inconsistent with the stand taken by the majority of the Full Bench in Parbhoo's case, AIR 1941 All 402 (FB) that it is sufficient for purposes of defence that the accused should create a reasonable doubt in the mind of the Court whether the accused person is entitled to the benefit of the exception or not. Preponderance of probabilities implies balance of evidence. In order to succeed, the accused must make out balance of evidence in his favour. The Court may entertain a reasonable doubt even if the balance of evidence is in favour of the prosecution. So, creating reasonable doubt cannot be equated with proof by preponderance of probabilities.

(Para 13)

Although a reasonable doubt arising under an exception may not secure an acquittal as a matter of course, in some cases the accused can secure an acquittal indirectly. There may be cases where, although the exception has not been proved, the evidence on record creates a doubt as regards some element which is an ingredient of the offence. Suppose, the accused is charged with an offence involving a certain intention or a certain object as an ingredient. It may happen that, as a result of the attempt of the accused to establish a particular exception, he succeeds in shaking the prosecution case as regards the necessary intention or object which is an ingredient of the offence. In such a case the accused will have to be acquitted. The reason of acquittal will be, not proof of the exception but failure of the prosecution to prove a necessary ingredient of the offence. AIR 1964 SC 1563 (1567) and AIR 1966 SC 1 (3), Rel. on.

(Para 15)

The majority in Parbhoo's case, AIR 1941 All 402 (FB) was not right in assuming that the accused has to be acquitted whenever the Court entertains a reasonable doubt as to whether the accused is entitled to the benefit of a certain exception or not. It all depends on the circumstances of each case. If the prosecution case is damaged as regards some ingredient of the offence, the accused will

be acquitted. But if all the ingredients of the offence are established, the accused has to be convicted. (Para 19)

Per Mukerjee, J.:—

Clearly the incidence of the burden of proving an exception under Section 105 is on the accused person. The crucial question for determination is how the burden may be rebutted by the accused. Section 105 says that the Court shall presume the non-existence of circumstances bringing the case within the exception proved until "disproved". In view of the categorical terms of the definition of the word "disproved" as given in Section 3 of the Evidence Act, it is manifest that the accused person cannot succeed by merely creating a reasonable doubt in the mind of the Court as to whether he is or is not entitled to the benefit of the said exception. A presumption of law cannot be successfully rebutted by merely raising a doubt, however reasonable. Something more than raising a reasonable doubt is required for rebutting a presumption of law and it is necessary for the accused to show that his explanation is so probable that a prudent man ought, in the circumstances, to accept it. AIR 1962 SC 605, Ref.

(Para 165)

The burden on an accused person being the same as the burden on a party in a civil proceeding, it follows that if the balance of probabilities supports the plea of exception the burden on the accused person is discharged, but if the Court is left in a state of reasonable doubt as to whether the accused person is or is not entitled to the benefit of the said exception, it would be a case where the probabilities are equal and the plea would fail.

(Para 167)

If, however, the nature of the case is such that, on the totality of evidence, a reasonable doubt arises as regards some ingredient of the offence, the accused person is entitled to an acquittal, in other cases, a reasonable doubt as regards the exception claimed will not entitle him to an acquittal. AIR 1966 SC 97 and (1947) 2 All E. R. 372, Ref.

(Para 168)

(B) Constitution of India, Article 141 — In face of Supreme Court decision, it is not necessary to make comments on English decisions — (Civil P. C. (1908), Preamble — Precedents).

Per Mathur J.:—

Where there exist clear decisions of the Supreme Court, it is not necessary to make comments on the English decisions or the decisions of the High Courts in India, for the simple reason that the law laid down by the Supreme Court is binding on all within the territory of India. (Para 31)

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- P. C. Chaturvedi, U S M Tripathi, for Appellants, A G. A., S P. Srivastava, for Respondent.

OAK, C. J.: The question before the Full Bench is :

"Whether the dictum of this Court in the case of Parbhoo v. Emperor, 1941 All LJ 619 = (AIR 1941 All 402) (FB) to the effect that the accused who puts forward a plea based on a general exception in the Indian Penal Code is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea based on such a general exception) a reasonable doubt is created in the mind of the Court whether the accused person is entitled to the benefit of the said exception is still good law".

2. I have read the judgment prepared by my learned brother Mathur, J. In my opinion, the statement of law in Parbhoo's case, 1941 All LJ 619 = (AIR 1941 All 402) (FB) is not accurate, and needs qualification.

Section 105, Indian Evidence Act, states :

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Mr. P C Chaturvedi, appearing for the appellants conceded that when an accused pleads an exception in the Indian Penal Code, the burden of proof lies upon him. Parties are not agreed as to the manner in which the burden may be discharged. One can conceive three different modes (1) by proving the exception beyond all reasonable doubt; (2) by proof through preponderance of probabilities, and (3) by creating a reasonable doubt in the mind of the Court. According to the learned Advocate-General, the second mode is the correct solution. According to Mr. Chaturvedi, the third mode is the correct method. It is well settled that when burden of proof lies upon an accused person, he need not prove his case beyond all reasonable doubt. We may therefore, confine our attention to the second and the third alternatives.

3. According to Section 3 of the Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It will be seen that a fact may be said to be proved under one of the two possible situations. Either the Court believes that the fact exists, or the Court considers existence of the fact probable. There is

no indication in Section 3 of the Evidence Act that a fact can be said to be proved even when the Court entertains a reasonable doubt as to whether the fact exists or not

1 Mr P C Chaturvedi contended that unless an accused person is given the benefit of reasonable doubt on an exception, there will be miscarriage of justice in many cases. Suppose two persons A and B quarrel at a lonely place and cause injuries to each other. They are both prosecuted in two cross cases. In neither case will the accused be able to produce an independent witness to prove that he was the victim of an assault by his opponent. The plea of private defence will fail in each case. The result will be that each case will end in conviction. In most of such cases the accused in one case ought to be acquitted. The same difficulty will arise when an accused pleads the right of private defence of property but is unable to collect reliable evidence in support of his plea.

5 I think, such cases would be rare. In most cases the accused person is in a position to substantiate the plea of private defence. If the question is whether the complainant or the accused was in possession over a field in dispute the accused is generally in a position to establish his plea by producing local residents and village papers in his support.

6 In *Jumman v State of Punjab* AIR 1957 SC 469 it was observed on p 474

In such a case where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor would it be correct to assume private defence for both sides? We are of the view that such a situation does not permit of the plea of private defence on either side and would be a case of sudden fight and conflict and has to be dealt with under Section 300 I P C Exception 4.

Chapter IV of the Indian Penal Code deals with general exceptions. The right of private defence has been mentioned in Sec 96 under Chapter IV of the Indian Penal Code. Insanity has been mentioned in Section 84 I P C. Under the Indian Law a plea of insanity and a plea of private defence stand on the same footing. Under the English law a plea of insanity is treated on the same footing as a statutory exception. It appears that under the English law a plea of private defence is not treated on the same footing as a plea of insanity or a statutory exception. That makes the task of an accused pleading private defence comparatively easy. If it is considered that the law in India should be brought in line with the English law Section 96 can be deleted from the Indian Penal Code.

7 In *State of Madras v Vaidyanatha Iyer* AIR 1958 SC 61 the Court was dealing with a case under the Prevention

of Corruption Act. The High Court of Madras observed in its judgment thus:

In any case the evidence is not enough to show that the explanation offered by the accused cannot reasonably be true and so the benefit of doubt must go to him.

This observation of the High Court was not approved by the Supreme Court. The Supreme Court remarked that the approach of the High Court indicates a disregard of the presumption which the law requires to be raised under Section 4 of the Act.

8 C S D Swami v The State AIR 1960 SC 7 was also a case under the Prevention of Corruption Act. It was held that after the conditions laid down in the earlier part of sub section (3) of Sec 5 of the Act have been fulfilled by evidence to the satisfaction of the Court the Court has got to raise the presumption that the accused is guilty of criminal misconduct in the discharge of his official duties and this presumption continues to hold the field unless the contrary is proved. That is to say unless the Court is satisfied that the statutory presumption has been rebutted by cogent evidence.

9 In *K M Nanavati v State of Maharashtra* AIR 1962 SC 60, Subba Rao J observed on page 617

The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Sec 103 of the Evidence Act is more imaginary than real. Indeed there is no conflict at all. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused. (2) The special burden may not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients. (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence. In the second case the burden of bringing the case under the exception lies on the accused. The general burden to prove the ingredients of the offence unless there is a specific statute to the contrary is always on the prosecution but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence. Indeed, the evidence though insufficient to establish the exception may be sufficient to negative one or more of the ingredients of the offence.

10 In *Bhukari v State of U P* AIR 1966 SC 1 the Court quoted with approval the following passage from *Dahya*

bhai v. State of Gujarat, AIR 1964 SC 1563:

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions.

(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial

(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime.....the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings....."

11. In Harbhajan Singh v. State of Punjab, AIR 1966 SC 97, it was observed on page 101:

"Where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused, but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds 'in proving a preponderance of probability'."

Similarly, in V. D. Jhingan v State of U. P., AIR 1966 SC 1762 it was observed on page 1764:

"It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability."

12. Likewise, in Munshi Ram v Delhi Administration, AIR 1968 SC 702, it was observed on page 703:

"It is well settled that even if an accused does not plead self-defence it is open to the Court to consider such a plea if the same arises from the material on record..... The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record"

It is to be noted that in Munish Ram's case, AIR 1968 SC 702 the accused raised the plea of private defence. So, the decision of the Supreme Court in Munshi

Ram's case, AIR 1968 SC 702 is directly applicable to the present case

13. It will be seen that it is settled law that when the burden of proof lies upon an accused person under Section 105, Indian Evidence Act, that burden can be discharged by showing preponderance of probabilities. This position is inconsistent with the stand taken by the majority of the Full Bench in Parbhoo's case, 1941 All LJ 619 = (AIR 1941 All 402) (FB) that it is sufficient for purposes of defence that the accused should create a reasonable doubt in the mind of the Court whether the accused person is entitled to the benefit of the exception or not, preponderance of probabilities implies balance of evidence. In order to succeed, the accused must make out balance of evidence in his favour. The Court may entertain a reasonable doubt even if the balance of evidence is in favour of the prosecution. So, creating reasonable doubt cannot be equated with proof by preponderance of probabilities

14. Mr. P. C. Chaturvedi contended that under Section 105, Indian Evidence Act, the position of the accused is the same as that of an accused in a prosecution under Section 411, I. P. C. read with Section 114 Indian Evidence Act. Reliance was placed on Otto George Gfeller v The King, AIR 1943 PC 211. In Dhanvantari v State of Maharashtra, AIR 1964 SC 575 it was explained that the position of the accused under Section 105, Indian Evidence Act is not the same as that of an accused in a prosecution under Sec 411, I. P. C. It was explained on pages 579 and 580 —

"That, however, was a case where the question before the jury was whether a presumption of the kind which in India may be raised under Section 114 of the Evidence Act could be raised from the fact of possession of goods recently stolen, that the possessor of the goods was either a thief or receiver of stolen property. In the case before us, however, the presumption arises not under Section 114 of the Evidence Act but under Section 4 (1) of the Prevention of Corruption Act the Court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one"

This passage shows that for purposes of Section 105 Indian Evidence Act, it is not sufficient for the defence to make out that

the explanation offered by the accused is plausible. The accused has to make out his case affirmatively.

15 Although a reasonable doubt arising under an exception may not secure an acquittal as a matter of course in some cases the accused can secure an acquittal indirectly. There may be cases where, although the exception has not been proved the evidence on record creates a doubt as regards some element which is an ingredient of the offence. Suppose the accused is charged with an offence involving a certain intention or a certain object as an ingredient. It may happen that as a result of the attempt of the accused to establish a particular exception he succeeds in shaking the prosecution case as regards the necessary intention or object which is an ingredient of the offence. In such a case the accused will have to be acquitted. The reason of acquittal will be not proof of the exception but failure of the prosecution to prove a necessary ingredient of the offence.

16 In AIR 1964 SC 1563 it was observed on page 1567 —

'The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may for instance raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 229 of the Indian Penal Code'. It was further observed on page 1568 —

'Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged'.

17 In AIR 1966 SC 1 it was observed on page 3 —

'If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted'.

Mr P C Chaturvedi contended that exceptions are ingredients of every offence. For this contention, he relied upon Section 6 of the Penal Code. Section 6 I P C states —

'Throughout this Code every definition of an offence, every penal provision and

every illustration of every such definition or penal provision shall be understood subject to the exceptions contained in the chapter entitled 'General Exceptions', though those exceptions are not repeated in such definition penal provision or illustration."

Section 6 I P C is merely a device to avoid quoting lengthy exceptions in description of offences. Strictly speaking an exception cannot be treated as an ingredient of an offence. Further Section 105 of the Evidence Act expressly lays down that the Court shall presume absence of circumstances bringing a case within any of the general exceptions in the Indian Penal Code. So assuming that exceptions constitute ingredients of offences the Court is bound to start with a presumption that circumstances bringing the case under any general exception do not exist. Consequently the question whether exceptions constitute ingredients of offences or not is merely of academic interest.

18 Creating a reasonable doubt under an exception may not always enable the accused to secure an acquittal. Suppose the accused is charged under Section 325 I P C. It is proved that the accused voluntarily caused grievous hurt to the complainant. The incident took place in a certain field. The accused pleads that he was in possession of the field and acted in the right of private defence of property. Although the accused produces some evidence the plea of private defence is not made out. The evidence is of such a character that the Court entertains a reasonable doubt as to whether the complainant or the accused was in possession. In such a case the position would be this. On the one hand it is proved that the accused voluntarily caused grievous hurt to the complainant. On the other hand the accused failed to establish his plea of private defence. In such a case the accused has to be convicted under Sec 325 I P C. Reasonable doubt on one part of the case is of no avail.

19 It will be seen that the majority in Prabhoo's case 1941 All LJ 619 = (AIR 1941 All 402) (FB) was not right in assuming that the accused has to be acquitted whenever the Court entertains a reasonable doubt as to whether the accused is entitled to the benefit of a certain exception or not. It all depends on the circumstances of each case. If the prosecution case is damaged as regards some ingredient of the offence the accused will be acquitted. But if all the ingredients of the offence are established, the accused has to be convicted.

20 It may be that law as explained above causes miscarriage of justice in some cases. But Courts have no power to alter statute law. The position indicated above is the combined effect of

Chapter IV of the Indian Penal Code, Section 3 of the Evidence Act and Section 105 of the Evidence Act. If it is considered that the present legal position is unsatisfactory, it is open to Parliament and State Legislatures to make the necessary amendments in the Indian Penal Code and the Indian Evidence Act.

21. In my opinion, the proposition of law laid down in 1941 All LJ 619 = AIR 1941 All 402 (FB) has been too broadly stated and needs qualification. The true legal position is this. Whenever an accused person raises a plea based on some general exception, the burden of proof lies upon him under Section 105, Indian Evidence Act. That burden has to be discharged by preponderance of probabilities. So far as the accused is concerned, the standard of proof is the same as the standard of proof for a plaintiff or a defendant in civil proceedings. The accused cannot always secure an acquittal by merely creating a reasonable doubt in the mind of the Court as to whether the accused person is entitled to the benefit of the exception or not. If the nature of the case is such that a reasonable doubt arises as regards some ingredient of the offence, the accused is entitled to an acquittal. In other cases, a reasonable doubt as regards a certain exception will not entitle the accused to an acquittal.

BROOME, GUPTA & PAREKH, JJ.

22. We are in general agreement with the conclusions arrived at by Mathur, J in this case (except that we would prefer to say that the Full Bench pronouncement in Parbhoo's case calls for elucidation rather than amendment). He has discussed the problem at considerable length and we do not consider it necessary to repeat the reasoning followed by him or his discussion of the case law. We would like, however, to add a few words of our own so as to leave no room for doubt as to our views regarding cases where the right of private defence is pleaded under Section 96, I. P. C.

23. An accused person who puts forward the plea of private defence will seek to prove it from the material on record, consisting of defence evidence, oral or documentary, and admissions elicited from the prosecution; and he can derive advantage from such material in two ways. In the first place, if this material is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved and the accused will be entitled to acquittal on the ground that he has discharged the onus laid on him by Section 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the court regard-

ing something that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. In the vast majority of offences, mens rea is one of the essentials that the prosecution has to establish before the crime can be said to be proved, and a reasonable doubt as to whether mens rea is present or not must inevitably lead to acquittal. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly devoid of mens rea, and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defence, a doubt will simultaneously arise as to whether he had the mens rea that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of the doubt regarding this essential prerequisite of the prosecution case and will be entitled to acquittal.

24. Oak C J., in his separate judgment, has considered a case in which an accused who has caused grievous hurt to the complainant in a dispute over a field pleads that he was in possession of the field and that he acted in private defence of his property, and the evidence produced, though insufficient to prove the plea, is enough to create a reasonable doubt as to which of the parties was actually in possession. In such a case, according to Oak C J., the accused must be convicted. With this view, however, we most respectfully but emphatically disagree. If the Court were to find, in a case of that nature, that the evidence gave rise to a reasonable doubt as to whether the disputed field was in the possession of the complainant or of the accused at the time of the incident, a simultaneous doubt would arise as to whether the accused had the necessary mens rea to make him guilty of the offence of grievous hurt; and in such circumstances the accused would in our opinion have to be acquitted on the ground that the prosecution had failed to prove beyond reasonable doubt an essential part of its case.

25. This, in our opinion, is precisely what the decision in 1941 All LJ 619 = AIR 1941 All 402 (FB) was meant to convey. The judgments of all the four Judges supporting the majority view in that case lay stress on the overriding need for the prosecution to discharge the burden of proving the accused guilty of the crime. Iqbal Ahmad C J remarked:—

"In cases falling within the purview of Section 105, the law placed on the accused the minor burden of bringing his case within the exception or proviso relied upon by him. There is however, nothing

in the Evidence Act to indicate that the failure of the accused to discharge the burden lightens the burden placed on the prosecution by Section 102
And Bajpai J observed —

'It is open to the Court to consider whether the entire evidence proves to the satisfaction of the Court that the accused is entitled to the benefit of the exception and the charge levelled against him has not been established or that there is a reasonable doubt as to the guilt of the accused and in both cases the accused would be entitled to an acquittal'
And further —

If there is such doubt (i.e. as to the plea of the right of private defence) has not a doubt been cast in connexion with the entire case and if that is so is not the accused entitled to an acquittal? I think he is and that is so because of the constant immutable primal burden resting on the prosecution.'
Ismail J also observed —

'The decision on the question of self defence will be only a decision upon one of the issues in the case. The Court at the end of the trial has still to see whether having regard to the entire evidence and the circumstances of the case the charge is proved beyond reasonable doubt'
And finally Mulla J held —

'There is nothing in the language of Section 105 to warrant the conclusion that the law intended such a result and for that purpose enacted Section 105 Evidence Act in order to curtail the fundamental right of the accused to claim an acquittal if there is any reasonable doubt about his guilt'

26 We are fully satisfied therefore that although the dictum in Parbhoo's case may be said to be somewhat unhappily worded it is fundamentally correct and calls for no amendment. When the learned Judges who decided that case stated that 'the accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general exception) a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception they had in mind the doubt that may arise on a consideration of the entire evidence (both prosecution and defence) with regard to the discharge of the primary burden resting on the prosecution to prove the guilt of the accused. That guilt can only be established if the prosecution is able to prove beyond reasonable doubt all the essentials that go to make up the offence including the fundamental requirement of mens rea. As already pointed out a doubt regarding the existence of mens rea must necessarily

arise whenever there is a doubt in the mind of the Court as to whether the accused is entitled to the benefit of a general exception such as the right of private defence. Viewed in this light the dictum of the Full Bench in Parbhoo's case is perfectly sound and requires no modification

27 Our reply to the question that has been referred to the present Full Bench for decision therefore is in the affirmative

MATHUR J —

28 The question referred to this Full Bench is as below —

Whether the dictum of this Court in the case of 1941 All LJ 619 = AIR 1941 All 402 (FB) to the effect that the accused who puts forward a plea based on a general exception in the Indian Penal Code is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea based on such a general exception) a reasonable doubt is created in the mind of the Court whether the accused person is entitled to the benefit of the said exception is still good law

29 The material facts of the case are that Rishi Kesh Singh and eight others were tried for offences punishable under Sections 147 or 148 and 323 324 325 and 307 I P C read with Section 149 I P C for forming an unlawful assembly with the common object to cause injuries to Sudarshan Singh Jai Govind Singh and Hirdanand Singh and for causing injuries to them. Some of the accused persons took the plea that they had caused the injuries in the right of private defence of their property and person. The Sessions Judge did not accept this plea and convicted the accused persons of the various offences detailed above. They preferred an appeal which came up for hearing before Asthana J. The appellants relied upon the Full Bench decision of this Court in the case of AIR 1941 All 402 = All LJ 619 (FB) and contended that they were entitled to the benefit of the Exception pleaded even though the Exception was not proved and only a reasonable doubt was created in the mind of the Court. The Government Advocate however urged that dictum laid down in the majority judgment was in view of the Supreme Court decisions no longer a good law and that the existence of a reasonable doubt could be no ground to give the accused persons the benefit of the Exception. The question being of importance Asthana J after framing the question referred the matter to a larger Bench. This reference came up for hearing before Uniyal and Capoor JJ who were of opinion that the decisions of the Supreme Court 'appear to have cast a cloud of doubt on the rule of law laid down in the majority decision' in the above case and

the aforesaid decision required reconsideration. They slightly modified the question and referred it to a larger Bench for consideration. The question as modified by Unyal and Capoor, JJ. has already been reproduced above.

30. At the very outset it may be observed that all the questions involved or which can be said to be in issue pertaining to the scope and effect of Section 105 of the Evidence Act in criminal trials are concluded by the decisions of the Supreme Court, though in different circumstances. General Exceptions pleaded in those cases were under Ss 80 and 84, I P C, that is, accident and insanity. One case refers to the Exception to Section 499, I. P. C (Defamation). The other two cases relate to the statutory presumption under the Prevention of Corruption Act, 1947. The main point for consideration is whether the rule laid down in those Supreme Court decisions applies with equal force to all the General Exceptions and the special Exception or proviso contained in the Indian Penal Code. The case of Parbhoo and others AIR 1941 All 402 = 1941 All LJ 619 (FB) related to the right of private defence (Section 96, I P C.) and a similar plea was raised in defence in the instant case. We shall, therefore, confine ourselves chiefly to this General Exception though reference shall be made to other Exceptions, if necessary. An attempt shall be made to lay down the law which can be applied to all the cases in which the benefit of the General Exception or special Exception or proviso is claimed.

31. Where there exist clear decisions of the Supreme Court, it is not necessary to make comments on the English decisions, or the decisions of the High Courts in India, for the simple reason that the law laid down by the Supreme Court is binding on all within the territory of India. However, we shall make reference to the various reported cases brought to our notice making comments wherever necessary.

32. AIR 1962 SC 605 is the leading case on the scope and effect of Section 105 of the Evidence Act. It will save time by reproducing in extenso the observations made therein, which are as below.

"The legal impact of the said provisions on the question of burden of proof may be stated thus. In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused, to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal

Code, or in any law defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the Court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such circumstances as proved till they are disproved. An illustration based on the facts of the present case may bring out the meaning of the said provision. The prosecution alleges that the accused intentionally shot the deceased, but the accused pleads that, though the shots emanated from his revolver and hit the deceased, it was by accident, that is, the shots went off the revolver in the course of a struggle in the circumstances mentioned in Section 80 of the Indian Penal Code and hit the deceased resulting in his death. The Court then shall presume the absence of circumstances bringing the case within the provisions of Section 80 of the Indian Penal Code, that is, it shall presume that the shooting was not by accident, and that the other circumstances bringing the case within the exception did not exist; but this presumption may be rebutted by the accused by adducing evidence to support his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients of the offence with which the accused is charged that burden never shifts. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused (See Sections 4 and 5 of the Prevention of Corruption Act). (2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients (see Sections 77, 78, 79, 81 and 88 of the Indian Penal Code). (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence (see Section 80 of the Indian Penal Code). In the first case the burden of (the) proving the ingredients or some of the ingredients of the offence, as the case may be, lies on the accused. In the second case, the burden of bringing the case under the ex-

ception lies on the accused. In the third case though the burden lies on the accused to bring his case within the exception, the facts proved may not discharge the said burden, but may affect the proof of the ingredients of the offence. An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased intentionally and thereby committed the offence of murder within the meaning of Section 300 of the Indian Penal Code. The prosecution has to prove the ingredients of murder and one of the ingredients of that offence is that the accused intentionally shot the deceased. The accused pleads that he shot at the deceased by accident without any intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution. The accused against whom a presumption is drawn under Section 105 of the Evidence Act that the shooting was not by accident in the circumstances mentioned in Section 80 of the Indian Penal Code may adduce evidence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of Section 80 of the Indian Penal Code but may prove that the shooting was by accident or inadvertence i.e. it was done without any intention or requisite state of mind which is the essence of the offence within the meaning of Section 300 Indian Penal Code on the essential ingredients of the offence of murder. In that event though the accused failed to establish to bring his case within the terms of Section 80 of the Indian Penal Code the Court may hold that the ingredients of the offence have not been established or that the prosecution has not made out the case against the accused. In this view it might be said that the general burden to prove the ingredients of the offence unless there is a specific statute to the contrary is always on the prosecution but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence indeed the evidence though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence.

'As in England so in India the prosecution must prove the guilt of the accused i.e. it must establish all the ingredients of the offence with which he is charged. As in England so also in India the general burden of proof is upon the prosecution, and if, on the basis of the evidence adduced by the prosecution or by the accused there is a reasonable doubt whether the accused committed the offence he is entitled to the benefit of doubt. In India if an accused pleads an

exception within the meaning of Section 80 of the Indian Penal Code there is a presumption against him and the burden to rebut that presumption lies on him. In England there is no provision similar to S 80 of the Indian Penal Code but Viscount Sankey L C makes it clear that such a burden lies upon the accused if his defence is one of insanity and in a case where there is a statutory exception to the general rules of burden of proof. Such an exception we find in Section 105 of the Indian Evidence Act."

'Further citations are unnecessary as in our view the terms of Section 105 of the Evidence Act are clear and unambiguous.'

33 The defence plea raised in the above case was that the deceased was killed accidentally and the death was not the result of any intentional act on the part of the accused. Benefit was thus claimed of Section 80 I P C.

34 AIR 1964 SC 1563 and AIR 1966 SC 1 are cases where the benefit of the General Exception detailed in Section 84 I P C was claimed. Plea of insanity was invoked by the accused to show that he was incapable of understanding the nature of the act done by him and hence was entitled to acquittal. In AIR 1964 SC 1563 (supra) the law was laid down as below:

It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and therefore the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Indian Penal Code. This general burden never shifts and it always rests on the prosecution. But Section 84 of the Indian Penal Code provides that nothing is an offence if the accused at the time of doing that act by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being an exception under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused and the Court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act read with the definition of 'shall presume' in Section 4 thereof, the Court shall regard the absence of such circumstances as proved unless after considering the matters before it it believes that the said circumstances existed or their existence was so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that they did exist. To put it in other words the accused will

have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man." If the material placed before the Court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence satisfies the test of "prudent man" the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 299 of the Indian Penal Code. If the Judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity."

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code the accused may rebut it by placing before the Court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

35. At another place after summarizing the law laid down in AIR 1962 SC 605 (supra), it was observed:—

"A Division Bench of the Nagpur High Court in Ramhitram v. State of Madhya

Pradesh, AIR 1956 Nag 187 has struck a different note inasmuch as it held that the benefit of doubt which the law gives on the presumption of innocence is available only where the prosecution had not been able to connect the accused with the occurrence and that it had nothing to do, with the mental state of the accused. With great respect we cannot agree with this view. If this view were correct, the Court would be helpless and would be legally bound to convict an accused even though there was genuine and reasonable doubt in its mind that the accused had not the requisite intention when he did the act for which he was charged. This view is also inconsistent with that expressed in Nanavati's case."

36. In AIR 1966 SC 1 (supra), after quoting the passage from AIR 1964 SC 1563, their Lordships of the Supreme Court observed as below:—

"This passage does not say anything different from what we have said earlier. Undoubtedly it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea. Once that is done a presumption that the accused was sane when he committed the offence would arise. This presumption is rebuttable and he can rebut it either by leading evidence or by relying upon the prosecution evidence itself. If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to acquittal. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in Section 105 of the Evidence Act."

37. In AIR 1966 SC 97 only one point was considered in detail namely, the nature and the extent of evidence which would discharge the onus of proof placed on an accused person claiming the benefit of an Exception. Observations on the other point are in consonance with the earlier decision. The relevant observations made on the point are as below:—

"There is consensus of judicial opinion in favour of the view that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove

that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds in proving a preponderance of probability. As seen the preponderance of probability is proved the burden shifts to the prosecution which has still to discharge its original onus. It must be remembered that basically the original onus never shifts and the prosecution has at all stages of the case to prove the guilt of the accused beyond a reasonable doubt. As Phipson has observed when the burden of an issue is upon the accused he is not in general called on to prove it beyond a reasonable doubt or in default to incur verdict of guilty; it is sufficient if he succeeds in proving a preponderance of probability for then the burden is shifted to the prosecution which has still to discharge its original onus that never shifts i.e. that of establishing on the whole case guilt beyond a reasonable doubt.

It will be recalled that it was with a view to emphasising the fundamental doctrine of criminal law that the onus to prove its case lies on the prosecution that Viscount Sankey in *Woolmington v Director of Public Prosecutions* 1935 AC 462 observed that no matter which the charge or where the trial the principle that the prosecution must prove the guilt of the Prisoner is part of the common law of England and no attempt to whittle it down can be entertained. This principle of common law is a part of the criminal law in this country. That is not to say that if an Exception is pleaded by an accused person he is not required to justify his plea but the degree and character of proof which the accused is expected to furnish in support of his plea cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case.

38 Thereafter after quoting with approval the observations made by Duff, J., in *R v Clark*, (1921) 61 SCR 608 which had been approved by Lord Hailsham in *Sodeman v R* 1936-2 All ER 1138 and making a reference to the law laid down in *R v Carr-Braint* 1943-2 All ER 156 it was observed as below —

'What the Court of Criminal Appeal held about the appellant in the said case before it is substantially true about the appellant before us. If it can be shown that the appellant has led evidence to show that he acted in good faith and by the test of probabilities that evidence proves his case he will be entitled to claim the benefit of Exception Nine. In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings and just as in civil proceedings the Court trying an issue makes its decision by adopting the test of probabilities so must a criminal

Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him.

39 Similar observations though in brief were made in AIR 1968 SC 702, which are as below —

The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. This is a case where the accused had pleaded alibi but a suggestion of self-defence was made in the cross-examination of the prosecution witnesses. Defence evidence on this plea was also adduced. It was observed that it was open to the Court to consider such a plea if the same arose from the material on record.

40 The other two cases brought to our notice relate to the statutory presumption under the Prevention of Corruption Act. Such a presumption is also covered by Section 105 of Evidence Act. However for purposes of this case reference need be made to only one case AIR 1966 SC 1762 wherein the nature of the burden of proof placed upon the accused person has been discussed. It was held —

The next question arising in this case is as to what is the burden of proof placed upon the accused person against whom the presumption is drawn under Section 4 (1) of the Prevention of Corruption Act. It is well established that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is of course the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under Section

(1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so the burden is shifted to the prosecution which still has to discharge its original onus that never shifts i.e. that of establishing on the whole case the guilt of the accused beyond a reasonable doubt.

We are accordingly of the opinion that the burden of proof lying upon the accused under Section 4 (1) of the Prevention of Corruption Act will be satisfied if the accused person establishes his case by a preponderance of probability and it is not necessary that he should establish

case by the test of proof beyond a reasonable doubt. In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings, the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him."

41. In criminal trials where the accused puts forward a plea based on a General Exception, or a special Exception or proviso in the Indian Penal Code, three questions often arise firstly on whom the burden of proof to establish the existence of the Exception or the proviso lies, secondly, the nature of evidence that shall justify the Court to hold that the Exception or proviso has been established; and thirdly, if the accused has not succeeded to rebut the presumption, how does his inability affect the result of the case, that is how is the conflict between the general presumption and the special presumption to be resolved? The rule on the first and third points has been laid down in detail in AIR 1962 SC 605 (supra), and this rule was applied to a case of alleged insanity in AIR 1964 SC 1563 (supra). A similar rule was also laid in AIR 1966 SC 1 (supra) and AIR 1966 SC 97 (supra).

42. For purposes of this reference, we can omit at least not make comments on that category of cases where the burden of proof of all or some of the ingredients of an offence is placed on the accused. We are at present more concerned with the General Exception, or special Exception or proviso, contained in the Indian Penal Code. Consequently, there can arise two different situations (1) where the special burden of proof does not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients; and (2) it relates to an Exception, some of the many circumstances required to attract the Exception if proved, affecting the proof of all or some of the ingredients of the offence. In AIR 1962 SC 605 (supra) it was mentioned that General Exceptions under five sections of the Indian Penal Code, fall within the first category. As it was contended before us that such observations were mere obiter dicta, it shall be proper not to indicate in this order the provisions which would fall in that category. That shall avoid unnecessary controversy in the future and it shall before the judge hearing a particular case to decide whether the case falls in the first or the second category. If this course be not adopted, it may at occasions become necessary to refer the matter to a larger Bench which would result in unnecessary waste of time of this Court.

43. Where the plea raised in defence falls in the first category, the burden of proving the case under the Exception shall lie on the accused and he shall naturally be liable to conviction forthwith in case the prosecution has succeeded to establish the charge beyond reasonable doubt, considering that the Courts of law invariably, first of all, consider the prosecution case whether the ingredients of the offence of which the accused is charged have or have not been established beyond reasonable doubt. It is when the Court is of opinion that the charge has been established beyond reasonable doubt that the defence plea is looked into. However, where the case falls in the second category, the Court can acquit the accused if on consideration of the total material on record and the defence plea, there exists a reasonable doubt in its mind as to all or any of the ingredients of the offence charged.

44. In the first two reported cases it was also observed that the difference between the general presumption and the special presumption was more imaginary than real. In view of this observation it was contended by the learned Advocate for the appellants that when the result was the same, this Court should refuse to modify the dictum as such step may lead to utter confusion. It was also contended that a case under Section 80, I. P. C. alone was before the Supreme Court and hence the observations whereby Sections 77, 78, 79, 81 and 88 of the Indian Penal Code were placed in the first category were 'obiter dicta' and not binding on this Court. Reliance was also placed upon Section 6, I. P. C. and Section 221 (5) Criminal Procedure Code in support of the contention that all the cases under the Indian Penal Code shall fall in one group, namely, the second group detailed above. In this connection it was mentioned that when each and every case of the General Exception or the special Exception or proviso contained in the Indian Penal Code shall fall in the same group, this Court should, in the circumstances detailed above, not disturb the law as had been in existence for more than 25 years.

45. Theoretically one can lay down how the matters in issue shall be decided. the prosecution must, first of all, establish its case beyond reasonable doubt and thereafter consider whether the accused has succeeded in discharging the burden of proof. With regard to cases falling in the second category, the Court shall have to consider again whether all or some of the ingredients of the offence charged had been established beyond reasonable doubt. Where the offence has not been established beyond reasonable doubt, the accused would be entitled to acquittal. While recording a finding on

any of these points the Courts of law have to consider the total evidence on record oral documentary or circumstantial whether adduced by the prosecution or by the accused. When the total evidence has to be judged at the initial stage it can be said what occasion there is or should be for rejudging the same evidence for recording a finding on the other two points. It is also contended that when as a result of reasonable doubt created in the mind of the Court as to the ingredients of the offence the accused would be acquitted in substance the acquittal is based upon the doubt created in the mind of the Court as a result of the Exception pleaded by the accused and in the circumstances it would be better to retain the old dictum that as consequence of reasonable doubt it be held that the accused is entitled to the benefit of the Exception.

46 In the administration of justice in India Law prevails over equity and good conscience and consequently the provisions of the statute must be given their full effect unless the enactment is held to be unconstitutional or invalid and it is only in the absence of an enactment that the matter can be decided on the principles of equity. In other words it would be possible for the Courts of law to depart from the provisions contained in Section 105 of the Evidence Act only if it can be held that the Evidence Act is not a complete Code by itself. If it is a complete Code it shall not be possible to depart from its provisions on the ground of injustice or inequity. Its provisions must be given their full effect. It is now a settled law that the Evidence Act is a complete Code not for assessment of evidence but for evidence which can be adduced in any suit or proceeding the circumstances in which such evidence can be adduced and also on whom the burden of proof lies. This shall be evident from the preamble and also Section 5 thereof. Repeal of Section 2 of the Evidence Act shall make no difference as the repeal of a provision does not revive the provisions which had been repealed by the repealed provision. In other words by the repeal of a provision there is no re-enactment of the provisions which had earlier stood repealed. (See *Maharaja Sris Chandra Nandy v Rakhalananda* AIR 1941 PC 16; *Collector of Gorakhpur v Palakdhari Singh* (1890) ILR 12 All 1 (FB) and *T W King v Mrs F E King* AIR 1945 All 190).

47 To put it differently if the dictum under reference is contrary to the provisions of Section 105 of the Evidence Act it must be suitably modified even though the practical effect thereof in all or most of the cases shall be the same. Further the law laid down by High Courts must be expressed in such clear and unambi-

guous words that no one may feel any difficulty in enforcing it. The Courts of law do not merely read the Headnotes or the concluding or operating portion of the judgment. Consequently if the dictum is suitably modified the Courts shall know not only what changes have been made but why the changes were introduced. They shall thus know the correct law and how to enforce it and I see no reason why there would exist any confusion in the mind of anyone. I therefore have no hesitation in suitably modifying the dictum even though the legality thereof has been challenged after a lapse of 25 years.

48 The prosecution is not till the end of the trial discharged of its burden to establish beyond doubt the guilt of the accused and it can consequently be said that no case shall fall in the first category they shall all be governed by the second group detailed above and further when the total evidence has to be assessed before considering the defence plea and also thereafter what importance does Section 105 of the Evidence Act have which places the burden of proof on the accused person for establishing the Exception pleaded by him.

49 Human mind does not like a machine move in only the prescribed manner. Ordinarily the judge hearing the case shall take an over all view of the evidence irrespective of the mode that may be laid down for assessment of the evidence and independently of the question of the burden of proof whether placed on the prosecution or on the accused and he shall decide beforehand whether the evidence on record is sufficient for conviction or the accused is entitled to honourable acquittal or to the benefit of doubt. But to remove any misapprehension about the two categories it would be desirable to lay down which matters must be decided before a formal opinion is expressed on the defence plea.

50 Offences defined in the Indian Penal Code or in other enactments invariably have more than one ingredient, some of which may not be connected with or co related to the General Exceptions or special Exception or proviso pleaded by the accused. The various ingredients are established by oral documentary or circumstantial evidence as may be adduced by the parties. Before entering into the defence plea it shall be necessary to consider and to record a finding on the ingredients of the offence other than those connected with or co related to the defence plea. If all such ingredients are established beyond doubt the Court shall look into the defence plea to find out whether the presumption contemplated by Section 105 of the Evidence Act has been rebutted that is the absence of the circumstances benefit of which has been sought for has or has not been disproved. If the accused

succeeds in rebutting the presumption, it is an end to the matter and he shall straight off be acquitted of the offence or convicted of a lesser offence on the ground that some of the ingredients of the main offence had not been established; but if the accused does not succeed in rebutting the presumption, that is, in disproving the absence of the circumstances, the Court shall consider the question from the point of view of general presumption of the innocence of the accused, whether the ingredients connected with or co-related to the defence plea have been established beyond doubt. Even though the accused may not be able to establish his plea, that is, to rebut the presumption under Section 105 of the Evidence Act, he may succeed in creating a reasonable doubt in the mind of the Court, and what the Courts of law shall say is that because there exists a reasonable doubt on some of the ingredients of the offence, the benefit thereof shall go to the accused and he shall deserve acquittal or convicted of a lesser offence.

51. In cases falling in the first category, where no ingredient of the offence is connected with or co-related to the Exception pleaded in defence, the Court shall have to consider, on the basis of the total evidence on record, whether the prosecution has or has not succeeded to establish beyond doubt the guilt of the accused and then to consider whether there has been mitigation of the offence, or the accused deserves being exonerated thereof on account of the Exception pleaded by him. If it be found that the defence plea has not been proved, that is, the presumption of the absence of circumstances under Section 105 of the Evidence Act has not been disproved, the Courts of law would straight off record a finding of conviction. There would then be no question re-assessing the evidence as a whole to decide whether all the ingredients of the offence had been proved and the guilt established beyond doubt, but in cases falling in the second category, the Court shall have to record, in the first instance, a clear finding as to whether the ingredients other than the ingredient or ingredients covered by the defence plea have or have not been established beyond doubt. Once the finding is recorded in favour of the prosecution, the Exception pleaded by the accused shall be looked into whether the accused has succeeded in rebutting the presumption by disproving the absence of the circumstances pleaded by him. If he succeeds to disprove the absence of circumstances that is, to prove the defence plea, he shall deserve acquittal or conviction of a lesser offence as there would be absence of some of the ingredients of the main offence. In case the accused does not succeed to repel the presumption under Section 105 of the

Evidence Act, but does create a reasonable doubt, the Court shall say that there exists a reasonable doubt as to the ingredients connected with the defence plea and hence the offence as defined has not been established and on this ground would acquit the accused or convict him of the lesser offence.

52. Without expressing any final opinion the above can be clarified by giving an example. I shall naturally give an example which can be said to be beyond any controversy. Section 499, I. P. C. defines "Defamation", while 'defamation' is punishable under Section 500, I. P. C. Sec. 500, I. P. C. lays down that—

"Whoever defames another shall be punished....." A person is said to defame another when "by words either spoken or intended to be read, or by signs or by visible representations makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person" This is subject to Exceptions detailed thereafter. The First Exception is that "it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published."

53. The ingredients of Section 499, I. P. C. are the making or publishing of the imputation; intending to harm, or knowing or having reason to believe that such imputation shall harm, the reputation of such person. Where the accused pleads the benefit of the First Exception, what he suggests is that the allegation made is true and the imputation was made for the public good. The accused then does not challenge the two ingredients of Section 499, that is, the making and the publication of the imputation with the intention to harm the reputation of the other person. When the two facts raised in defence are in no way connected with the main ingredients of S 499, I. P. C., the Court shall, first of all, have to record a finding whether the alleged defamation has or has not been established beyond doubt and thereafter to consider the defence plea. Protection is given to the accused person by the First Exception only if the imputation is true. No protection exists where the defamatory statements are not true, but may be true. When the benefit of the First Exception can be availed of only when the imputations are true, it cannot be open to the accused to say that he should be given the benefit of this Exception even when he is merely able to show that there is some possibility of the imputations being true; to put it differently, the imputations may be true or may not be true. When no question of reasonable doubt

as to the truth of imputations arises the charge of defamation shall be fully established where the ingredients of Section 499 I P C are established beyond doubt and the accused fails to establish the truth of the imputations (See Lal-mohan Singh v The King AIR 1950 Cal 339) This case would clearly fall in the first category where none of the ingredients of the offence is connected with or co-related to the Exception pleaded by the accused

54 The offence of murder is defined in Section 300 I P C This section by itself says that —

"Except in the cases hereinafter excepted culpable homicide is murder if the act by which the death is caused is done with the intention of causing death or

Every homicide is not murder It is only culpable homicide which amounts to murder The word 'culpable' means criminal or blame-worthy Consequently the intention or knowledge contemplated by Section 300 I P C must be a criminal or guilty one Where it appears that the intention or knowledge is not criminal or illegal, the causing of death cannot be said to be culpable and it shall not be culpable homicide that is murder In the circumstances it must be held that the intention or knowledge contemplated by Section 300 I P C is a criminal or guilty intention knowledge and not mere intention or knowledge To make this point more clear it must be mentioned that it is a well established rule that 'unless the statute either clearly or by necessary implication, rules out mens rea as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind Such observations made in *Brend v Wood* (1946) 110 JP 317 (318) were quoted with approval by their Lordships of the Privy Council in *Srinivas Mall v Emperor* 49 Bom LR 688 = (AIR 1947 PC 135) Consequently the ingredients of the offence under S 300 I P C are the doing of an act by which the death is caused and the doing of the act with the intention, that is criminal intention to cause death Where the accused seeks the benefit of the General Exceptions contained in Sections 80 and 84 I P C what he implies to mean is that he did not have the guilty intention at the time he caused the death Consequently at the initial stage the Court shall have to consider whether the prosecution has established beyond doubt that the death of the person was caused by or is the result of the act done by the accused If so satisfied, the defence plea shall be looked into whether the accused has succeeded to rebut the presumption, that, is to disprove the absence of the circumstances contemplated by the above sec-

tions Once the accused succeeds in establishing his plea he would deserve acquittal on account of there being no guilty intention it is a different thing that he may be liable to conviction of the lesser offence but if the accused is not successful in disproving the absence of circumstances the Court of law shall still have to see whether the ingredient of criminal intention, that is mens rea has been established by the prosecution beyond reasonable doubt It is then that a reasonable doubt created in the mind of the Court as to the defence plea shall lead to the inference that the guilty intention has not been established beyond reasonable doubt and on this ground the guilt of the accused as to the main offence shall be deemed not to have been established beyond doubt and he shall be acquitted From the practical point of view the accused is being given the benefit of the Exception pleaded by him but, in the eye of law the benefit of reasonable doubt is of the ingredients of the offence and not of the Exception pleaded by him The above case admittedly falls in the second category mentioned above

55 The contention of the learned Advocate for the appellants that in view of Section 6 of the Indian Penal Code and Section 221 (5) of the Criminal Procedure Code all the Exceptions whether General or special are parts of the offence and hence ingredients thereof and they must be established beyond doubt by the prosecution, has in my opinion no force Section 6 merely lays down that every definition of an offence shall be understood subject to General Exceptions even though not repeated in such definition The effect of Section 6 is to incorporate the General Exceptions in every definition of an offence For example while reading Section 300 I P C we shall have to include therein not only the Exceptions 1 to 5 detailed therein but also the General Exceptions contained in Sections 76 to 106 I P C The offence would still be as defined in the main part of Sec 300 I P C and the rest shall be Exceptions If the burden of proving the Exception is placed on the accused it shall be necessary for him to discharge this burden Section 6 cannot thus affect application of Section 105 of the Evidence Act In other words Section 6 can be of no help in considering the scope of Section 105 of the Evidence Act

56 Similarly Section 221 (5) of the Criminal Procedure Code provides that—

'The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case'

Illustration thereof is as below—

(a) A is charged with the murder of B This is equivalent to a statement that

A's act fell within the definition of murder given in Ss 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code, and that it did not fall within any of the five exceptions to Section 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception apply to it"

Section 221 (5), Cr. P. C. is a procedural clause and cannot affect the rights and liabilities of the parties, nor can it affect the burden of proof, that is, which party must establish a particular fact or matter in issue. Apparently, this provision was incorporated to make it clear that it is for the accused to plead the benefit of the Exception, and if no such plea is raised, the Court shall assume that the Exception did not exist, and on the main ingredients being established the accused can be convicted of such offence

57. The above contention was evidently repelled in the Full Bench case of 1941 All LJ 619 = AIR 1941 All 402 (supra) Iqbal Ahmad, C J, expressed his opinion clearly by laying down that none of the above sections had the effect of reducing the scope of Section 105 of the Evidence Act and the burden of proof did lie on the accused.

58. My attention was also drawn to the fact that the Evidence Act was passed after the Indian Penal Code and before the commencement of the Code of Criminal Procedure. Each is a distinct law: Indian Penal Code laying down the criminal offences; the Code of Criminal Procedure, the procedure to be followed in criminal trials, while the Evidence Act, the evidence which can be adduced in any suit or proceeding and on whom the burden of proof lies. When each statute covers a particular branch of the law, it cannot override the provisions of the other laws

59. The nature and extent of the evidence necessary to establish the Exception or proviso raised in defence has been considered in AIR 1964 SC 1563 (supra), AIR 1966 SC 97 (supra) and AIR 1966 SC 1762 (supra). It is thus a settled law that the burden of proof which lies on the accused by virtue of the provisions of Section 105 of the Evidence Act is not as heavy as on the prosecution to establish the guilt of the accused. The prosecution has to prove its case beyond reasonable doubt, while the accused has simply to disprove the absence or circumstances contemplated by the Exception, that is, to prove facts which would entitle him to the benefit of the Exception. The test of probabilities is to be applied in judging the defence plea. The accused has to establish his plea in the manner a plaintiff or defendant shall prove his case in a civil proceeding. It is thus the preponderance of probabilities which shall deter-

mine whether the defence plea has been established and the case falls or does not fall within one of the Exceptions contained in the Indian Penal Code. When the three expressions mentioned above are read together, there can be no difficulty in understanding the meaning of the term "preponderance of probability." However, in view of the fact that this question had been raised at the Bar, it is necessary to make a few observations.

60. Our attention was drawn to the definition of "preponderance of evidence" as in vogue in America. In American Jurisprudence, 2nd Edition, Volume 30, the expression has been defined in Article 1164. In America the term means "the weight, credit and value of the aggregate evidence on either side, and is usually considered to be synonymous with the term greater weight of the evidence", or "greater weight of the credible evidence". It is a phrase which, in the last analysis, means probability of the truth. To be satisfied, certain, or convinced is a much higher test than the test of "preponderance of evidence".

61. The phrase "preponderance of probability" appears to have been taken from Charles R. Cooper v. F. W. Slade, (1857-59) 6 HLC 746. The observations made therein make it clear that what "preponderance of probability" means is "more probable and rational view of the case", not necessarily as certain as the pleading should be.

62. On the basis of the definition of the words "proved", "disproved" and "not proved", as contained in Section 3 of the Evidence Act, a similar inference can be drawn. The term "proved" is defined as below:—

"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists"

When the evidence is of a overwhelming nature and is conclusive, there shall exist no dispute, nor shall there be any doubt and the Court can say that the fact does exist, but in criminal trials, where the accused claims the benefit of the Exception, there cannot be any evidence of such a nature. Very often there is oral evidence which may be equally balanced. In the circumstances, the case of the prosecution or of the defence has to be accepted or rejected on the basis of probabilities. Section 3 of the Evidence Act by itself lays down that a fact is said to be proved when, after considering the matters before it, the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is what is meant

by the "test of probabilities" or the "preponderance of probabilities" The decision is taken as in a civil proceeding

63 To avoid repetition it can here be mentioned that the law with regard to the discharge of burden of proof by the prosecution or by the defence against whom a presumption can be drawn under Section 105 of the Evidence Act is as detailed in AIR 1962 SC 605 (supra) and whether the accused has been able to discharge the burden of proof is to be judged on the basis of the 'test of probabilities' or the 'preponderance of probabilities' in the same manner as the Court records a finding in a civil proceeding This rule applies to the accused A more rigorous proof is called for from the prosecution which must establish its case beyond reasonable doubt

64 The next point for consideration is to what extent the above rule laid down by the Supreme Court in case in which the benefit of Sections 80 and 84 I P C is claimed can be applied to cases in which the accused claims the benefit of other Exceptions all the more where a plea of private defence has been raised The Evidence Act is a complete Code and its purpose is to consolidate define and amend the law of Evidence Consequently the provisions of this Act shall govern all the judicial proceedings in or before any Court The Evidence Act applies equally to civil and criminal cases It may however be mentioned that in the Evidence Act there are certain provisions applicable exclusively to civil proceedings and a few others to criminal trial only but speaking broadly it can be laid down that the Evidence Act applies equally to both the civil and criminal proceedings Further there shall be no justification to depart from the express provisions contained in the Evidence Act Such provisions shall govern the recording of evidence and also the question of the burden of proof We cannot look into the English practice or the law prevalent in our country in the past on the ground of public policy or the interest of justice To put it differently the provisions of the Evidence Act must be strictly construed even though such a step may not conform with the ideas of the Court or may appear to be unjust or may cause hardship to the accused (See Governor and Company of the Bank of England v Vagliano Brothers 1891 AC 107 and Norendra Nath Sircar v Kamalbasini Das (1895) 23 Ind App 18 (PC))

65 Section 105 of the Evidence Act has been worded in clear and unambiguous terms and it shall apply to each and every case where the benefit of the General Exceptions or the Special Exceptions or provisos contained in the Indian Penal Code or in any other law is claimed Section 105 reads as below—

"When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence is upon him and the Court shall presume the absence of such circumstances"

The term 'shall presume' has been defined in Section 4 of the Evidence Act and means that the Court shall regard the fact as proved unless and until it is disproved Reading Section 105 of the Evidence Act with the definition of the terms 'shall presume' as contained in Section 4 it must be held that where the existence of circumstances bringing the case within the Exception is pleaded or is raised the Court shall presume the absence of such circumstances unless and until it is disproved 'Disproved' is different to 'not proved' In Section 3 the meaning of the terms proved and disproved has been given and the term 'not proved' is defined "neither proved nor disproved" Consequently if the accused is unable to disprove the absence of circumstances that is prove the existence of the circumstances the case would fall in the category of not proved and in the eye of law the burden imposed by Section 105 shall not stand discharged In other words the accused has to prove the existence of the circumstances bringing the case within the Exception and he shall be deemed to have discharged the burden of proof only when the Court considers the existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists In other words no question of the benefit of doubt arises while the Court is considering the question of the existence of circumstances bringing the case within the Exception On the basis of doubt the contention can be rejected or the case of the party not accepted but to accept a case not free from doubts that is to accept a doubtful case is not warranted by the Evidence Act In this view of the matter the accused can be deemed to have discharged the burden of proof only when he is in a position to disprove the absence of circumstances that is is able to discharge the onus in the manner the plaintiff or the defendant must in a civil proceeding It would be a wrong proposition of law to say that in criminal trials where there exists a reasonable doubt in the mind of the Court the Exception pleaded be deemed to have been proved Section 105 of the Evidence Act makes no difference between the Exceptions or provisos contained in one enactment or the other In the circumstances the rule applicable to the General Exceptions under Sections 80

and 84, I P. C. shall apply with equal force to the other General Exceptions contained in the Indian Penal Code or the special exceptions or proviso contained in this Code or in other enactments

66. Two other points raised on behalf of the appellants may now be considered. It was argued that the term "may presume" shall have the same meaning as "shall presume" in case the Court decides to presume the existence of a fact. The suggestion thus made is that it is discretionary with the Court to presume or not to presume and once the Court decides to presume the existence of a fact, the same rule shall apply as in a case where there is a statutory clause to presume the existence of the fact. Reliance was placed upon the case of AIR 1943 PC 211, where mere giving of a reasonable or plausible explanation was held to be sufficient to discharge the burden of proof. The definition of "may presume" and "shall presume", as contained in Section 4 of the Evidence Act, makes it clear that the discretionary presumption where the words "may presume" have been used is much weaker than in a case where the provision directs the Court to presume the existence of a fact. In case of a weaker presumption, mere explanation can be sufficient and such strong evidence is not needed as in a case where the Court must presume the existence of a fact. The above contention was raised in AIR 1964 SC 575 and AIR 1960 SC 7 but was repelled on the ground that the burden resting on the accused in a case under the Prevention of Corruption Act where the word "shall" had been used was not as light as it was where the presumption was raised under Section 114 of the Evidence Act, and could be held to be discharged merely by reason of the fact that the explanation offered by the accused was reasonable and probable. It was held that the presumption under the Prevention of Corruption Act must be rebutted by "proof" and not by a bare explanation which was merely plausible.

67. The second point raised is that in criminal trials more convincing evidence is expected from the prosecution before the accused can be held guilty of the charge, and this is a departure from the ordinary meaning of "proved" as contained in Section 3 of the Evidence Act. It was thus contended that in criminal trials while judging the defence plea similar leniency can be shown to the accused. The suggestion made is that where the evidence is equally balanced and the Court thinks that the defence plea may, or may not be true, a prudent person contemplated by Section 3 of the Evidence Act must act on the supposition that the fact exists. What is suggested is that the benefit of the reasonable possibility of truth

of the defence plea be utilized to hold that the absence of circumstances contemplated by Section 105 of the Evidence Act has been disproved. It is true that the maxim, applicable in India as in England, that an accused shall be presumed to be innocent and the prosecution must establish its case beyond reasonable doubt is a departure from the ordinary meaning of the term "proved" as contained in Section 3 of the Evidence Act. It is, however, a rule of caution and prudence laid down by the Courts of law how a prudent man must, in a criminal case, assess the evidence adduced by the prosecution. In the words used in Section 3 of the Evidence Act, the prosecution case is not deemed to have been 'proved', that is, is deemed to be 'not proved', even though in a civil proceeding the fact could, on the basis of such evidence, be deemed to have been 'proved', and the effect of the above maxim is to regard a fact "not proved", though in civil proceeding it could be deemed to be "proved". The same cannot, however, be laid down for a provision where one has to consider whether the absence of circumstances had been disproved, or the existence of the circumstances had been proved. On the application of a rigorous rule, the Court can hold that the existence of circumstances had not been proved, or the absence of circumstances had not been disproved, but to say that the existence of circumstances shall be deemed to have been proved or the absence of circumstances disproved shall not be correct, for the simple reason that on the basis of doubt, the fact is to be disbelieved, and not believed. I am, therefore, not inclined to agree with the proposition that on a reasonable doubt being created, a prudent man should proceed with the assumption that the existence of circumstances had been proved.

68. Section 105 of the Evidence Act, therefore, applies to each and every Exception or proviso contained in any enactment and hence shall apply even when the accused pleads the benefit of the "General Exception" contained in Section 96, I P C, that is pleads to have acted in the exercise of the right of private defence of his person or property. In the circumstances, the rule laid down by the Supreme Court in cases where the benefit of Sections 80 and 84, I P C had been claimed can be applied with equal force to a case where the accused pleads the benefit of Section 96, I P C. The application of this rule to a case where the accused person has pleaded the benefit of Section 96, I P C shall not cause any hardship to him, as in such a case the burden shall lie on the prosecution till the end of the trial to prove all the ingredients of the offence beyond any reasonable doubt. When the accused raises the plea contained in Sections 80 and 84, I P C, what he

contents is that he did not have the criminal intention or knowledge contemplated by the definition of the offence. The same can be said when the plea of private defence is raised. Section 80 I P C provides —

Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Criminal intention or knowledge is a material ingredient of Sec 80—the other ingredients being that the act should be lawful and was done in a lawful manner by lawful means and with proper care and caution.

Similarly S 84 I P C provides —

'Nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.'

A person incapable of knowing the nature of the act is a person who cannot be deemed to have guilty knowledge or intention.

69 The plea contemplated by Section 80 and Section 84 I P C directly affects one of the ingredients of the offence namely the mens rea. The same can be said of the plea contemplated by Section 96 I P C.

70 Section 96 I P C provides —

Nothing is an offence which is done in the exercise of the right of private defence.

The subsequent sections detail such right. Section 97 provides that every person has a right subject to the restrictions contained in Section 99 to defend not only his person and property but also the person or property of others.

71 When an accused person acts in the exercise of the right of private defence what is meant is that even though armed he had no prior intention to commit an offence and whatever he did was in the exercise of the rights given to him under the law. His act would thus not be illegal and in the eye of law the act cannot be deemed to have been done with a criminal or guilty intention or knowledge which is invariably the most important ingredient of a criminal offence.

72 At the very start of the argument the learned Advocate for the appellants had cited three illustrations where injustice shall be done to the accused if the benefit of the Exception, as contemplated by the dictum under reference was not given to the accused. It was said that where there was a dispute as to possession of property between A and B and such disputes were followed by a marpit in

which both the parties were injured it shall be necessary to convict both the parties where the possession of either was doubtful considering that none of the parties shall be able to discharge the burden of proof as contemplated by Section 105 of the Evidence Act. The suggestion thus made is that one party or the other must have been in possession and the conviction of the party in possession shall be against equity and conscience. Where the possession is in dispute there can be two kinds of cases the property belonged to a third person and parties A & B start laying claim thereto or that A is in possession and B raises a claim to the property at the same time asserting that he was in possession. In the first case both the parties can be deemed to have the guilty intention and they can be convicted for the acts done by them. It would be a case of free fight or in suitable circumstances a case sudden fight (See AIR 1957 SC 469). In the other case one party alone shall be convicted and the other given the benefit of the General Exception contained in Section 96 I P C that is of private defence provided that the evidence adduced by the party in possession is sufficient to hold that the possession had been proved. The Courts of law shall hold that the burden of proof contemplated by Section 105 the Evidence Act had not been discharged by both the parties. However while deciding whether mens rea one of the important ingredients of the offence has or has not been established beyond doubt the Courts of law can grant the benefit of doubt to both the parties or convict one party and give the benefit of doubt to the other. In such a case what according to the learned Advocate should be done by assuming the existence of circumstances shall be by holding that all the ingredients of the offence had not been established beyond doubt.

73 The other two illustrations pertain to those cases where there is a dispute as to where the marpit took place or who started the marpit. The principles indicated above while making comments on the first illustration shall apply with equal force to these illustrations also. In other words the accused person shall not be convicted simply because the dictum under reference shall not be followed and instead the law as laid down by the Supreme Court shall be made applicable.

74 Reference may now be made to the English decisions and the decisions of the High Courts in India to which our attention has been drawn. *Woolmington v The Director of Public Prosecutions* 1935 AC 462 has been the foundation of decisions not only by the Courts in England but also in India. This case and also 1943-2 All ER 156 were considered by the Supreme Court in some of the

decisions referred to above. The rule of law laid down in 1935 AC 462 (supra) has been reproduced in Halsbury's Laws of England. In the circumstances, it is not necessary to make further comments on these three cases

75. The rule enunciated by Viscount Sankey L C in 1935 AC 462 (supra) was relied upon in *Mancini v. Director of Public Prosecutions* 1942 AC 1. The King v. Kakelo, 1923-2 KB 793 is a case where onus lay on the accused to prove that he was not an alien, and not upon the prosecution to prove that he was. This case cannot be of any help considering that therein the prosecution had itself adduced sufficient evidence to prove that the accused was an alien.

76. It was strongly argued on behalf of the State that the majority decision in 1941 All LJ 619 = AIR 1941 All 402 (supra) was contrary to the decisions of the Supreme Court and can no longer be regarded as a good law. I have carefully gone through the judgments of Iqbal Ahmad, C. J., and Collister, J., which can be regarded as the leading judgments of the majority and minority Judges and find that Iqbal Ahmad, C. J., had laid down the law correctly, though a mistake was committed while giving the answer to the question referred to the Full Bench. The answer was given in the form of a dictum which has been referred to us for consideration. If the dictum is not given unnecessary weight, it shall be found that the majority view is in consonance with the recent Supreme Court decisions. The minority view shall be contrary to the law laid down by the Supreme Court.

77. Iqbal Ahmad, C. J., has laid down not at one place but many that the reasonable doubt is as to the guilt of the accused, and not to the existence of the Exception. At page 407 he observed as below.—

"It would thus appear that there is formidable weight of authority in support of the view that in cases falling within the purview of Section 105, Evidence Act, the evidence produced by the accused person, even though falling short of proving affirmatively the existence of circumstances bringing the case within the exception pleaded by him, can be utilized as part of the entire evidence in the case for the purpose of showing that a reasonable doubt exists as to his guilt."

Other observations made by Iqbal Ahmad, C. J., are as below.—

"It is on the basis of these principles that it is well settled in England that the evidence against the accused must be such as to exclude, to a moral certainty, every reasonable doubt about his guilt and if there be any reasonable doubt about his guilt he is entitled to be acquitted."

What holds good in England must hold good in India"

"The burden of proving the existence of circumstances bringing the case within the "exception" or "proviso" is no doubt cast on the accused by Section 105, but this does not in any way absolve the prosecution of the burden laid on it by Sec 102. The burden of proof, so far as the entire "proceeding" is concerned, remains on the prosecution, even though the burden of the "fact in issue" pleaded by the accused is cast upon him by Section 105"

There is, however, nothing in the Evidence Act to indicate that the failure of the accused to discharge the burden lightens the burden placed on the prosecution by Section 102"

... .. and "the onus never changes" It is, therefore, manifest that even in cases to which Section 105 applies the prosecution has to prove the guilt of the accused."

"Should it in the consideration of the question whether A is guilty of murder, put aside the evidence produced by A, so to say, in a watertight compartment and exclude that evidence entirely from consideration? or should it take that evidence, for what it is worth into consideration along with the other evidence in the case and then make up its mind as to the guilt or innocence of A? I cannot but hold that it is only the latter alternative which is open to the Court and this is what follows from the definition of "proved" in the Act. It is one thing to hold that the "exception" or "proviso" pleaded has not been proved and it is quite another thing to say that it has been disproved. If a reasonable doubt as to the existence of the exception or proviso exists the Court cannot, while considering the evidence as a whole, deny to the accused the benefit of that doubt".

78. Collister, J personally preferred the law as enunciated by Viscount Sankey in *Woolmington's case*, and saw no reason why the law in India as regards this branch of burden of proof should differ from the law in England, but he regarded it as his duty to interpret the law as it was. He summed up the legal position in the following words—

"Upon a careful examination of the relevant sections of the Evidence Act I find myself forced to the conclusion that at the termination of the trial the accused person will not be entitled to the benefit of Section 96, Penal Code, unless upon a review of all the evidence the Court is either satisfied as to the existence of the circumstances pleaded or considers the fact of their existence to be probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that they existed."

Collister, J repelled the contention that notwithstanding the specific provisions of the Evidence Act relating to exceptions the Court must acquit an accused person if it entertained reasonable doubt as regards his guilt. At another place he expressed a similar opinion by laying down that the general onus on the prosecution was subject by statute to the special onus which Section 105 imposed on the accused person and that the Court would not be justified in falling back on the general principle that the Crown must prove the prisoners' guilt in view of the specific provisions contained in Section 105. In Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) reference to the Full Bench was made by Braund J and he expressed the question referred to the Full Bench in the following words —

The question before this Full Bench is whether in such a situation the Court is bound to reject the plea of the exception or whether it still remains open to it on looking at the evidence as a whole (including the evidence of self-defence) to give to the accused the benefit of any reasonable doubt that remains whether the act may not have been committed in self-defence.

The judgment of Collister J all the more when read with that of Braund J makes it clear that the minority Judges were of opinion that once the defence story of self-defence was rejected that is plea of the exception was not accepted the Court cannot looking at the evidence as a whole including the evidence of self-defence give to the accused the benefit of any reasonable doubt as to the guilt on the ground that the accused had acted in self-defence.

79 The Supreme Court has clearly laid down that even after the rejection of the defence plea the general onus remains on the prosecution and if there exists any reasonable doubt as to the guilt the benefit shall go to the accused and he shall be entitled to acquittal even though he had failed to discharge the burden of proof placed upon him under Section 105. It shall thus appear that the majority judgment in Parbhoo's case expresses the law correctly though the reply to the question referred to the Full Bench was not expressed in correct legal words.

80 To avoid unnecessary repetition later it may be added that the minority judgment in Parbhoo's case stands overruled by the Supreme Court decision in AIR 1964 SC 1563 (supra). While discussing the case of AIR 1956 Nag 187 (Supra) their Lordships made it clear that they did not agree with the view expressed therein, namely that the benefit of doubt which the law gives on the assumption of innocence is available only where the prosecution has not been able to connect

the accused with the occurrence and it has nothing to do with the mental state of the accused. In other words even if the accused is unable to substantiate the defence plea the Court has to see whether the guilty intention or knowledge which is a material ingredient of the offence has or has not been proved beyond reasonable doubt.

81 In *J. Danubha Vanubha v State* AIR 1952 Sau 3 and *State v Bhuma Devrai* AIR 1956 Sau 77 the view expressed in the Full Bench case of *Government of Bombay v Sakur* AIR 1947 Bom 38 was adopted. Macklin J observed in this Bombay case that 'the practical difference between English and Indian Law as to the proof of exceptions is not very great in the result it is often no more than a matter of words. However certain observations made suggest that in a case of murder the prosecution has merely to prove that the accused caused the death and thereafter the burden lies upon the accused to prove the existence of circumstances bringing his case within the exception relating to the right of private defence and if he fails to discharge this onus the Court shall presume the absence of such circumstances and can convict the accused. At another place it was observed that in the eye of law the standard of 'proof' required from both the prosecution and the accused is the same though in practice the standard of 'proof' required to bring a case within one of the exceptions is lower than the standard of proof required from the prosecution to establish its own case. It was further observed that this was because a 'prudent man might well consider it his duty to act upon circumstances in the one case which he might not consider to be a justification for action in the other case.' It was held that the jury should not be told that the accused should prove his case beyond reasonable doubt or that the burden on him is necessarily less than the burden on the prosecution. These observations are clearly against the Supreme Court decisions and I may say with respect do not lay down the law correctly. It is true that in view of the definition of 'proof' as contained in Section 3 of the Evidence Act the proof expected from both the prosecution and the accused is the same which would be what a prudent man considers sufficient in the circumstances of the case but in view of the presumption of the innocence of the accused, it is necessary for the prosecution to establish its case beyond reasonable doubt while the accused has to establish his case in the manner a plaintiff or defendant has to make out his case in a civil proceeding. Further there are not always two questions involved the proof of the case for the prosecution and the proof of the exception put forward by the

defence." They are also not "two separate questions to be decided separately", the second question arising after the first has been decided. This rule can be applied to only those cases which fall in the first category, and not those which fall in the second category detailed above. The Bombay case is more or less on the lines of the minority judgment in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) and cannot be said to correctly express the law.

82. The above Full Bench case was followed by the same High Court in Har Prasad Ghosi Ram Gupta v. State, AIR 1952 Bom 184. No further comments are therefore, necessary.

83. The observations of Mitter, J in Yusuf Sk. v. The State, AIR 1954 Cal 258 that the "question of an onus under Section 105 only arises after the prosecution has established the commission of an offence" and that the "standard of proof under Section 105, Evidence Act, is the same as the standard which is required of the prosecution in a criminal trial," are clearly against the Supreme Court decisions. The first observation may however, apply to a case falling in the first category.

84. In Re, Gampla Subbigadu, 1940-2 Mad LJ 1018 = (AIR 1941 Mad 280) it was observed that in the absence of proof of the plea of self-defence it was not possible for the Court to presume the truth of the plea of self defence. It was further observed that it was not possible to reject the prosecution evidence merely because the prosecution witnesses did not explain how the accused himself came by his injuries. The Report suggests that the accused cannot be acquitted after giving the benefit of reasonable doubt created as to his guilt on the plea of private defence raised by him not being accepted. This is clearly against the law laid down by the Supreme Court.

85. In Baswantrao Bajirao v Emperor, AIR 1949 Nag 66, it was observed that:—

"The accused is not entitled to any benefit of the doubt as to his insanity because the burden is on him to prove strictly that he committed the act in a moment of insanity."

This can no longer be treated as a correct law, the Supreme Court having decided to the contrary, namely, that if any reasonable doubt is created as to mens rea, the benefit of doubt shall go to the accused by holding that the charge had not been established beyond doubt.

86. In the State v. Chhotelal Gangadin Gadariaya, AIR 1959 Madh Pra 203 the earlier decision of that Court in AIR 1955 Nag 187 (Supra) was followed, but as already mentioned above, the case of Ramhit Ram has been overruled by the Supreme Court.

87. Though not so expressed Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) appears to have been followed in Bala Prasad Dhansukh v State of Madhya Pradesh, AIR 1961 Madh Pra 241. I am drawing this inference from the following observations made in para 21 of the Report.

"In all such cases, as soon as such evidence is introduced, which, if believed, would establish the circumstances on which the defence may rely to bring his case under any of the exceptions, etc., the burden of the accused is discharged. It is equally discharged when on a consideration of the whole of the evidence the Court is left in doubt as to whether the killing may have been under the circumstances disclosed in the evidence on record."

88. Parbhoo's case was followed in Kamla Singh v The State, AIR 1955 Pat 209 and it was observed that the onus under Section 105 was discharged or could be taken as discharged once "the Court is brought to a point where it becomes doubtful of the fact or when it cannot positively hold that the prisoner was then not of unsound mind and that he was capable of knowing the nature of the act alleged against him." For reasons already indicated above, this is not a correct approach, though the accused, can be given the benefit of reasonable doubt as to his guilt. In other words, the Court can hold that the prosecution has not succeeded to establish its case beyond reasonable doubt.

89. In Etwa Oraon v. The State, AIR 1961 Pat 355 the earlier case of AIR 1955 Pat 209 was not dissented from. It was observed that:—

"The burden is discharged if the defence establishes facts and circumstances which might lead to a reasonable inference that at the time of the commission of the offence the accused was of unsound mind, the unsoundness of his mind being of the nature or extent mentioned in Section 84, Indian Penal Code."

Reasonable inference is not the same thing as reasonable doubt. It cannot also amount to 'proof' as contemplated by Section 3 of the Evidence Act. The above observations are to some extent against the view expressed by the Supreme Court.

90. Brindaban Prasad v. The State, AIR 1964 Pat 138 is based upon the Supreme Court decision in the case of K. M. Nanawati v. State of Maharashtra (supra) and needs no further comments.

91. Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) was not followed in V. Ambhi v. State of Kerala, 1962 (2) Cri LJ 135 (Ker), and it was held that the accused would be entitled to acquittal on the ground of insanity only if there was a probability of the accused being legally insane at the time of the commission of

the crime. In case it was meant to lay down that the accused could not be given the benefit of reasonable doubt as to all or some of the ingredients of the offence it would not be a correct exposition of law.

92 To sum up the doctrine of the burden of proof and the nature of evidence necessary to discharge this burden in cases where the accused claims the benefit of the general Exceptions in the Indian Penal Code or of any special exception or proviso contained in any other part of the same Code or in any other law can be stated as below —

1 The case shall fall in one of the three categories depending upon the wording of the enactment —

- (i) The statute places the burden of proof of all or some of the ingredients of the offence on the accused himself
- (ii) the special burden placed on the accused does not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients and
- (iii) the special burden relates to an exception some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence

2 In the first two categories the onus lies upon the accused to discharge the special burden, and on failure he can be convicted of the offence provided that the prosecution has succeeded to discharge its general burden of proof that is to establish the case beyond any reasonable doubt

3 In cases falling under the third category inability to discharge the burden of proof shall not in each and every case automatically result in the conviction of the accused. The Court shall still have to see how the facts proved affect the proof of the ingredients of the offence. In other words if on consideration of the totality of evidence on record a reasonable doubt exists in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he shall be entitled to its benefit and hence to acquittal of the main offence even though he had not been in a position to prove the circumstances to bring his case within the exception. This shall be on the ground that the general burden of proof resting on the prosecution was not discharged.

4 The burden of proof on the prosecution to establish its case rests from the beginning to the end of the trial and it must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea

5 The burden placed on the accused is not so onerous as on the prosecution. The

prosecution has to prove its case beyond reasonable doubt but in determining whether the accused has been successful in discharging the onus the Court shall look into the preponderance of probabilities in the same manner as in a civil proceeding. In other words the Court shall have to see whether a prudent man would in the circumstances of the case act on the supposition that the case falls within the exception or proviso as pleaded by the accused

93 In this view of the matter the dictum laid down in 1941 All LJ 619 = AIR 1941 All 402 (FB) (Supra) is partly erroneous and requires modification though the decision read as a whole is in conformity with the law. The dictum can be modified as below —

In a case in which any General Exception in the Indian Penal Code or any special exception or proviso contained in another part of the same Code or in any law defining the offence is pleaded or raised by an accused person and the evidence led in support of such plea, judged by the test of the preponderance of probability as in a civil proceeding, fails to displace the presumption arising from Section 105 of the Evidence Act in other words to disprove the absence of circumstances bringing the case within the said exception but upon a consideration of the evidence as a whole including the evidence given in support of the plea based on the said exception or proviso a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence the accused person shall be entitled to the benefit of the reasonable doubt as to his guilt and hence to acquittal of the said offence

94 M H BEG J — The question we have to answer the facts and circumstances leading to its reference to a Full Bench of nine Judges and the authorities cited by both sides have been very fully set out in the judgment of my learned brother D S Mathur J I concur with the views expressed there on a number of points but respectfully differ on others indicated below. I find myself in respectful disagreement also with Oak C J on the questions whether there is some conflict either between the Indian law and English law on burden of proof when the plea of private defence is set up or between the majority view in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) and the Supreme Court's interpretation of Section 105 of the Indian Evidence Act (hereinafter referred to as the Act also). I have endeavoured to show in the course of this opinion that S 105 of the Act does not depart from the principles of English law of Evidence on the plea of private defence and that the majority view in Parbhoo's case 1941 All

LJ 619=AIR 1941 All 402 (FB) were meant to answer questions which only arise in a case of reasonable doubt on the ingredients of an offence even where the exception pleaded is not established or completely proved. These questions did not arise in AIR 1968 SC 702 at p 702 and in other cases of the Supreme Court which lay down that an exception pleaded can be completely proved only by a preponderance of probability. Application of different principles due to differing degrees of proof given by each side in different types of cases on facts does not involve a conflict of principles applied which have been taken from English law. For this reason and others, explained below in detail, I respectfully differ from the opinion expressed by my learned brethren who have referred this case to a Full Bench on the ground that decisions of the Supreme Court have "cast a cloud of doubt" on the correctness of the majority view in Parbhoo's case. I concur with the views expressed and conclusions recorded by my learned brethren Broome, Gupta, and Parekh JJ, and also with the conclusions reached by my learned brethren Gyanendra Kumar and Yashoda Nandan, JJ. My learned brother Mukherjee, J. has also dissented from the majority view here which only reaffirms and explains the majority view in Parbhoo's case. I share the majority view here expressed, also by my learned brother D S Mathur, J, on this point, that the plea of private defence falls in the category of cases in which proof of the exception affects ingredients of the offence which the prosecution has to prove beyond reasonable doubt. I entirely agree with D. S. Mathur, J, that the majority view in Parbhoo's case correctly states the law, but I am unable to go so far as to hold that the majority actually committed an error of law in stating its conclusion in such a way that its answer does not accord with the reasoning. I prefer to use the word "answer" in place of the word "dictum" (which has a special significance attached to it), used in the question referred to us. I do not, with great respect, find it possible to go beyond saying that, if the answer has been misunderstood, it may be restated so as to bring out its real meaning more clearly. Before I restate the answer, as I understand it, or, proceed to elaborate my reasons to support the restatement, I will summarise the main contentions of the two sides

95. The Advocate General of Uttar Pradesh assailed the correctness as well as the validity today of the majority view in Parbhoo's case. He submitted that this view was based on a misapprehension and misapplication of what was decided in Woolmington's case. According to learned counsel, the principle laid down in

Woolmington's case did not apply to cases of statutory exceptions, such as those covered by Section 105 of the Act, because Lord Sankey said so clearly there. The majority view in Parbhoo's case, according to the Advocate General, substitutes the negative test of a doubtful plea for the positive statutory requirement of a proved exception laid down by S. 105. It was submitted that a negative test, requiring elimination of reasonable doubts was to be satisfied only by the prosecution, but the accused had to prove a positive case and could not succeed by merely raising doubts that his plea may be true. It was contended that the two burdens, one of the prosecution to prove its case beyond reasonable doubt, and the other of the accused, to prove his plea by a "preponderance of probabilities" had to be kept distinct and apart. It was urged that evidence tendered to discharge each burden had to be viewed separately and not confused. The majority view, in Parbhoo's case, 1941 All LJ 619=AIR 1941 All 402 (FB) (supra) had, according to the Advocate General, wrongly treated the accused's burden as a "minor" one of "bringing his case within an exception" and had then held it to be capable of discharge by mere doubts instead of by credible or acceptable evidence. All proof, according to the Advocate General, has to rest on "preponderance of probabilities" so as to appeal to reason and prudence, but the test adopted by the majority, for judging the accused's plea, was imprudent and unreasonable, and, therefore, illegal. Such a test, it was submitted, was inconsistent with the test of what was "proved" propounded by the Supreme Court in several recent cases, AIR 1960 SC 7, AIR 1966 SC 1, AIR 1966 SC 97, AIR 1966 SC 1762; AIR 1968 SC 702. The Advocate General went so far as to contend that, if the majority view in Parbhoo's case was correct, the weaker the case of an accused, and, therefore, the greater the doubt about it, the brighter would be the prospect of an acquittal before the accused. This amounted, the learned counsel urged, to a direction to acquit accused with doubtful defences instead of acquitting them only on doubtful prosecution cases against them. It had, he informed us, actually resulted in a number of unjustified acquittals and miscarriages of justice. Doubt, the Advocate General argued, could only be an obstacle or impediment in the way of the prosecution but it could not be the foundation of or substitute for the positive proof required by law. It could not, therefore, be converted into an aid given to the accused to help them to surmount what Section 105 compels them to prove before claiming acquittal. Considerable emphasis was laid on the duty of the Court, under the last part of Section 105, read with Section 4

of the Act to presume absence of circumstances entitling the accused to the benefit of an exception unless and until the contrary was actually proved. It was contended that at least so far as rules relating to burden of proof were concerned the Evidence Act which was meant to provide a complete and comprehensive code without invoking the aid of any external rules was exhaustive. It was therefore the duty of Courts to enforce the provisions of the Act instead of making law which should be left to the legislature.

96 Mr P C Chaturvedi appearing for the accused contended that the accused could be presumed to discharge the positive burden of proving an exception pleaded if he succeeds in creating a reasonable doubt by evidence from whichever side it came that his plea may be true. According to him the standard of proof required by a prudent man laid down by Section 3 of the Act would be satisfied by a hypothesis. Prudence according to him, always bases its judgments on reasonable hypothesis and not on certainties which are seldom possible in judging human affairs. And Section 3 of the Act learned counsel pointed out specifically enacts that the prudent man not only could but ought under the circumstances of the particular case to act upon the supposition that a state of facts exists. His contention was that the duty of the prudent man to act upon a supposition based no doubt on probabilities obliges the prudent man to equate reasonable doubt that the accused's case may be covered by an exception with 'proof' of the exception in a criminal case. Such an elastic and variable concept of prudence and proof which differs in its application from case to case was implicit according to learned counsel in Section 3 of the Act itself. In criminal cases involving deprivations of life and liberty much depended on oral testimony which may be defective or perjured. Therefore in order to avoid the lurking risks of grave injustice it was necessary according to learned counsel, not to unduly limit the scope of the principle of benefit of doubt. Learned counsel went to the extent of asking us to countenance even a fiction if need be so as to meet or to repeal the obligatory presumption under Section 105 and thus to remove what the learned counsel tried to depict as a possible impediment in the way of justice, equity and prudence. The learned counsel invited us to consider the consequences in cases where evidence was so equibalanced on a disputed question of possession of property or on the question whether one or the other party was the aggressor in a fight that the astutest judge could not possibly determine which of two rival versions was correct. Learned counsel urged that on

the State's interpretation, both sides will have to be convicted in such cases as neither side could prove its defence case positively by a 'preponderance of probabilities'. Lastly the learned counsel argued that Section 6 of the Indian Penal Code read with Section 221 (5) Criminal Procedure Code placed the burden upon the prosecution of negating the exceptions pleaded by the accused. This conclusion according to learned counsel necessarily flows from the proposition that the absence of an exception was an ingredient of each offence defined by the Indian Penal Code. The prosecution's primary and unalterable duty to dispel all reasonable doubt in a criminal case must, it was contended extend to removing such doubts arising from anything whatsoever in the case which Courts could properly and legally consider.

97 Much unnecessary confusion which has gathered round the relevant provisions of the Act will vanish if we adopt the time honoured mode of construing statutes formulated in the form of rules as far back as 1584 in Heydon's case (1584) 3 Co Rep 7a so as to remove ambiguities by examining the mischief meant to be remedied. These rules were adopted by the Supreme Court and cited with approval in *Bengal Immunity Co Ltd v State of Bihar* AIR 1955 SC 661 at p 674. In *Craies' Statute Law* (5th Ed p 91) it was observed 'These rules are still in full force and effect with the addition that regard must now be had not only to the common law but also to prior legislation and to the judicial interpretation thereof'. Fletcher Moulton L J observed in *Macmillan v Dent* 1907-1 Ch 107 at pp 117 at p 120

'In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's case to consider how the law stood when the statute to be construed was passed what the mischief was for which the old law did not provide and the remedy provided by the statute to cure that mischief'.

98 Lindley M R in *Re Mayfair Property Co* 1898-2 Ch 23 at p 35 said—

In interpreting an Act of Parliament you are entitled and in many cases bound to look to the state of the law at the date of the passing of the Act not only the common law but the law as it then stood under previous statutes in order properly to interpret the statute in question.

99 In *Shivanarayan Kabra v State of Madras* AIR 1967 SC 986 at p 989 also the Supreme Court referred to these rules. It held that in construing the section of an Act and determining its true scope 'it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature such as history

of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the Statute for curing the mischief."

100. The concepts of 'proved', 'disproved', and 'not proved,' defined in alluringly simple terms in the Act, compress a great deal of judicial wisdom with history and processes of evolution and development behind them which have not yet ended. The term 'Burden of proof' is not defined in the Act and cannot be fully understood without an exposition of its place and meaning in our procedural law as a whole. Nor an adequate understanding of the import of these basic concepts, even when they are incorporated in a comprehensive code, we have to necessarily examine their sources, the context in which they were given statutory form, the purposes they were designed to serve, and the functions they actually fulfil. Cut off from these moorings they may become ugly caricatures of that justice which all law is meant to serve. It is obvious that a mechanical interpretation with the help of a dictionary and rules of grammar, found to be inadequate on several occasions by our Supreme Court (e.g. *Deputy Custodian Evacuee Property New Delhi v. Official Receiver of the Estate of Daulat Ram Surana*, AIR 1965 SC 951 at p 957, *Kanwar Singh v. Delhi Administration*, AIR 1965 SC 871 at p 875, *R. L. Arora v. State of U. P.*, AIR 1964 SC 1230 at p 1237; *State of U. P. v. C. Tobit*, AIR 1958 SC 414), may not suffice here also.

101. Our Evidence Act is the first of the three comprehensive codifications of our adjectival or procedural laws introduced with the object of enabling courts to correctly ascertain those facts which determine rights and liabilities defined by the substantive laws. It provides for the adduction of evidence declared relevant and in a logical order conformably with rules of natural justice and reason so that truth may be brought out so far as possible and not obscured. Its purpose was "to consolidate, define, and amend the law of Evidence" so that inadequacies and uncertainties in this branch of our law may be removed. It is no secret that this was sought to be accomplished by basing the Act on principles and rules evolved by the judge-made Anglo Saxon law of evidence with slight modifications but without departing from its basic norms. Therefore, to these principles and rules we have to turn to find out the meanings of ambiguous expressions.

102. We find that the term "Burden of Proof" as used in English law, both at the time when Sir James Fitzjames Stephen drafted the Act and also today, carries within it two meanings. I may quote from Phipson on Evidence (10th ed., at page 43) to indicate the two senses—

"As applied to judicial proceedings the phrase 'burden of proof' has two distinct and frequently confused meanings (1) the burden of proof as a matter of law and pleading—the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt, and (2) the burden of proof in the sense of introducing evidence"

Again, we find here (p 45)

"It is in the second sense that the term is more generally used, and must be applied in the following pages, and while the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly according as one scale of evidence or the other preponderates"

103. Whenever the law places a burden of proof upon a party a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together. It has been said that a rebuttable presumption always covers a gap in evidence, but the gap, and together with it, the presumption will disappear as soon as there is credible evidence to fill the gap. The extent of the gap, in the eye of law, will vary with the nature of the presumption. The burden of establishing a plea connotes a bigger gap requiring more acceptable evidence to fill it than the burden of removing a presumption that no circumstances whatsoever exist to support the plea. As has been often pointed out, when there is ample evidence from both sides, the fate of the case is no longer determined by presumptions or burden of proof but by a careful selection of the correct version, based no doubt on preponderance of probabilities which has to be so compulsive or overwhelming in the case of a choice in favour of a conviction as to remove all reasonable doubt. In other words, the importance of burdens of proof and presumptions vanishes in the face of evidence given by both sides. They may, however, become decisive again in cases where evidence is equibalanced. Thus, their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equibalanced. Neither a burden of proof nor a rebuttable presumption can be used for excluding any evidence. That is not their function at all but of other provisions of law.

104. In Phipson's Evidence (10th ed. p 838), it is pointed out: "The chief function of a rebuttable presumption of law is to determine upon whom the burden of proof rests, using that term in the sense of adducing evidence." Wigmore, the celebrated American authority of the law of Evidence, dealing with the "Legal Effect of a Presumption" (See, 3rd ed,

Vol. IX, p 289) explains —

" It must be kept in mind that the peculiar effect of a presumption 'of law (that is the real presumption) is merely to involve a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence) the presumption disappears as a rule of law and the case is in the jury's hands free from any rule. Again, he observed (3rd ed Vol IX, p 230) 'It is, therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts even when the opponent has come forward with some evidence to the contrary. For example if death be the issue and the fact of absence for seven years unheard from be conceded but the opponent offers evidence that the absentee before leaving proclaimed his intention of staying away for ten years until a prosecution for crime was barred this satisfies the opponent's duty of producing evidence removing the rule of law and when the case goes to the jury they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighed down with any artificial additional probative effect they may estimate it for just such intrinsic effect as it seems to have under all the circumstances. This much is a plain consequence in our mode of jury trial and the fallacy has arisen through attempting to follow the ancient continental phraseology which grew up under the quantitative system of evidence fixing artificial rules for the judge's measurement of proof."

105 It is true that the rules of evidence indicated above were evolved in the course of development of a mode of trial in which the judge gave guidance on questions of law and the jury pronounced its verdicts on questions of fact. Nevertheless, when these very guiding principles were sought to be reduced to the form of a code the basic principles could not be deemed to be abandoned or departed from without clear words to the contrary. In fact it is not possible to appreciate the true meaning of a number of provisions of the Act including Sec 103 without exploring the law contained in the sources of the codification. If, however the above mentioned expositions are kept in view it becomes quite easy to interpret Section 103 of the Act which covers the burden of establishing as well as the duty of introducing evidence of exceptions set up by the accused. It becomes clear that the obligation of the Court to presume absence of circumstances supporting a plea is meant to operate only initially. The presumption

which the Court is obliged to make vanishes when any circumstances supporting the exception are proved. On the other hand the duty or the burden of the accused dealt with in the first part of Section 103 to establish the exception pleaded may remain even after the initial presumption against him is removed as a result of evidence of either side. The obligation of the Court to presume initially absence of circumstances to support an exception cannot be used to eliminate or wipe out facts actually proved from either side even though they are not sufficient to establish an exception. The circumstances actually proved even though falling short of proving the plea of the accused by a preponderance of evidence will nevertheless free the case from the initial presumption that no circumstances at all exist to support the exception pleaded. The case will then be decided on the whole evidence. This is all that Sec 103 read with other provisions of the Act clearly means.

106 If, for example an accused "proves" infliction of injuries on him by the complainant in the course of the occurrence which is the subject-matter of the charge he certainly proves some of the circumstances to support a plea of self-defence. The obligatory initial presumption against him is removed. Nevertheless he may be convicted if the prosecution evidence proves that these injuries were indubitably caused in the exercise of a right of private defence by the complainant. But his conviction would not be the result of any presumption under the last part of Section 103. It would follow from the superior proof given by the prosecution either direct or circumstantial or both. On the other hand added to injuries on the person of the accused proved to have been caused by the complainant during the occurrence the accused may succeed in proving even from such circumstances as an attempt of the prosecution to conceal these injuries that there is a doubt about the veracity of the prosecution version itself and that his plea of self-defence although not positively established may reasonably be true. In such a case the prosecution could not use the presumption contained in the last part of Section 103 to secure a conviction. No doubt, the prosecution will fail in such a case because it has failed to prove its own case beyond reasonable doubt. But the doubt it has failed to eliminate would have been introduced by proved facts relied upon by the accused to establish the plea of an exception. The facts relied upon for proving an exception could not be automatically equated with facts disproved or disintitle the accused from getting the benefit of an exception simply because he could not fully prove by a

"preponderance of evidence," the exception pleaded. A plea taken but left in the region of "not proved" by the evidence on record may be enough, on a criminal charge, for a bare acquittal provided the doubt introduced by some proved facts and circumstances, displacing the initial obligatory presumption, is strong enough to reasonably shake the moral conviction of guilt of the accused on the charge levelled against him. This seems to me to be the line of reasoning underlying the majority view in Parbhoo's case. It seems to be both practical and just. It accords with very firmly established principles of proof and burden of proof applicable to criminal trials in this country as well as with the provisions of the Act read as a whole. I confess that I fail to see any flaw in it.

107. The contrary view would erect the initial presumption under Section 105 into an artificial barrier against the entry of a reasonable doubt into the prosecution case even when the accused, though failing to fully prove an exception, actually creates a reasonable doubt. Not only is it humanly impossible for a judge to keep evidence confined in two separate watertight compartments of his mind, but it would also be illegal for him to do so. Apart from being much too unrealistic a view, this would restrict the powers of the Court to judge, on all the materials placed before it, whether the prosecution has proved its case beyond reasonable doubt or not. It would equate relevant and proved facts with what is either irrelevant and inadmissible or disproved. Such a view would clearly infringe Section 3, and, indirectly, also provisions relating to relevancy by reducing even facts duly proved as relevant to the same positions as those which are irrelevant and excluded. Such a course seems warranted neither by law nor by any canon of justice or expediency.

108. In Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) Baipai, J., held that the fixed or stable burden of proof is found in Sections 101 and 102 of the Evidence Act, whereas Sections 103 and 105 of the Act contain the unstable burden which shifts in the course of the trial "as one scale of evidence preponderates over the other." In other words, preponderance of evidence was the test to be used in criminal as well as in civil cases for judging the veracity of a case, the only distinction being that such preponderance has to be great or overwhelming enough to eliminate reasonable doubt to warrant conviction in a criminal trial. Again, Mulla, J., who expressed the opinion, in Parbhoo's case, that the principle of reasonable doubt may not be found incorporated "in its entirety" in Sections 3 and 101 of the Act, relied on

Sir John Woodroffe's work on Evidence to hold that the test which the prosecution had to satisfy to secure conviction by proving its case beyond reasonable doubt was higher than the ordinary criterion of "preponderance of probability" contained in Section 3. Even this expression of an individual opinion by Mulla, J. implied that all parties, other than prosecutors, were required to satisfy the test of "preponderance of probability" for proving their pleas or cases. To hold that the special burden of the prosecution to prove its case beyond reasonable doubt is higher than the burden which lies upon a party in a civil proceeding or upon an accused under Section 105 of the Act does not mean that the accused could establish his own plea completely by anything less than a "preponderance of probabilities." Whenever the Supreme Court had held that the burden of the accused under Sec 105 was discharged on a balancing of probabilities, it had referred to a full discharge of the burden, but, that was not the type of case under consideration in Parbhoo's case.

109. Again, to hold that, even if the accused failed to prove the plea fully, it was possible that he may yet succeed in shaking the foundations of the prosecution case and obtain an acquittal on a reasonable doubt is not to lessen the burden of what may be called a "clean acquittal." There is a difference between a complete exoneration, which is only possible when an accused turns the balance of probability in his favour, and a bare benefit of doubt, which is not entirely devoid of harmful consequences for the accused. The Supreme Court had also held that Section 105 did not prevent the Court from giving the benefit of doubt altogether to an accused pleading an exception, or in other words, S 105 makes possible both kinds of acquittal—one by proving his plea fully and another by raising genuine doubt in the case. Ismail, J. observed in Parbhoo's case, that the difficulty to be resolved arose only in those limited number of cases where evidence in the case "falls short of proof but creates a reasonable doubt in the mind of the Court whether the accused person is or is not entitled to the benefit of the exception." He pointed out that the question before the Full Bench was whether in such a case, which was before the Court, the Court had no option except to convict. The majority of their Lordships rightly held, just as the Supreme Court later held, that the Court could not be expected to convict in such a case. It is not permissible, in my opinion, to extend the ratio decidendi of Parbhoo's case beyond what was decided there.

110. In Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) the learned Chief Justice spoke of the accused's

'minor burden of bringing his case within the exception or proviso relied upon by him. Ismail J considered that the decision on the question of self-defence would only be a decision upon one of the issues in the case. The Advocate General contended that this approach to the plea of the accused was itself erroneous inasmuch as it gave the impression that the accused had to prove something less than a preponderance of probabilities to establish his case. All that seems to have meant in describing the burden of the accused as minor compared with that of the prosecution was to contrast it with the heavier burden of the prosecution to eliminate reasonable doubts which may creep in about the veracity of the prosecution version. There seemed to be no intention to reduce the burden of the accused below what the law required. On the other hand Bappai, J took some pains to explain that the nature of the doubt as to the plea of the right of private defence which was before the Court in Parbhoo's case was that a doubt had been cast in connection with the entire case. He emphasised that it had to be a reasonable doubt which reacts on the whole case. He made it clear that the doubt he had in mind was one which "pervades the whole case". In fact the learned Judge indicated that it would be wrong to assume that the doubt before the Court did not affect the ingredients of the offence with which the accused has been charged (the words used by him are italicized here " "). In other words the nature of the doubt contemplated or assumed to exist for the purposes of answering the question before their Lordships in that case was one which affected the ingredients of the offence.

111 In fact Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) was not concerned with the quantum of credible evidence in support of the plea of the accused which could infect if I may use that word the whole prosecution case and stamp it with doubt even though it falls short of fully establishing the plea of private defence. The question framed in Parbhoo's case proceeded on the assumption that the evidence given by the accused was credible with regard to some of the circumstances proved in support of the plea of private defence and threw a reasonable doubt on an ingredient of an offence even if it did not establish the plea of private defence by a preponderance of probabilities. The answers given in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 were based upon that assumption. It may be mentioned here that in each of the two Rangoon cases which the majority purported to follow in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 the plea of accused was quite substantially supported on facts. In Em-

peror v U Damapala, AIR 1937 Rang 83 (FB) the first question framed which is relevant here indicated that the exception was so well supported that the Court could be in doubt whether the exception itself was proved or not. In Nga Thein v The King AIR 1941 Rang 175 the facts found against the victim and in favour of the accused were quite substantial. It is in cases of this sort that genuine doubts arise.

112 There is a difference between a flimsy or fantastic plea which is to be rejected altogether and a reasonable but incompletely proved plea which casts a genuine doubt on the prosecution version so that it indirectly succeeds. Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) was not meant to afford any guidance on what reasonable doubt itself means. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating capricious indolent drowsy or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to 'separate the chaff from the grain'. It is the doubt of a reasonable astute and alert mind arrived at after due application of mind to every relevant circumstances of the case appearing from the evidence.

113 I may mention here that in two reported cases I have tried to point out that Courts must reach whenever possible definite conclusions by a careful analysis of the evidence and not take shelter behind a supposed uncertainty created by the facts appraised from a preconceived angle. Those cases are *Bharosa v State* AIR 1965 All 417 which was a case resulting in two deaths one on each side from a fight over a disputed possession of a field which ended in a conviction and *Mangat v State* AIR 1967 All 204 where there were injuries on both sides but the case ended in a conviction on the finding that the aggression came from the side of the accused. I doubt whether what was laid down quite correctly but in rather general terms by the majority in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) has been really widely misunderstood. If any case of a real misunderstanding of the law by a trial Court occurs it can be brought to the notice of this Court by appropriate proceedings taken by the State or by the complainant.

114 Perhaps the most important aspect of Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) which learned counsel for both sides seem to have assumed that we will see for ourselves was stated by Iqbal Ahmad C.J., at the outset when it was indicated that the real question before the Court in that case was whether the evidence produced by the accused persons even though falling short

of proving affirmatively the existence of the circumstances bringing the case within the exception pleaded by him, can be utilized as part of the entire evidence in the case for the purpose of showing that a reasonable doubt exists as to his guilt." The learned Chief Justice thus stated the prosecution's submission on this question. The argument is that, unless the accused succeeds in proving that his case comes within the exception or proviso pleaded by him, the evidence led by him must be totally discarded and the Court must proceed on the definite supposition that "there was an entire absence of the 'exception' or 'proviso' relied upon by the accused." It seems to me that on this question, involving a correct interpretation of the obligatory presumption at the end of Section 105, there is no escape from the answer given by the majority in Parbhoo's case unless the accused is to be denied the benefit of doubt altogether when he pleads an exception. Any answer other than the one given by the majority in Parbhoo's case will involve a clear (sic) with propositions enunciated by the Supreme Court in Nanavati's case, AIR 1962 SC 605 and Dahyabhai's case, AIR 1964 SC 1563 and Bhikari's case, AIR 1966 SC 1 discussed by me below, which necessarily mean that the whole evidence must determine the result.

115. Iqbal Ahmad, C J, in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) also referred to the argument of Sir Wazir Hasan that Section 6 of the I P. C. provided a part of the definition of every offence. This section reads as follows:

"Throughout this Code every definition of an offence, every penal provision, every illustration of every such definition or penal provisions, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions, though exceptions are not repeated in such definition, penal provision, or illustration."

The learned Chief Justice held that, although this conception was correct, yet, Section 105 of the Act would become ineffective if the further argument, built on it, was accepted that Section 6, I P. C., imposed automatically a burden of disproving the existence of exceptions upon the prosecution. Thus, the prosecution was not required to lead evidence to prove that an accused person was sane. Even in the absence of any provision, such as Section 105 of the Act, this would be the position. The ordinary presumption would be that every individual concerned in a case is sane, unless and until the contrary is proved, or, at least, until the validity of the presumption is shaken. Similarly, every person inflicting an injury on another would be presumed to have done so with intent to cause it without any

lawful excuse unless a justification, such as the exercise of a right of private defence, was either fully proved or its existence could be quite reasonably conceived on facts proved. Section 103 of the Evidence Act was there to place the burden of proving special facts to sustain the plea of an exception upon the accused. There seemed, therefore, no particular reason for Section 105 in the Act unless the reasoning which appealed to the learned Chief Justice, that it effectively meets an argument based on Section 6, I P. C., was present in the minds of the framers of Section 105 also.

116. Section 105 of the Act specifically refers to the provisions of the Indian Penal Code which were before the draftsman. It must be presumed that the Legislature was fully aware of Section 6, I. P. C. Therefore, Section 105 of the Act seemed necessary in order to meet a possible construction which was not intended. In other words, Section 105 serves the purpose sometimes served by a proviso (See Maxwell's "interpretation of Statutes" 11th Edn, page 156). Of course, it could be looked upon as analogous to a proviso only if we view S 6, I P. C. and Section 105 of the Act together. It is certainly difficult to see the purpose of Section 105 of the Act unless it is viewed in the context of S 6, I. P. C.

117. The argument that some negative burden may rest upon the prosecution seems to have been accepted by the Advocate General by implication when he conceded that the prosecution's burden extends to eliminating doubts which may arise from the evidence on the record. Section 105 of the Act could have been enacted to repel the more ambitious contention, which was actually advanced in Parbhoo's case by Sir Wazir Hasan and before us by Mr P. C. Chaturvedi, that the prosecution must actually disprove, as a part of even its initial duty, all possible exceptions which may be set up by the accused because Section 6 of the I. P. C. annexes absence of exceptions to every definition of an offence. At least, its utility and effect do not seem to extend further than repelling such contentions because all else it enacts seems already covered by Section 103 of the Act. And, as we know, there is a presumption against redundancy.

118. The Advocate General repeated the argument accepted by the minority in Parbhoo's case, 1941 All LJ 619 = (AIR 1941 All 402) (FB) that English law of Evidence and English authorities could not be used for interpreting the provisions of our Evidence Act. Learned counsel tried to invoke the aid of Section 2 of the Act. He contended that its repeal in 1938 did not alter the position. Here again, I think we must apply the Mischief Rule in order to appreciate the effect of the repealed

Section 2 of the Act. It appears to me that the repealed section was directed only against rules of evidence which prevailed in this country independently of statutory authority. It did not prevent an examination of the sources upon which the codification contained in the Act is based when there is a doubt about the meaning of any particular provision. It certainly did not bar the adoption of correct canons of construction in interpreting the provisions of the Act.

119 The extent to which English authorities could be used in interpreting provisions of those enactments which are largely based on English law has been indicated on a number of occasions by Courts in this country. In *State of Punjab v S S Singh* AIR 1961 SC 493 their Lordships of the Supreme Court who took the majority as well as the minority views did refer quite extensively to the English sources and authorities in order to determine the correct meaning and scope of some of the provisions of the Evidence Act. It is true that the majority after referring to an argument of a learned counsel, based upon the supposed intention of Sir James Fitzjames Stephen in drafting provisions of Sections 123 and 162 of the Act, observed that the learned counsel fairly conceded that recourse to extrinsic aid in interpreting the statutory provisions would be justified within well recognised limits and that primarily the effect of statutory provisions must be judged on a fair and reasonable construction of the words used by the statute itself. The majority did not however expressly dissent from a somewhat different proposition stated by Subba Rao J when his Lordship said: "The dictionary meanings do not help to decide the content of the said words. The content of the said words therefore can be gathered only from the history of the provisions. It has been acknowledged generally with some exceptions that the Indian Evidence Act was intended to and did in fact consolidate the English law of Evidence. It has been often stated with justification that Sir James Stephen has attempted to crystallise the principles contained in Taylor's work into substantive propositions. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act we can with profit look to the relevant English Common Law for ascertaining their true meaning. It is true that where provisions of the Act are clear and unambiguous no recourse to extrinsic matter even if it consists of the sources of the codification would be permissible. But, the position before us is, as already indicated that it is not possible to fully bring out the meaning of Section 105 of the Act itself without reference to the principles found in the sources of the Act contained in English

Law. At least the aspect of Section 105 which was raised and considered in Parbhoo's case made it necessary to go to those sources.

120 The majority of the judges deciding Parbhoo's case did attach considerable importance to what was held by the House of Lords in *Woolmington's case* 1935 AC 462 (Supra). But they also examined the meanings of the words used in the relevant provisions of the Act to determine the scope of the burden of proof resting upon the accused under Sec 105 of the Act. The mere fact that they sought support from the basic principles laid down in *Woolmington's case* 1935 AC 462 could not make their interpretation incorrect. It only added weight to the view taken by their Lordships perhaps it would have been better to refer to *Woolmington's case* after interpreting the language used in the relevant provisions of the Act. This however does not affect the correctness of the view taken by the majority. Even Collier J expressing the minority view in *Parbhoo's case* 1941 All LJ 619 = AIR 1941 All 402 (FB) turned to the statement of the law in *Foster's Crown Laws* for discovering a possible source or basis for Section 105 of our Act. Allsop J seems to have held the view that Section 2 of the Evidence Act (no one seems to have pointed out that it was repealed then) prohibited even use of English authorities. Braund J took the view "The law of England is one thing and the law of India another. If one may say so with very great respect the erroneous assumption which seemed to underlie the minority view in *Parbhoo's case* was that the law in India must be different from that in England on questions of burdens of proof of the prosecution and the accused and that the two did not meet here. This assumption seems to have stirred the judicial instinct of that great Judge of this Court on the Criminal side Tej Naram Mulla J so much that he declared it to be fundamentally wrong."

121 The English law on burdens of establishing cases in criminal trials is thus stated in *Phipson's Evidence* (10th Edn paragraph 101 page 49): "Generally in criminal cases (unless otherwise directed by statute) the presumption of innocence casts on the prosecutor the burden of proving every ingredient of an offence even though negative averments be involved therein. Thus, in cases of murder the burden of proving death as a result of the voluntary act of the accused and malice on his part is on the prosecution."

And the prosecution is bound to negative any exception favourable to the defendant which is engrafted in the statutory description of the offence though not one contained in a separate clause."

(Vide: Roberts v. Humphreys, (1873) 8 QB 483; R v. James, (1902) 1 KB 540, R. v. Audley, (1907) 1 KB 383.

122. If this was the state of law in England round about 1872, as it appears from (1873) 8 QB 483 (supra), decided in 1873, it will be evident why Section 105 of our Evidence Act, passed in 1872, became necessary. Although, the exceptions contained in the Indian Penal Code, to which Section 105 of the Act refers, are contained in separate sections, yet, the result of Section 6 of the Indian Penal Code could well be said to be that the exceptions were engrafted in every definition of an offence as though they formed parts of each section defining an offence. The language of Section 6, Indian Penal Code is quite explicit. Therefore, Section 105 of the Act became necessary so as to make it clear that, notwithstanding such a statutory provision, the ordinary rule of English law of Evidence, that an exception found in a separate clause or section has to be established by the party claiming its benefit, will apply in this country also. In other words, as I see it, Section 105 of the Act was introduced not in order to depart from but to make our law conform to the norms of English law of evidence on the subject.

123. The basic or primary burden of the prosecution is stated and explained again in Phipson's Evidence (10th Ed paragraph 101, page 49) as follows:

"The prosecution must prove the guilt of the accused and he is under no obligation to prove his innocence. It is sufficient for him to raise a reasonable doubt as to his guilt. Thus, where an act is criminal or the offence is more serious, if it is done with a particular intent, the burden of proving that intent, in the absence of statutory provision, rests throughout on the prosecution. If the evidence proves that the accused did an act the natural consequence of which is a certain result, the jury is entitled to find that the act was done with the intention of bringing about that result. If on a review of all the evidence, they are left in doubt, then the prosecution have not discharged that burden. But generally facts in confession and avoidance are upon him, e.g., insanity or diminished responsibility, and the prosecution ought not to assume that burden".

124. This statement of the law in England seems to me to be applicable with equal force in this country with this difference that instead of the jury Courts generally decide questions of fact also here, and the plea of insanity and other exceptions seem to stand on the same footing when the ingredients of an offence overlap and conflict with those of the exceptions.

125. The burdens of the prosecution and of the accused were thus contrasted in Phipson's Evidence (10th Ed, paragraph 102 at page 50):

"When the burden of the issue is on the prosecution, the case must, as we have seen, be proved beyond a reasonable doubt; though a prima facie case made by the prosecution and not rebutted by the accused may often amount to this, and suffice for conviction. When, however, the burden of an issue is upon the accused, he is not in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty, it is sufficient if he succeeds in proving a preponderance of probability, for then the burden is shifted to the prosecution, which has still to discharge its original onus that never shifts, i.e., that of establishing on the whole case, guilt beyond a reasonable doubt".

The cases relied upon for this statement of English law were. (1942) AC 1; (1935) AC 462, R. v. Stoodart, (1909) 25 TLR 612; R. v. Schama, (1914) 84 LJKB 396; (1943) KB 607; R. v. Cohen, (1951) 1 KB 506, R. v. Dunbar, (1958) 1 QB 1

126. The cases cited above in Phipson's Evidence to support the statement of the English law on the subject, include those which deal principally with the discharge of his full burden by an accused (e.g. 1943-1 KB 607 and 1958-1 QB 1) establishing a "preponderance of probability" in his favour as well as those (e.g. 1935 AC 462) which revolve round the prosecution's failure to discharge its burden of proving beyond reasonable doubt. To avoid confusion, it is necessary to bring out the difference clearly not only between the prosecution's higher onus of proving its case beyond reasonable doubt and the lower burden of the accused to prove an exception by a "preponderance of probability" only, but also between a complete proof and a reasonable doubt as different conclusions. Again, the process of balancing probabilities prudently, which is common to all cases, and the results of that process, which may differ from case to case, must also be clearly differentiated.

127. While the process of balancing probabilities is common for all cases the burdens of the parties to establish their respective cases in a criminal trial are really only two in kind, the higher one of the prosecution to establish its case beyond reasonable doubt and the lower one of the accused to prove his plea by a mere preponderance of probability. As, however, the conclusions which can emerge from the process of assessing evidence include a state of reasonable doubt about the existence of an exception pleaded by the accused, which necessarily involves the failure of the prosecution to discharge its burden of eliminating reasonable

doubt when an ingredient of an offence becomes involved the result viewed from the point of view of the practical or actual as distinguished from the legally imposed burden of the accused is sometimes put as it is in Phipson's Evidence where it is stated that it is enough for the accused to raise a reasonable doubt as to his guilt. This mode of describing the result of the prosecution's higher burden to eliminate reasonable doubt about the guilt of the accused has led to an attempt to reduce the legally imposed burden of proving an exception to the lower level of a burden of creating reasonable doubt only and to equate reasonable doubt with complete proof of an exception. On the other hand the duty imposed by law upon the accused to prove the exception pleaded by him by a preponderance of probability is sought to be used to reduce so much the prosecution's undeniable burden to eliminate reasonable doubt as to eliminate the accused's right to the benefit of doubt itself. In my opinion neither should 'preponderance of probability' be confounded with and reduced to the level of a reasonable doubt only nor can the principle of reasonable doubt be eliminated altogether in a criminal trial. Each of the two kinds of conclusion—proof of an exception by a preponderance of probability and reasonable doubt about guilt—reflects a different situation. As soon as a Court finds one of these two types of conclusion to be the correct one to reach in a case the other is necessarily excluded.

128 The legal position of a state of reasonable doubt may be viewed and stated from two opposite angles. One may recognise in a realistic fashion that although the law prescribes only the higher burden of the prosecution to prove its case beyond reasonable doubt and the accused's lower burden of proving his plea by a preponderance of probability only yet there is in practice a still lower burden of creating reasonable doubt about the accused's guilt and that an accused can obtain an acquittal by satisfying this lower burden too in practice. The objection to stating the law in this fashion is that it looks like introducing a new type of burden of proof, although it may be said in defence of such a statement of the law that it only recognises what is true. Alternatively one may say that the right of the accused to obtain the benefit of a reasonable doubt is the necessary outcome and counterpart of the prosecution's undeniable duty to establish its case beyond reasonable doubt and that this right is available to the accused even if he fails to discharge his own duty to prove fully the exception pleaded. This technically more correct way of stating the law was indicated by Woolmington's

case and adopted by the majority in Parbhoo's case and after that by the Supreme Court. It seems to me that so long as the accused's legal duty to prove his plea fully as well as his equally clear legal right to obtain the benefit of reasonable doubt upon a consideration of the whole evidence on an ingredient of an offence are recognised a mere difference of mode in describing the position from two different angles is an immaterial matter of form only. Even if the latter form appears somewhat artificial it must be preferred after its adoption by the Supreme Court.

129 The phrase 'preponderance of probability' used in Phipson's Evidence to describe the lower burden of the accused for proving his plea and to contrast it with the higher onus of the prosecution to prove its case beyond reasonable doubt has been employed for this very purpose by their Lordships of the Supreme Court as indicated below. A passage was also cited by Mulla J in Parbhoo's case from Woodroffe and Amir Ali's Law of Evidence where the term proved as used in Section 3 of the Act was explained as implying a mere preponderance of probability when applied to civil cases. My learned brother Gupta has informed me that in the separate judgment of my learned brethren Broome, Gupta and Parekh JJ the use of this expression was deliberately avoided as it is liable to be misunderstood. While I respectfully agree that such an expression can be misunderstood I prefer to explain it as I understand it rather than avoid using it. I find that this expression is too well established and recognised after the repeated use by their Lordships of the Supreme Court for Courts in this country to be able to eschew it now. As Oak C J has pointed out the expression contains according to the Advocate General the only test of proof when an accused pleads an exception. The use of this expression by the Supreme Court in circumstances indicated below could be said to be the main reason for this reference to a Full Bench. This expression has also given rise to some differences of opinion between learned judges of this Court. Therefore it seems to me to be very necessary to explain its meaning.

130 "Preponderance literally interpreted means nothing more than an outweighing in the process of balancing however slight may be the tilt of the balance or the preponderance. I do not find sufficient grounds for holding that the word has been used in any other sense whenever it has been used either by our Supreme Court or by English Courts or by commentators such as Phipson or Sir John Woodroffe. It covers every tilt or preponderance of the balance of probability whether slight or overwhelming. In

fact, the dividing line between a case of mere "preponderance of probability" by a slight tilt only of the balance of probability and a case of reasonable doubt is very thin indeed although it is there. A case of reasonable doubt must necessarily be one in which, on a balancing of probabilities, two views are possible. What may appear to one reasonable individual to be a case not fully proved may appear to another to be so proved on a balancing of probabilities. Such a case and only such a case would in my opinion, be one of reasonable doubt. A mere preponderance of probability in favour of the exception pleaded by an accused would, however, constitute a "complete" proof of the exception for the accused but a state of reasonable doubt would not. "Complete" proof for the prosecution cannot fall short of elimination of reasonable doubt about the ingredients of an offence. If one is clear about the meanings of the terms used no misapprehensions need arise.

131. It was contended by the Advocate General that the English Law had been misunderstood by the majority in Parbhoo's case inasmuch as Lord Sankey laid down in Woolmington's case (supra) that the principle of benefit of doubt was subjected to statutory exceptions. It is true that in Woolmington's case, the House of Lords was not interpreting any statutory exception to the principle, described as "a golden thread" always to be seen "throughout the web of English criminal law", that "it is the duty of the prosecution to prove the prisoner's guilt". But, their Lordships were dealing with a general statement of the law, found in Sir Michael Foster's "Crown Law", which had been repeated in different forms in Stephen's "Digest of Criminal Law", in Archbold's "Criminal Pleading, Evidence, and Practice", in Russel on "Crimes", and in Halsbury's "Laws of England". This statement of the law resembled what is to be found in Section 105 of our Evidence Act so much that Collister, J., in Parbhoo's case, almost took the view that Sec. 105 of the Act was meant to reproduce it. With great respect, I find some conflict between this view expressed by Collister, J., and a passage in an earlier part of his judgment where the learned Judge said that he could find no rule of English law "which exactly corresponds with the provisions of Section 105 and certain other sections". The correspondence may not be exact, but it was close enough to make Woolmington's case, 1935 AC 462 relevant. Moreover, a glance at (1873) 8 QB 483 will indicate that, when offences were created by statute, the burden of proving exceptions was placed on the accused even in England under statutory provisions meant for clarifying the position. In Woolmington's case, however, the effect of

Common Law rules of ordinary presumptions against the accused, arising from proof of commission of conscious acts, on the principle of Benefit of Doubt was explained. This was done in the context of the requirement to prove *mens rea*, still conventionally spoken of as "malice aforethought", as an ingredient of the offence of murder in England and of a charge to the jury which could be vitiated by a misplaced emphasis. Nevertheless, the principles stated and explained there were general and basic.

132. Section 105 of the Act is really a part of a general statement of principles derived from English Common Law rules such as those considered in Woolmington's case. It does not contain a statutory exception to any general principle. It lays down general rules for cases in which accused plead exceptions. It merely codifies, in careful and concise language, certain general rules of presumptions and burdens of proof for such cases, just as Sir Michael Foster attempted to state them in a somewhat different language. The view taken by Lord Sankey about such statements of the rules found in English law was "Rather do I think they simply refer to stages in the trial of a case". In other words, they are more akin to rules of pleading than to rules determining quantum of proof. Lord Sankey pointed out that rules of Evidence found in earlier cases and statements of law are confused. He observed: "It was only later that Courts began to discuss such things as presumption and onus". He also said "The word onus is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving and sometimes the conclusion." When Lord Sankey referred to a "statutory exception", he did not mean such general propositions or principles only, lying partly in the region of rules of pleading and partly of rules of evidence, which were enacted in Section 105 of the Act. What was meant by Lord Sankey, when he spoke of a "statutory exception", was a real exception to the general principle of a full burden of proof upon the prosecution. Such an exception, which constitutes a departure from the general principle, was considered in (1943) 1 KB 607 where a statutory presumption of corrupt motive arose, "unless the contrary is proved", from a receipt by the accused of a gift or other consideration from a contractor. This presumption relieved the prosecution of a part of its duty. But, Section 105 of the Act has no such object or effect.

133. If there could be any doubt whether Section 105 conflicts with or subjects the general principle contained in Section 101 of the Act to an exception, so as to diminish the prosecution's burden of

proof the very definite pronouncement of our Supreme Court in AIR 1962 SC 605 has cleared it completely. It was held there. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real. Indeed there is no conflict at all." Woolmington's case was used here to show identity of principles applied between our law and English law in cases in which exceptions are pleaded. Hence the Supreme Court declared that the law in India was the same as that in England on the general principles found in Woolmington's case.

131 Cases dealing with a real statutory exception which does modify the operation of the principle that the prosecution must prove all the ingredients of the offence with which the accused is charged do not help us in interpreting S 105 of the Act. For example in AIR 1960 SC 7 the character of a presumption of guilt under Sec 5 of the Prevention of Corruption Act (1947) from proof of certain facts 'unless the contrary is proved' was considered. It was held there that the exception laid down by statute was 'a complete departure from the established principle of criminal jurisprudence that the burden always lies upon the prosecution to prove all the ingredients of the offence charged and that the burden never shifts on to the accused to disprove his guilt. AIR 1966 SC 1762 is also a case of a presumption under Section 4 of Prevention of Corruption Act where the accused was obliged after proof by the prosecution of facts sufficient to raise the presumption to disprove his guilt by leading evidence which could by a preponderance of probabilities establish the defence case. These are cases of presumptions of guilt or of true statutory exceptions to the principle of a full burden of proof upon the prosecution.

135 In AIR 1966 SC 1 it was held that even in a case where insanity is pleaded the accused would be entitled to an acquittal if a doubt is created by any evidence in the case on the question whether the accused had the required mens rea when he committed the offence. Such a doubt was held to be capable of shaking the prosecution case on an ingredient of the offence with which the accused is charged. It was also pointed out that this was very different from saying that the prosecution must also establish the sanity of the accused despite Section 105 of the Act. The last mentioned observation could be reconciled with the principle stated first only by adopting the majority view in Parbhoo's case which was that the prosecution was not called upon to discharge initially any burden of eliminating the exception although in order to satisfy its unshifting stable burden, it had to remove

doubts introduced in the course of trial, about the ingredients of the offence. The whole evidence was examined including the accused's previous acts and conduct, to overcome possible doubts. Therefore, this case does not conflict with the majority view in Parbhoo's case.

136 In AIR 1966 SC 97 the Supreme Court, after citing Woolmington's case held. The principle of common law is part of the criminal law of the country. That is not to say that if an exception is pleaded by an accused person, he is not required to justify his plea but the degree and character of proof which the accused is expected to support his plea cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case. Here the Supreme Court was really contrasting the lower degree of proof required from the accused for fully establishing the exception pleaded by a preponderance of probabilities just like the burden of a party in civil litigation with the heavier special burden resting upon the prosecution in a criminal case to prove its case beyond reasonable doubt. This was a case in which the accused having completely justified his plea of protection, under the ninth exception contained in Section 499, in a prosecution for defamation was acquitted. As I have already explained the majority view in Parbhoo's case where quite a different problem was before this Court also was that the accused could fully establish the exception pleaded by a preponderance of probability." The Supreme Court in holding here that as soon as the preponderance of probability is proved the burden shifts to the prosecution which has still to discharge its original onus, evidently took the view, also expressed by the majority in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) that Section 105 deals with the shifting burden and Section 101 with the stable burden. This was not a case of an equipoised balance of probabilities. Nor was it a case where the prosecution version, although not improbable was yet faced with a genuine or serious doubt. In this case the Supreme Court did not really have the problem before it which was before this Court in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB). I therefore find no conflict whatsoever between what was held here by the Supreme Court and the majority view in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB). On the other hand in my estimation, the views expressed by the Supreme Court in this case give considerable support either directly or indirectly to the majority view in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB).

137 AIR 1968 SC 702 was another case in which the Supreme Court held

that a party which had pleaded an exception (this was a case of private defence) must succeed due to a demonstration of "preponderance of probabilities" in favour of its version that right to possession of property was being vindicated legitimately by it. I find no statement of the law in this case also by their Lordships of the Supreme Court which either expressly or impliedly overrules or conflicts with the majority view of this Court in Parbhoo's case.

138. In AIR 1964 SC 1563 where the plea of insanity of an accused was rejected their Lordships of the Supreme Court practically held what was held by the majority in Parbhoo's case. Several of the very propositions laid down by the majority in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) were expressed here by the Supreme Court in a somewhat different language. It was very explicitly held here that even if the accused does not succeed in discharging the burden of proving the exception pleaded, he will be entitled to an acquittal if he is able, with the help of all the material on the record, from whichever side it may have come, to show that there is a prudent man's "reasonable doubt as regards one or other of the necessary ingredients of the offence itself"

139. I may, however, observe that one question, which was raised and considered both by the majority and minority of the judges of this Court, in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) has not engaged the attention of the Supreme Court so far because it does not appear to have been raised in any case there. That question is whether the presumption under the last part of Sec. 105, which is obligatory upon a Court, is not removed as soon as any credible evidence in support of the plea comes on the record. This presumption imposes a duty upon the Court which differs very much from the burden of the accused, contained in the first part of Section 105, to prove his plea. Unless the hands of the Court are freed from any supposed grip or hold of this presumption, by lifting it as soon as any credible evidence comes on record in support of the exception pleaded by the accused, the Court would not be in a position to view the evidence as a whole and give the benefit of doubt to the accused. The presumption would then operate practically as a rule of exclusion of evidence. It would, in that case, act as a genuine statutory exception snapping the golden thread of Anglo-Saxon Jurisprudence which we have adopted as our own.

140. The crux of the problem of construction of Section 105 before this Court in Parbhoo's case lay in determining the true scope of the last few words of Sec-

tion 105: "The Court shall presume the absence of such circumstances" That problem is again before us. The decisions of the Supreme Court, particularly those in Nanavati's case (supra) and in Dahyabhai's case (supra), go a long way in enabling us to resolve the difficulty in the same way as the majority solved it in Parbhoo's case. I say so because the Supreme Court has held that, Section 105 does not limit or conflict with Section 101; that the accused would get the benefit of doubt even if he fails to prove his plea by a "preponderance of probability" but succeeds in casting a doubt on the prosecution version relating to an ingredient of an offence; that, the hands of the Court are not tied so that it is not legally bound to convict, even if the accused fails to discharge his burden fully but succeeds in raising a reasonable doubt (See: Dahyabhai's case, AIR 1964 SC 1563 at p 1568) about his intent in committing the alleged offence; that, the general law on the question of the fixed or primary burden of the prosecution, which lasts till the end of the trial and is not curtailed by Section 105, is the same in India as it is in England. These propositions can only hold good if the same meaning is given to the duty imposed by the obligatory presumption upon the Court, as contrasted with the burden of the accused, which the majority of learned Judges of this Court gave to it in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB)

141. There are, however, two passages, one in Nanavati's case, (AIR 1962 SC 605 at pp 616 to 617) and the other in Dahyabhai's case, (AIR 1964 SC 1563 at p 1567) which have been quoted fully by my learned brother D S Mathur, J., and the first partly by my learned brother Mukerjee, J. also, on the strength of which it could be urged that the significance of the obligatory presumption, contained in the last part of Section 105, has also been considered and pronounced upon by their Lordships of the Supreme Court. After having examined these passages very carefully in the context in which they occur, it seems to me that the Supreme Court was not interpreting, in either of these two cases, the last part of Sec. 105 separately and as contrasted or compared with the first part of it. Although, the scope or the hold of the obligatory presumption on the Court under the last part of Section 105 or the situation in which it must be lifted by the Court has not been specifically or directly considered in these cases, yet, it is evident that the Supreme Court clearly expressed views which necessarily mean that the obligatory presumption is lifted when there is sufficient material on record to justify giving the benefit of a reasonable doubt to an accused even if the accused has failed to discharge his own burden of prov-

ing an exception by a preponderance of probabilities

142 Another difficulty in the way of accepting the correctness of the majority view in Parbhoo's case is said to arise from the three-fold division of possible situations made by the Supreme Court in Nanavati's case AIR 1962 SC 605 at p 617. We are not concerned here at all with the first category of cases which do not really require the proof of a statutory exception by the accused but demand from him a disproof of ingredients of an offence which are deemed to be established on proof of certain facts justifying the raising of a statutory presumption (e.g. Sections 4 and 5 of the Prevention of Corruption Act). In the second and third types of cases the accused is required to bring his case within the exception pleaded by him. The question arises whether in these cases the accused becomes entitled to acquittal when he proves facts or circumstances raising genuine doubts or providing reasons to believe that the exception may exist even though not fully proved. The Supreme Court was not considering the right of private defence specifically here and did not put it in the second category of cases. But dealing with the plea of an accident in the doing of a lawful act in a lawful manner covered by the exception found in Section 80 I P C it held that the accused could be proving only some of the facts necessary to establish the exception to the offence of culpable homicide negative the offence or throw a reasonable doubt about the 'intention or the requisite state of mind which is the essence of the offence. In other words whenever the facts proved throw the prosecution case into a state of doubt on intention or the requisite state of mind the ingredients of the offence are affected.

143 Every offence against which a plea of private defence can be taken requires a state of mind or mens rea on the part of the accused to be proved by the prosecution. This is usually gathered by circumstances raising a presumption about the intention. The defence may give some evidence pointing in another direction. This may actually negative mens rea as was the case in Amjad Khan v The State AIR 1952 SC 165 where the Supreme Court pointed out that a reasonable apprehension of death or grievous hurt may justify killing in exercise of a right of private defence even before an actual attack on a person had commenced. In some cases the defence may while falling short of negating mens rea be only able to show that its existence has become doubtful. In such cases according to the view of the majority in Parbhoo's case the accused would be entitled to an acquittal because the prosecution has failed to dis-

charge its special burden of eliminating doubts. The accused may have failed to prove his plea but he gets a benefit which whether it is called the benefit of the exception pleaded or of doubt on the whole case is available to him only because he has succeeded in throwing the existence of an ingredient of the offence into the region of reasonable doubt. To constitute any offence under the I P C there is a mens rea which makes the action complained of criminal or culpable. In Shiv Ram v State AIR 1965 All 196 at p 199 I held with regard to mens rea. If the doctrine of mens rea is as it no doubt is, elaborately and carefully attempted to be incorporated throughout the provisions of the Indian Penal Code I do not think that this truth is expressed felicitously at all by saying that the doctrine does not apply to offences against the Indian Penal Code. I also held there (at page 201).

In applying this fundamental doctrine of our criminal jurisprudence to an offence defined by a statute when it is applicable as it is to all offences under the Indian Penal Code one has to assume that there is a mens rea for the offence and then to proceed by scanning the words of the statute to discover it. To those views I still adhere.

144 The doctrine of mens rea is not abstruse. The principle is stated in the maxim 'actus non facit reum nisi mens sit rea' or an act does not make one guilty unless the mind is also guilty. In AIR 1947 PC 135 at p 139 the Privy Council adopted the rule with regard to an alleged violation of Rule 81 (2) of Defence of India Rules that unless the statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind. In other words it is presumed to exist within or may be impliedly annexed to even a statutory definition of an offence unless the definition is in terms which necessarily exclude it.

145 A guilty mind standing by itself, is not punishable under the law although, as Dr Johnson's judgment on the actor Garrick who said that he felt like a murderer when acting Richard III—that he should be hanged each time he acted Richard III—implied it may be morally reprehensible. Mens rea as a 'state of mind' becomes a part of a legally punishable offence only when it produces harmful results. It is manifested by intent actual or presumed gathered from acts or omissions which flow from it. It includes more than an immediate intent to injure. It partly embraces what falls under motive. As Paton points out (Text book of Jurisprudence' 3rd Ed p 275) the distinction between intention and motive is not always so precise as may appear at

first sight. Even if the distinction made in Salmond's jurisprudence (12th Ed p 372), between motive as the cause or the "ulterior object", which lies behind, and the immediate intention, which accompanies an act, is accepted, it is clear from Salmond's own explanation of mens rea as a basis of a criminal liability (See: Salmond's jurisprudence 12th Ex p 366), that wrong motivation overlaps mens rea "A man is responsible", wrote Salmond, "not for his acts in themselves but for his acts coupled with the mens rea or the guilty mind with which he does them" The guilty mind is not only exhibited or proved by the immediate intent to injure but also by what may be called an "ulterior intention" actuating the action

146. Investigation into the nature of intent, both immediate and ulterior or underlying, is carried out in cases of insanity as well as of accident. An insane person may form the immediate intention to attack another person due to a delusion that he was about to be attacked by that other person. If he had an immediate intention to kill due to such a delusion his incapacity to see facts as they actually are and to realise that what he was doing was wrong can only appear, if at all, from evidence other than that of his intention to injure. The pleas of accident as well as of grave and sudden provocation were repelled in Nanavati's case, AIR 1962 SC 605 (Supra) by examining facts showing an ulterior or prior intention proved by deliberate preparation. In Dahyabhai's case, AIR 1964 SC 1563 (Supra) and Bhikaris case, AIR 1966 SC 1 (Supra) the alleged incapacity of the accused for mens rea was disbelieved by investigating "all circumstances which preceded, attended, and followed the crime," including previous acts and conduct of the accused, indicating a deliberately formed legally punishable intention

147. If the ingredients of an offence can be affected in cases of alleged insanity and accident by reasonable doubts entertained about the motivation or about the totality of facts affecting intention at the time of commission of the alleged crime, I do not see why they cannot be similarly affected by findings of reasonable doubt on the question of the real intent in causing injuries in the course of an alleged exercise of a right of private defence. The ingredients of each of these pleas will necessarily overlap and collide with the ingredients of the offence. Mens rea cannot simultaneously be present and absent. Initially, the prosecution can rely on proof of the actus coupled with the obligatory presumption at the end of Section 105. But, an incompletely established plea will remove the initial presumption and can—not must—cast a rea-

sonable doubt on the existence of mens rea which the prosecution must dispel to succeed. In most cases of alleged exercise of a right of private defence it is not difficult to arrive at a definite finding whether the right existed or not. In a genuine case of an exercise of the right of private defence, the primary intention is to protect from injury and the intent to injure the aggressor is as much secondary and consequential as the injuries themselves. Presence or absence of mens rea will be determined in such cases by the real or ulterior or primary intent. If that intent is to protect and defend, the consequential intention to injure will not make the act criminal. We cannot confine our attention to the immediate or consequential intent and forget the real intent for determining mens rea.

148. There seems to me to be no need to distinguish between the wrongfulness or guilt of the mind and of the act in a case where a right of private defence is pleaded because the two must go together in such a case. It is true that causing of injury during the lawful exercise of a right of private defence is authorised by law just as an executioner is permitted to hang a condemned man in the discharge of his duty. In Keny's "Outlines of Criminal Law" (16th ed at p 21) we find "One who had duly executed a condemned criminal had effected a homicide which was justifiable, his own innocence of crime stood really on the basis that the actus was not forbidden (and therefore, not reus), but it could equally well be established by the plea that he had done nothing wicked nor immoral and therefore, had displayed no mens rea". The actus stands on a separate footing only in exceptional cases. In cases of strict statutory liability the actus is punishable without the need to prove any mens rea and the only issue to be decided is whether the actus reus is proved. In a case where a right of private defence is set up the actus cannot be wrongful or rightful independently of the existence or absence of mens rea, as explained above. Both intention behind as well as voluntariness in the commission of acts cannot, I believe, be viewed apart from the whole set of circumstances which produce them. If injuries are shown to have been caused under the compulsion of events necessitating acts of private defence, or, it is doubtful whether they were so caused, it seems to me that belief in the existence of mens rea, which is an essential ingredient of the offence, is bound to be shaken.

149. I may also observe that the Advocate General conceded that possession of property may be an essential part of a particular prosecution case which the prosecution will have to prove in establishing the ingredients of an offence. Here,

the prosecution case will presumably include a charge for criminal trespass under Section 441 I P C which requires a very clearly specified intention. And it is likely that there will be counter cases in which each side will claim a right to defend property and person. A definite finding on possession, which is usually not difficult decides the fate of the case of each side in such situations. In very exceptional cases however it may not be possible to determine which side was in possession and which meant to disturb it. Similarly there may be exceptional cases where although no right to possess property may be involved it may not be reasonably possible to decide which side had the primary aggressive intent and which side had the right and primary intent to defend. I therefore hold that cases in which the plea of private defence is taken would fall in the third category of cases classified by the Supreme Court in Nannavati's case (Supra) so that the plea even if not fully proved may when supported by sufficient evidence make the prosecution case doubtful on an essential ingredient of the offence.

150 The views expressed by the Supreme Court and the propositions stated by the majority of judges of this Court in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) will not even appear to be inconsistent in any way if the factual context and assumptions on which each view rests are kept in mind. It has been rightly pointed out by Dr A L Goodhart in a very elaborate essay on Determining the Ratio Decidendi of a case (See Jurisprudence in Action 1953 Essays published by the Association of the Bar of New York) that the principle of a case is determined by taking into account the facts treated by the Judge as material and his decision as based thereon. The only criticism of this method found in Salmond's Jurisprudence (12th ed p 181) is that Courts in their quest for the rule which the judge thought himself to be applying tend to ignore it in practice. But it was stated there any such rule must be evaluated in the light of facts considered by the Court to be material. Our Supreme Court certainly adopted the method in Andhra Sugars Ltd. v State of Andh Pra AIR 1958 SC 599 at p 606 when it held that a passage in a previous decision, which appeared to lay down a rule must be read with the facts of the case. If this method is followed no conflict whatsoever between anything laid down by the Supreme Court and what was held by the majority in Parbhoo's case will even seem to arise.

151 I may now refer to an argument advanced by Mr P C Chaturvedi the learned counsel for the accused relying on AIR 1943 PC 211. It was contended

that the optional presumption arising under Section 114 Illustration (a) which can be rebutted by merely offering a reasonable explanation such as the accused may give in his statement under Sec 342 of the Criminal Procedure Code accounting for recent possession of stolen goods, results in a situation which is exactly similar to that which arises from the obligatory presumption under the last part of Section 105 of the Act after the optional presumption has been raised. The submission was that the obligatory presumption can also be similarly rebutted by a reasonable explanation. The flaw in this argument is that the particular optional presumption under S 114 of the Act is a conditional presumption which will not arise at all if there is a reasonable explanation whereas the rebuttable obligatory presumption under S 105 operates always and invariably at the outset and is removed only by proof of some circumstance or circumstances and not by a plausible explanation only. The conditional presumption under Section 114 when raised goes the whole length of proving the guilt of the accused. The gap it will cover when raised is either of proof of intention in removing property or of proof of knowledge of the stolen character of goods. Where the explanation is accepted the optional presumption is not raised at all and the prosecution will fail on the ground that an ingredient of the offence charged has not been proved. On the other hand the accused may be convicted even if the obligatory presumption under the last part of Section 105 of the Act is removed. The learned counsel for the accused also erroneously assumed in putting forward this argument that the accused must be deemed to have discharged his onus of proving an explanation as soon as the initial obligatory presumption at the end of S 105 is lifted. Guilty even the conditional optional presumption under S 114 can be used to illustrate how various presumptions differ in function and application.

152 The common factor which operates in using a presumption whether optional or obligatory is the prudence and reasonableness which the Court is expected to employ. This is not defined by any provision dealing with the burden of proof or a presumption. Though the illustrations given in Section 114 indicate what it requires. It is only broadly defined by Section 3 of the Act. It covers a proof by preponderance of probability where this is enough and, in a criminal trial also the higher degree of proof by eliminating reasonable doubt which the prosecution must provide.

153 Even a literal interpretation of the first part of Section 105 could indicate that the burden of proving the existence of circumstances bringing the case within

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Andh Pra 276 B (C N 59)

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Andh Pra 276 A (C N 59)

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an exception is meant to cover complete proof of the exception pleaded, by a preponderance of probability, as well as proof of circumstances showing that the exception may exist which will entitle the accused to the benefit of doubt on the ingredients of an offence. If the intention was to confine the benefit of bringing a case within an exception to cases where the exception was established by a preponderance of probability, more direct and definite language would have been employed by providing that the accused must "prove the existence" of the exception pleaded. But, the language used in the first part of Section 105 seems to be deliberately less precise so that the accused, even if he fails to discharge his duty fully, by establishing the existence of an exception, may get the benefit of the exception indirectly when the prosecution fails in its duty to eliminate genuine doubt about his guilt introduced by the accused. Again, the last part of Section 105, even if strictly and literally interpreted, does not justify reading into it the meaning that the obligatory presumption must last until the accused's plea is fully established and not just till circumstances (i.e. not necessarily all) to support the plea are proved. Moreover, a restrictive interpretation of Section 105, excluding an accused from the benefit of bringing his case within an exception until he fully proves it, is ruled out by the declaration of law by the Supreme Court that there is no conflict between Section 105 and the prosecution's duty to prove its case beyond reasonable doubt. Hence, the obligatory presumption, at the end of Section 105, cannot be held to last until the accused proves his exception fully by a preponderance of probability. It is necessarily removed earlier or operates only initially as held clearly by judges taking the majority view in *Parbhoo's case*, 1941 All LJ 619 = AIR 1941 All 402 (FB).

154. My view, therefore, is that, in cases where the accused pleads exceptions the obligatory presumption is lifted as soon as there is some evidence to support the plea. The accused may carry his plea further and succeed in creating a reasonable doubt about an ingredient of an offence. The prosecution will have to remove this doubt, possibly in the course of argument to succeed after this. In other cases, the accused may have carried his case still further and established his plea by a preponderance of probabilities. Although, there is no provision in our Criminal Procedure Code for production of evidence in rebuttal by the prosecution, as of right, after the accused has established an exception by a preponderance of probability, yet it is conceivable that, in exceptional cases, the prosecution may be able to demolish the defence case, even

after it is fully proved, by some rebutting evidence which the Court is persuaded to admit under Section 540, Criminal P. C. in exercise of the Court's power to decide the case justly after finding out the whole truth. For example, the prosecution may be able to prove that a doctor, who had given evidence of the injuries on the accused, had undoubtedly fabricated evidence. Ultimately, these stages become parts of a single psychological process of appraisal of evidence as a whole which the judge goes through in his mind when considering, sifting, weighing, comparing, and testing the prosecution and defence versions and evidence, placed side by side, with a view to pronouncing his judgment. At this stage, the obligatory presumption under Section 105 cannot stand in the way of an acquittal if evidence in the case justifies giving the accused the benefit of reasonable doubt on the charge.

155. The obligatory presumption thus fits into the whole procedural machinery regulating a criminal trial in this country only as a sort of proviso, inserted almost parenthetically by way of abundant caution, so as to prevent Courts from imagining circumstances in support of exceptions pleaded when they are unsupported by any proved circumstances. Its function does not extend to obstructing Courts in performing their duties to give effect to genuine doubts which may arise from facts proved. Its purpose and meaning can only be fully understood in the context of the whole scheme for the adduction of evidence in a criminal trial. Torn from this context it can operate only as a stumbling block and not as the aid to justice which it was, I have no doubt whatsoever, meant to be.

156. The duty and power of the Court to find out the truth in a criminal case, independently of the duties which devolve on the parties to adduce their evidence, are exemplified by S 540, Cr. P. C. This additional duty of the Court to ascertain the truth more accurately when trying a criminal case as compared with the duty in the trial of a civil case, could not be discharged satisfactorily unless it had the power to give the benefit of a reasonable doubt to the accused. Our Evidence Act has clearly provided for three kinds of conclusion a Court may arrive at. The negative conclusion, falling under "not proved" reminds one of the verdict "not proven" which a jury may return in Scotland as an alternative to either of the two other verdicts, "guilty" or "not guilty", which are the only ones open to a jury in England. In England, however, the verdict of "not guilty" covers a case in which the prosecution has failed to prove its case "beyond reasonable doubt" as well as a case where an accused pleading an exception establishes it fully so that the prosecution case is disproved.

157 The Advocate General also raised the question whether the principle of benefit of doubt accepted in England as a matter of public policy the ground upon which it was placed by Lord Hailsham in 1936-2 All ER 1138 was available to the accused on the same grounds or to the same extent in this country. The learned counsel for the accused answered this argument by pointing out that irrespective of the ground on which this principle should be accepted it must have the same force in India as in England after the final pronouncement of the Supreme Court on this matter. I may observe that Sodemans case 1936-2 All ER 1138 (Supra) citing observations of Duff J has been mentioned with approval by their Lordships of the Supreme Court in Harbhajan Singh's case AIR 1966 SC 97 at p 102. Speaking for myself, I do not see why principles of public policy or consideration of consequences of taking a particular view should not affect the interpretation to be given to statutory provisions dealing with basic norms when two interpretations of a statutory provision are open. Acting in this manner would not be legislation but an operation within the interstices of the Statute. I do not see why the principle of benefit of doubt deserves either on grounds of public policy or as a part of the concept of fair trial in a criminal case to be given less recognition or force in this country. Methods of investigation of crime available to the prosecuting authorities in this country are still rudimentary and have not reached the level of scientific precision which they have attained in other countries. Powerful motives and factors come into play to conceal the actual offenders and to mislead prosecuting authorities in criminal cases everywhere. The adoption of short cuts by producing perjured evidence in support of hastily arrived at conclusions of prosecuting authorities are not less common in this country than elsewhere. However I am content to base my opinion on this question on the strength of the declaration of law by the Supreme Court that the principle of benefit of doubt has the same force in this country, as it has in England. Accused persons in this country are not entitled to a lesser protection than the accused in England when the Constitution itself protects life and liberty here against deprivation except one in accordance with the procedure prescribed by law. The meaning of our procedural or adjectival laws must, therefore, be determined in conformity with firmly established notions of a fair trial unless some statutory provision clearly sanctions a departure from these

158 As the answer given by the majority of the learned judges in Parbhoo's case 1941 All LJ 619 = AIR 1941

All 402 (FB) (Supra) accords with the basic principles embodied in Sections 3 and 101 and 103 and 105 of the Act as explained by their Lordships of the Supreme Court it is not necessary for me to discuss authorities of other High Courts cited before us which have been referred to fully by my learned brother D S Mathur J.

159 I may also mention that although Parbhoo's case does not appear to have been specifically referred to by the Supreme Court so far—and this according to the Advocate General was also significant—their Lordships did cite with approval in Dahyabhai's case AIR 1964 SC 1563 (Supra) a decision of a Division Bench of the Patna High Court in AIR 1955 Pat 209 where reliance was placed on the majority decision in Parbhoo's case. Kamla Singh's case was mentioned by the Supreme Court because just as in Dahyabhai's case AIR 1964 SC 1563 the plea of insanity as an exception was raised there. The precise problem considered in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) and the answer given there have not so far as I am aware come up for consideration before the Supreme Court in relation to the right of private defence.

160 After a close scrutiny of every part of each of the seven opinions in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) I have come to the conclusion that the majority of their Lordships did not lay down anything beyond three important propositions which if not either directly or indirectly supported by decisions of their Lordships of the Supreme Court have not been affected in the slightest degree by these decisions. These propositions are firstly that no evidence appearing in the case to support the exception pleaded by the accused can be excluded altogether from consideration on the ground that the accused has not proved his plea fully secondly that the obligatory presumption at the end of Sec 103 is necessarily lifted at least when there is enough evidence on record to justify giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged and thirdly if the doubt though raised due to evidence in support of the exception pleaded is reasonable and affects an ingredient of the offence with which the accused is charged the accused would be entitled to an acquittal. As I read the answer of the majority in Parbhoo's case 1941 All LJ 619 = AIR 1941 All 402 (FB) I find it based on these three propositions which provide the ratio decidendi and this is all that needs to be clarified.

161 The practical result of the three propositions stated above is that an accused's plea of an exception may reach

one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man weighing or balancing probabilities carefully. These stages are, firstly, a lifting of the initial obligatory presumption given at the end of Sec. 105 of the Act, secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence, and, thirdly, a complete proof of the exception by "a preponderance of probability", which covers even a slight tilt of the balance of probability in favour of the accused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This, in my opinion, is the effect of the majority view in Parbhoo's case which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stage has not yet been dealt with directly or separately there in any case brought to our notice.

162. The last two preceding paragraphs, which summarise my opinion, would have been enough to answer the question before us if it had not been urged so emphatically, on behalf of the State, that the majority view in Parbhoo's case overlooks important aspects of the question, which were more fully argued before us with the help of Supreme Court decisions, and that trial Courts need detailed guidance on the application of the principle of Benefit of Doubt when exceptions are pleaded. After having anxiously examined every aspect of the question referred to us, I answer the question framed, in complete agreement with the conclusions of my learned brethren Broome, Gupta, Gyanendra Kumar, Yashoda Nandan and Parekh, JJ. as follows.—

The answer of the majority of learned Judges who decided AIR 1941 All 402 (FB) is still good law. It means that in a case in which, in answer to a prima facie prosecution case, any general exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea, he will still be entitled to an acquittal, provided that, after weighing the evidence as a whole prudently (including the evidence given in support of the plea of the said general exception), the Court reaches the conclusion that, as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of the accused beyond reasonable doubt.

163. MUKERJEE J.:— I am in respectful agreement with the views expressed by my Lord the Chief Justice that the statement of law in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) is not accurate. I would like to add a short few words.

164. The answer to the question referred to this Full Bench should follow from a correct interpretation of Sec 105, S 4 and S 3 of the Indian Evidence Act. The terms of these sections have been quoted in the judgment of my Lord the Chief Justice and I do not reproduce them here to avoid repetition.

165. The effect of Section 105, read with Sections 3 and 4 of the Indian Evidence Act, was considered by the Supreme Court in the case of AIR 1962 SC 605. At page 616 of the report Subba Rao J. (as he then was) observed as follows

"The legal impact of the said provisions on the question of burden of proof may be stated thus: In India, as it is in England there is a presumption of innocence in favour of the accused as a general rule and it is the duty of the prosecution to prove the guilt of the accused, to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, Sec 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the Court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such circumstances as proved till they are disproved."

Clearly, the incidence of the burden of proving an exception under Section 105 of the Indian Evidence Act is on the accused person and this was conceded by Mr Chaturvedi. The crucial question for determination is, as pointed out by my Lord the Chief Justice, how the burden may be rebutted by the accused. Section 105 says that the Court shall presume the non-existence of circumstances bringing the case within the exception proved until "disproved". In view of the categorical terms of the definition of the word "disproved" as given in S 3 of the Indian Evidence Act, it is manifest that the accused person cannot succeed by merely creating a reasonable doubt in the mind of the Court as to whether he is or is not entitled to the benefit of the said exception. A presumption of law cannot be successfully rebutted by merely raising a doubt, however, reasonable. Something more than raising a reasonable doubt is required for rebutting a presumption of

law and it is necessary for the accused to show that his explanation is so probable that a prudent man ought in the circumstances to accept it

166 The Advocate General frankly conceded that the burden on the accused of proving an exception is lighter than the burden which lies on the prosecution of establishing the guilt of the accused. In AIR 1966 SC 97 the Supreme Court observed

Where an accused person is called to prove that his case falls under an exception law treats that onus as discharged if the accused succeeds in proving a preponderance of probability. The onus on an accused person may well be compared to the onus on a party in civil proceedings

In a criminal proceeding the prosecution has to prove the guilt of an accused person beyond reasonable doubt but in a civil proceeding a party succeeds on the balance of probabilities. The distinction in the standard of proof in the two classes of cases cannot I think be better expressed than by quoting from the judgment of Denning J in *Miller v Minister of Pensions* (1947) 2 All ER 372 (Not cited at the bar). Speaking of the degree of proof required in a criminal case before an accused person is found guilty Denning J stated —

'That degree is well settled. It need not reach certainty but it must reach a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable the case is proved beyond reasonable doubt.'

As regards the degree of cogency required to discharge a burden in a civil case his Lordship stated

'That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "We think it more probable than not" the burden is discharged but if the probabilities are equal it is not' (Emphasis (here in ') mine)

167 The burden on an accused person being the same as the burden on a party in a civil proceeding it follows that if the balance or probabilities supports the plea of exception the burden on the accused person is discharged but if the Court is left in a state of reasonable doubt as to whether the accused person is or is not entitled to the benefit of the said ex-

ception it would be a case where the probabilities are equal and having regard to what Denning J has laid down the plea would fail

168 If however as pointed out by my Lord the Chief Justice the nature of the case is such that on the totality of evidence a reasonable doubt arises as regards some ingredients of the offence the accused person is entitled to an acquittal. In other case a reasonable doubt as regards the exception claimed will not entitle him to an acquittal

169 **GYANENDPA KUMAR AND YASHODANANDAN JJ** — We have had the advantage of reading the judgment jointly prepared by Broome Gupta and Parekh JJ as well as the separate judgments of Oak C J Mathur J and Beg J. Concurring with these learned Judges we find ourselves in respectful disagreement with the view taken by Oak C J that in a case where an accused pleads that he had caused grievous hurt to the complainant in the exercise of his right of private defence of property but succeeds only in creating a reasonable doubt about his claim of being in possession over the field in question he will be liable to conviction. We also respectfully concur in the view taken by Broome Gupta Beg and Parekh JJ that the dictum laid down by the majority of Judges in *Parbhoo's case* 1941 All LJ 619 = AIR 1941 All 402 (FB) is fundamentally correct and calls for a mere elucidation. In our opinion, there is no conflict between the decisions of the Supreme Court and *Parbhoo's case* 1941 All LJ 619 = AIR 1941 All 402 (FB) and we agree that the question referred to this Full Bench should be answered in the affirmative

170 We now proceed to give our own reasons for coming to this conclusion. The question that has been engaging the attention of this Full Bench loses much of its complexity if it be clearly borne in mind that the task before a Court administering criminal justice is to determine whether a crime has been committed and if so whether the responsibility for it can be fastened on the accused. Before the Court proceeds to consider the responsibility or otherwise of the accused it has to determine as to whether a crime has been committed at all. The burden of proving beyond reasonable doubt that a crime has been committed and that the accused is responsible for it rests upon the prosecution

171 Crime may be described as an act or omission prohibited by law and made punishable by it. In this sense not every act of killing is a crime. To cite some examples of killing which are not forbidden by law but are in fact permitted by it we may take a case where the killing is by way of execution of a prisoner sentenced to death by a Court competent to

do so by the executioner appointed by lawful authority for that purpose. In cases of such homicides, which have sometimes been described as "justifiable homicide", no crime can be said to have been committed and consequently no one can be found guilty for its commission. Likewise a case in which the accused pleads having committed homicide in the exercise of right of his private defence of person or property and also successfully establishes his claim, would, in our opinion, fall in the same class. A person who kills another in order to save his own life cannot be said to have committed an act prohibited by law or a crime. If an accused claims protection of the Exception mentioned in Section 96 of the Indian Penal Code and fails to establish affirmatively by preponderance of probabilities that he had acted in exercise of the right claimed, but the evidence on record, taken as a whole, creates a doubt that the claim made by the accused might reasonably be true, then the matter becomes doubtful whether an unlawful homicide has taken place at all. In such a case a corresponding doubt is created as to whether an act prohibited by law has been committed and consequently the accused cannot be found guilty of a crime which remains in the region of doubt. He will, in spite of his having failed to discharge the burden placed on him by Section 105 of the Evidence Act, be entitled to the benefit of doubt and acquittal.

172. In a case where the accused claims to have committed homicide in the exercise of his right of private defence either of person or of property and fails to satisfy the Court affirmatively that he had such a right but only succeeds in creating a reasonable doubt regarding the correctness of his claim, it is not, in our opinion, quite accurate to say that one of the ingredients of the offence of culpable homicide, as defined in Section 299 of the Indian Penal Code, or the mens rea is wanting. The offence of culpable homicide is fully defined in Section 299 and the mens rea necessary for the offence are also expressly enumerated in the section itself. There are three species of mens rea in Section 299 of the Indian Penal Code: (1) An intention to cause death, (2) an intention to cause bodily injury likely to cause death; (3) knowledge that death is likely to be caused. When an accused has killed another to protect his own life, he did have the intention to kill. In fact in most cases it is not denied by him that he had the requisite intention or knowledge. He merely claims that he was motivated by the desire to save his own life. To equate motive with mens rea would result in a confusion of legal concepts. "Mens rea" has been defined by Glanville Williams in his "Criminal Law,

The General Part Second Edition" as follows

"What, then, does the legal mens rea means. It refers to the mental element necessary for particular crime and this mental element may be either intention to do the immediate act or bring about the consequence or (in some crime) recklessness as to such act or consequence".

In this sense of the expression, when a person commits homicide in exercise of the right of private defence either of property or of person, the element of mens rea contemplated by Section 299 of the Indian Penal Code is undoubtedly present. Thus where a reasonable doubt is created with regard to the claim of an accused to the protection of the Exception provided for by Section 96 of the Indian Penal Code, the accused becomes entitled, in our opinion, to the benefit of doubt and acquittal not because an ingredient of the offence under Section 299 of the Indian Penal Code or its mens rea becomes doubtful, but because a doubt is created as to whether the act attributed to him amounts to a crime at all. We find support for the view we are taking from the following passages from Russell on Crime, XI Edition:

"The new conception that merely to bring about a prohibited harm should not involve a man in liability to punishment unless in addition he could be regarded as morally blameworthy came to be enshrined in the well known maxim *actus non facit reum, nisi mens sit rea*. This ancient maxim has remained unchallenged as a declaration of principle at common law throughout the centuries up to the present day. So long therefore, as it remains unchallenged no man should be convicted of crime at common law unless the two requirements which it envisages are satisfied, namely, that there must be both a physical element and a mental element in every crime

A clear analysis of the requirements of law for the establishment of criminal liability demands a term which indicates the physical element alone, entirely distinct from that mental element which the old maxim so sharply set in opposition to it. For this purpose lawyers have for some time been in the habit of employing the expression *actus reus* thus using the adjective *reus* to qualify the noun *actus* in the same way as the maxim used it (in the feminine form), to qualify the noun *mens* in both cases then it means "legally prohibited" or "legally reprobated". Thus it is logically possible and correct to advance the legal proposition that for criminal liability at common law there must be not only an *actus reus* but also a *mens rea*, each distinct from the other.....

On this footing the word *actus* carries only a factual significance, i.e. that a

human deed has been effected. The addition of the word *reus* carries the further significance that in the factual circumstances of the deed there is a situation which the law has forbidden to be brought about. To have killed a man is without more an actus of no precise legal kind it is a homicide and we do not yet know for certain if the law has forbidden that particular killing. If however there is for example evidence that the killing was the execution of a condemned prisoner by the legally appointed executioner then it is an actus which the law far from forbidding has indeed commanded and therefore it is not an actus reus and it is described as a justifiable homicide a homicide in accordance with and not against the law. Again if the death had been caused by a surgeon in the course of an operation which was recognised by him and by the medical profession in general to be dangerous (in the sense that it was medically advisable to risk the known chance that even when conducted with the best of skill and care it might cause the patient's death) this will be a risk which the law does not forbid to be taken but permits to be taken and the killing will not be an actus reus.

However harmful or painful an event may be it is not an actus reus unless the law in the particular circumstances of the case has forbidden it to be brought about. The duly appointed executioner who has put to death a convicted criminal in accordance with his sentence has killed a man with deliberate intent so to do but he has committed no crime because the deed was not prohibited but was actual commanded by the law again the use in certain circumstances of even deadly force by any citizen in the prevention of the commission of a crime by another person or in the arrest of one who has committed a felony does not give rise to criminal liability. Similarly the law does not prohibit a limited chastisement of a child by a parent or schoolmaster nor the causing of hurt in the course of many sports and games or in the performance of a surgical operation by one duly qualified. That the deed was not prohibited by law is a complete defence for the man who had done that deed for although the actus was his yet in the special circumstances of his case it was not reus.

To our mind there is nothing in Section 105 of the Indian Evidence Act or Section 4 thereof which runs counter to the view expressed above.

173 The Supreme Court in AIR 1962 SC 605 while considering the question of burden of proof resting on the accused has laid down three different categories.

(1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused. (2) The special

burden may not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients (See Ss 77 78 79 81 and 88 of the Indian Penal Code). (3) It may relate to an exception some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence. (See S 80 of the Indian Penal Code).

173-A We are not concerned with the first category of cases. With regard to the third category of cases the Supreme Court has held that though the burden lies on the accused to bring his case within the Exception the facts proved may not discharge the said burden but may affect the proof of the ingredients of the offence. In this category the Supreme Court has placed Sections 80 and 84 of the Indian Penal Code. Section 80 is concerned with an accident where the consequences brought about are naturally unintentional while Section 84 deals with the unsoundness of mind of the accused i.e. absence of capacity in the accused to form an intention.

174 In our view the claim to an Exception under Section 96 of the Indian Penal Code does not fall in the third category of cases because if there is a reasonable doubt regarding the correctness or otherwise of the claim of the accused none of the ingredients of the offence defined in Section 299 of the Indian Penal Code is affected.

175 To us it appears that Section 96 is more akin to Sections 77 78 79 81 and 88 of the Indian Penal Code and falls in the second category of cases contemplated by the Supreme Court. Though the Supreme Court has held that as far as the second category of cases is concerned the burden of bringing his case under the Exception lies on the accused it has not proceeded to consider as to what would be the result if there is a reasonable doubt regarding the claim of the accused. The observation of the Supreme Court that the alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real applies in our judgment with equal force to the second category of cases and if a doubt is created in the mind of the Court that the defence of the accused might reasonably be true a resultant doubt would accrue about the commission of the crime and hence the guilt of the accused. Thus from a practical point of view there is no difference in the result whether the defence raised by the accused falls within the second or third category of Exceptions.

176 In the result we answer the question referred to the Full Bench as under:

The dictum of the majority of learned Judges of this Court in 1941 All LJ 619 = AIR 1941 All 402 (FB) is still good law. But, it may be elucidated that in a case in which any general Exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea of the claimed Exception, he will still be entitled to an acquittal, if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general Exception), a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence with which he is charged

BY THE COURT

177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows —

The majority decision in 1941 All LJ 619 = AIR 1941 All 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused

Reference answered accordingly

1970 CRI L. J. 182 (Vol. 76, C. N. 41) =

AIR 1970 BOMBAY 48 (V 57 C 7)

(AT NAGPUR)

DESHMUKH AND NATHWANI, JJ.

Abdul Jabbar Tai, Applicant v. R. K. Karanjia, Non-Applicant

Criminal Appln No 130 of 1968, D/- 21-8-1968.

(A) Contempt of Courts Act (1952), S. 1 — Contempt — What amounts to — Kinds of.

What constitutes a contempt of Court is now settled law. The contempt of Court is committed in two different ways. One way is to attack the Judge or the Courts generally and level against them criticism which far exceeds the bounds of legitimate criticism. When the judiciary as such, or the Judge in particular is so attacked and the attack contains various kinds of imputations, such a contempt is styled as scandalizing the Court itself. The other type of contempt is committed when there is an attempt to interfere with the course of justice, an instance in point would be publishing material affecting the party defending itself, while a case is pending. This amounts to obstruction or interference in the course of justice. AIR 1953 SC 75 & AIR 1936 PC

IM/JM/E369/69/MVJ/D

141 & AIR 1940 Nag 407 & AIR 1959 SC 102, Rel on (Para 6)

When unjustified and excessive criticism of the judiciary is treated as a contempt of Court, the ground on which it is so treated, is that such unwarranted, unjustified and unoccasioned malicious criticism tends to undermine the prestige and dignity of the judiciary. This is only one effect. Such criticism, if it passed unnoticed, has also the tendency to shake the confidence of the common man in the impartiality of the judiciary. The Courts are the bulwark of liberty and the rights of the people. If this is the position of the judiciary which the Constitution has given it, it is the duty of every right-thinking citizen not to do anything consciously or unconsciously which will undermine that special position of the judiciary. Since this is the reason why the proceedings are taken against a mischief of this type, the effect that such a criticism will create on the mind of a common reader must determine the gravity or otherwise of the offence (Para 7)

(B) Contempt of Courts Act (1952), S. 4 — Apology — Belated apology — Weight to be given.

An apology, which is unreserved, clean and immediately offered at the earliest opportunity, is an apology which undoubtedly must be given greater weight than a belated apology. If an unreserved, unconditional and unqualified apology is not tendered immediately on the realisation of the mistake committed but if after some discussion in the Courts and after getting a possible feeling that the matter may lead to grave consequence, an apology comes to be offered, it loses much of its grace. An apology, should be evidence of real contriteness and manly consciousness of the wrong done; it ceases to be so if it is belated, and it becomes instead the cringing of a coward shivering at the prospect of the stern hand of justice about to descend upon his head (Para 22)

(C) Contempt of Courts Act (1952), S. 4 — Punishment — Discretion of Court — Quantum of punishment.

The contempt proceedings are a special type of proceedings where summary justice is meted out. This proceeding is to be sparingly used only when the gravity of the occasion demands it. However, a statistical approach to punishment could not be considered to be either proper or judicial approach. The punishment in any case for the matter of that is primarily a matter of discretion. When the Legislature lays down that a particular offence is punishable upto a certain punishment in the form of substantive sentence as well as fine, a wide margin is available to the Courts to exercise their discretion. This discretion is judicially exercised and the punishment meted out

has got to be commensurate with the occasion that demands the exercise of jurisdiction. Undoubtedly the punishment should not be unduly harsh or severe but it also need not be so light as to create an impression that whatever the gravity of the offence one could always escape lightly. A norm is therefore to be struck by examining the facts and circumstances of a particular case.

(Para 24)

The contemner indulged himself into a most unwarranted and most unhealthy criticism of the entire class of judges namely the lower judiciary. He gave to this unwarranted criticism a very wide publicity in his paper which was widely circulated. When it was brought to his notice by a show cause notice that he had committed a contempt and why action should not be taken against him he did not come before the Court with the kind of genuine remorse accompanied by unreserved apology which alone was the kind of apology that is given due consideration by Courts. When he realised the possible grave consequences on the second occasion he came forward with an apology which for the first time suggested that he was admitting that he had done a wrong.

Held that the belated apology came from a person who was an experienced journalist and who claimed to be the head of a popular weekly and who had on two previous occasions known what contempt proceedings were. Therefore even the belated apology could not be considered as indication of real contriteness. [In the circumstances the contemner was sentenced to S I for 15 days and to pay fine of Rs 2000/-]

(Para 24)

Cases Referred Chronological Paras

- (1969) AIR 1969 SC 189 (V 56) = 1969 Cri LJ 401 = Cri Appeal No 55 of 1965 D/- 2-7-1968 Debabrata Bandyopadhyaya v State of West Bengal 21
- (1963) AIR 1963 Madh Pra 61 (V 50) = 1963 (1) Cri LJ 187 Padmavati Devi v R K Karanjia 22
- (1959) AIR 1959 SC 102 (V 46) = 1959 Cri LJ 251 State of Madhya Pradesh v Retashankar 18
- (1957) AIR 1957 Madh Pra 152 (V 44) = 1957 Cri LJ 1137 Babulal Shukla v Shivprasadsingh 22
- (1953) AIR 1953 SC 75 (V 40) = 1953 Cri LJ 519 Aswini Kumar v Arabinda Bose 17
- (1940) AIR 1940 Nag 407 (V 27) = 1940 Nag LJ 425 Sub-Judge First Class Hoshangabad v Jawaharlal Ramchand 19 22
- (1936) AIR 1936 PC 141 (V 23) = 1936 All LJ 671 Andre Paul v Attorney General of Trinidad 17

N Kamlakar and Nisarali for Petitioner V R Manohar and G C Banerjee for Respondent C S Dharmadhikari Asst Govt Pleader for the State

DESHMUKH J — The petitioner is requesting this Court to take action against the respondent under section 3 of the Contempt of Courts Act. The present litigation is an off-shoot of a prior litigation. The facts of that case are not relevant for deciding the present petition but the background against which the present petition comes to be filed may be noted in brief.

2 The subject-matter of the present petition is an article written by the respondent R K Karanjia in his Weekly named "Blitz" in the issue dated April 20 1968. The complainant had filed a complaint against the respondent in the Court of the Judicial Magistrate First Class Nagpur under section 292 of the Indian Penal Code. On the last page or the cover page of the issue of Blitz dated 5th of March 1966 a picture of one Pamela Tiffin appeared which was being styled as obscene by the complainant in his complaint. The respondent defended himself but the case ended in conviction on 28th September 1967. The respondent filed an appeal in the Court of Session and by his judgment dated February 13, 1968 the learned Sessions Judge accepted the appeal and acquitted the respondent. It also appears that some move was made in the Parliament for amending the provisions of section 292 of the Indian Penal Code and to have that offence tried by a Tribunal higher than the Judicial Magistrate First Class. Those discussions were held in the Parliament in February and March of 1968.

3 Against this background and after the acquittal by the Sessions Judge the respondent wrote the present article which is now being impugned. After the article was published in the issue dated April 20 1968 the complainant petitioner filed a criminal application on April 22, 1968 for permission to file an appeal under the provisions of section 417(3) of the Code of Criminal Procedure. He also moved this Court on April 25 1968 by the present application. According to the petitioner the article as a whole and more particularly some of the passages which are quoted in the petition are calculated to undermine the dignity and prestige of the judiciary. They are in the nature of an unjustified criticism against the trial Judge personally as also against the entire lower judiciary. The petitioner therefore brings to the notice of this Court that a contempt has been committed by the respondent by publishing the said article and that appropriate action may be taken by this Court.

4 When this petition was admitted and a show cause notice was sent to the

respondent, he appeared in the Court on July 30, 1968 and produced what is styled by the respondent as his unqualified apology "for any word, sentence or para which may be construed as contempt of Court" It may be mentioned that the petitioner in his petition had specifically quoted two paragraphs from the article which, in the opinion of the petitioner, clearly amounted to contempt. On July 30, 1968 the matter was called out before another Bench of this Court. It was then brought to the notice of the respondent and his Advocate, who was present, that there was another paragraph relating to the probe being made into the circumstances of the Nagpur case, which means the trial for obscenity. There were certain observations regarding the probe being made by the Chief Minister of the State and the Chief Justice of the Bombay High Court and it was particularly pointed out that if such probe was undertaken it would be as astounding as it would be rewarding. The respondent was told by the learned Judges of that Bench that here was a passage which *prima facie* demanded an enquiry into the Judge's conduct or the judgment of the Court, and if such course was permitted, that would be the end of the judiciary. What explanation the respondent had to offer in respect of that paragraph? When such an enquiry was made, an adjournment was sought by the learned Counsel for the respondent as he wanted to take instructions and file the reply. The matter was then adjourned to August 12, 1968 on which date the explanation to the query made, was filed in the form of an affidavit sworn by the respondent. On that date, further adjournment was sought. The learned Counsel Mr. Banerjee had some personal difficulty. Adjournment was granted and the matter was posted for hearing on August 19, 1968. Yesterday, when the matter was called out, Mr. Manohar, another learned Counsel, appeared for the respondent along with Mr. Banerjee and he produced an apology again in the form of an affidavit. When the case was called out we were not aware of this apology in the form of an additional affidavit as it was filed just when the matter was called out. We pointed out to Mr. Manohar that the apology so-called, which was filed on the previous day of hearing, does not appear to be either an apology or at any rate an unqualified apology. He, therefore, said that the respondent was producing another affidavit containing the apology which would indicate his mind in a proper manner. He now tenders unreserved, unqualified and unconditional apology. When we brought to his notice that the wording in this apology paragraph No 1, was almost the same as in the earlier and would not, therefore, amount to an un-

conditional apology, Mr. Manohar pointed out that there was a typing mistake and the affidavit in terms did not represent what the respondent wanted to say or was dictated to the stenographer. In this manner, we have the last affidavit filed yesterday which, according to the respondent, now indicates what he precisely thinks in respect of the charges that are made against him.

5. When the matter was called out and the three apologies appeared on the record, one of the questions that we ourselves raised for consideration was whether in fact the article of the respondent amounts to a contempt. The petitioner alleged that it constitutes a contempt of Court. The respondent's learned Counsel also admitted that in his view this was a contempt. The last affidavit filed by the respondent also concedes that the article amounts to contempt. However, the respondent further places himself at the mercy of this Court for accepting the apology as sufficient amends and to treat the contempt as purged. Whether such an apology should be accepted and the contempt should be deemed to have been purged or some other punishment appropriate to the occasion is called for, was the only issue that was debated.

6. Though the only question that fell for decision was whether the apology tendered by the respondent should be accepted as sufficient amends we were generally addressed on the nature of the article, the type of contempt and the case law which deals with what constitutes a contempt and what punishment was meted out to the persons concerned. We must point out to the credit of the learned Counsel on both sides that they took a complete survey of all the important decisions on this point. We were taken through the judgments of the Privy Council, the Supreme Court and the various High Courts including this Court. What constitutes a contempt of Court is now settled law. The contempt of Court is committed in two different ways. One way is to attack the Judge or the Courts generally and level against them criticism which far exceeds the bounds of legitimate criticism. When the judiciary is so attacked and the Judge in particular is so attacked and the attack may contain various kinds of imputations such a contempt is styled as scandalizing the Court itself. The other type of contempt is committed when there is an attempt to interfere with the course of justice, an instance in point would be publishing material affecting the party defending itself, while a case is pending. This amounts to obstruction or interference in the course of justice. So far as the present article is concerned, it is in the nature of a direct attack on the particular trial Judge who

delivered a judgment of conviction and it also includes sweeping remarks against the entire lower judiciary. There is therefore no doubt that the impugned article falls under the category of scandalizing the Court itself.

7 In order to find out whether the article in fact constitutes an offence and if so what is the gravity of that offence we heard learned Counsel on both sides and got the article read in the Court as a whole. How this article should be read is one of the questions that was debated before us. The learned Counsel for the respondent Mr Manohar submitted that this article cannot be analysed microscopically as a statute is analysed and that will have to be read in a broad manner and the normal sense that is conveyed by the words used must be accepted. We think that this is a correct approach. The article is published in a weekly newspaper and we agree that the effect of this article should be gauged from the point of view of a reader who reads the weekly in a certain manner. Newspapers of this type and magazines are not studied like text books. They are hurriedly read and the broad impression that the article creates on the mind of a normal reader should be the test for the purpose of calculating the possible mischief that such an article would lead to. This argument was particularly emphasised before us because the petitioner in his petition has singled out two passages for pointing out the grave nature of the contempt. In addition on the first date of hearing the learned Judges who constituted another Bench called up on the respondent to explain what precisely he meant by calling for a probe or enquiry into the Nagpur case. The paragraph requiring the Chief Justice and the Chief Minister to make an enquiry into this case was particularly brought to his notice and he was asked to explain the nature of enquiry that was contemplated. During the course of the argument before us the last paragraph where the trial Judge's judgment has been criticised and is equated with an April fool joke was particularly emphasised on behalf of the petitioner. It is under these circumstances that Mr Manohar argued that an analysis word by word and sentence by sentence is not the proper manner of reading such a newspaper article. When unjustified and excessive criticism of the judiciary is treated as a contempt of Court the ground on which it is so treated is that such unwarranted, unjustified and unprovoked malicious criticism tends to undermine the prestige and dignity of the judiciary. This is only one effect. Such criticism if it passed unnoticed has also the tendency to shake the confidence of the common man in the impartiality of the judiciary. The respondent himself

points out in the second paragraph of his apology that he considers Courts as the bulwark of liberty and the rights of the people. If this is the position of the judiciary which the Constitution has given it is the duty of every right-thinking citizen not to do anything consciously or unconsciously which will undermine that special position of the judiciary. Since this is the reason why the proceedings are taken against a mischief of this type the effect that such article will create on the mind of a common reader must according to us determine the gravity of or otherwise of the offence.

8 Though Mr Manohar learned Counsel appearing for the respondent, said that the time chosen was most inopportune and the article was unnecessary, let us examine by looking to the contents of the article itself what justification the writer had for writing such an article. Mr Manohar made a very able attempt to defend the respondent by pointing out why this article was written and what precisely was in the mind of the writer. That argument was addressed to us not in justification of what was done but only by way of pointing out the extenuating circumstances. Mr Dharmadhikari learned Assistant Government Pleader appearing for the State had the same approach but with a different emphasis. He took us through the second paragraph of this article which opens with the words from the Judicial Magistrate of Nagpur whose strange judgment convicting me of the offence of obscenity shocked everybody. He says that the next portion of that paragraph no doubt refers to the debates of Rajya Sabha and Lok Sabha. Though apparently the debates in the Parliament and Rajya Sabha are being pointed out as an occasion for writing this article the main emphasis of the writer is that the judgment of conviction by the trial Magistrate was a strange judgment. The trial Magistrate his judgment and in the sweep of his pen the entire lower judiciary are the objects of criticism. He intended to give the lower judiciary in general and the trial Magistrate in particular a bit of his mind and was just waiting for some opportunity. The present pretension in the affidavit as also the argument addressed on his behalf that this is a genuine criticism against the background of the Lok Sabha debate does not appear to be so true. We do think that there is considerable force in what Mr Dharmadhikari argued. However since it is the accepted proposition that the press individually as well as the judiciary as an institution are open to legitimate and reasonable criticism we would not much emphasise the occasion for writing an article. If a legitimate criticism is made and we assume that it

is amply justified, there will be no occasion to enquire about the reason at all. For a good educative criticism, any occasion is good enough. It is more the contents of an article and the effect thereof that must be emphasised apart from the occasion on which it is written.

9. Reading the article as a whole as a normal reader might read, it appears to us that besides the title of the article, there are three sub-titles which are made attractive to catch the eye of any reader. The title of the article is "whom will you fine for Konarak and Khajuraho". The sub-titles are "abuse of law", "Poor doomed" and "probe imperative". What the reader would think is that to publish pieces of art which are comparable to Konarak and Khajuraho is itself being held as an offence and that amounts to abuse of law. When a conviction takes place, poor man has no future and the only remedy, therefore, is a probe into the incident that happened at Nagpur. If, however, we would consider a reader who will read the article as a whole, even in that case, the effect that will be created on his mind is fraught with great mischief. The first portion dealing with "abuse of law" quotes out of context one observation of the learned Sessions Judge who allowed the appeal of the respondent. That observation points out that the judgment of the trial Court was "a typical case of how a very conservative application of the penal provisions can suffocate or stop a normal good expression of art and science". Against this quotation, a portion of the speech of one Mr. V C Shukla, Union Home Minister of State, is reproduced by styling it as an example of the triumph of commonsense. This passage may be a correct reproduction of the speech made by Mr V C Shukla in the Parliament. Mr. Shukla has recalled the Blitz case to point out where the lower Court Magistrate had punished the editor, but the Sessions Judge had acquitted him. Against the background of this portion is immediately the next part dealing with the inability of the poor to defend themselves in the Courts of law. What is then stated is that the poor are doomed. It may be alright that the Blitz had come out with triumphant colour, but a question is posed what about hundreds of those cases where those convicted and condemned by "such harsh and unwarranted judgments" in the lower Courts do not own the financial and "other resources" to get such convictions quashed and their honour and prestige vindicated by the higher Courts. Immediately follows a paragraph which says "If only people with money and power can afford the luxury of such costly appeals, the poor will be doomed to submit to the whimsicalities of the lower Courts". Now,

this paragraph read against the background of criticism of the lower Courts made by a member of the Parliament on a privileged occasion undoubtedly makes an untrained common man to believe that there is no justice in the lower Courts and unless you have 'financial ability, other resources and power', you have no hope of vindicating your rights. Such remarks are likely to make the common readers feel that the judgments delivered by the lower Courts are generally whimsical, that is, without any rational basis, but depending upon the personal sporadic impulse of the Judge.

10. The next portion starting with the title "probe imperative" first informs the reader how Blitz had to spend more than Rs 20,000/- for defending itself. It is then pointed out that but for the magnificent manner in which leading citizens, trade unions, student organisations and other public bodies of Nagpur came to his rescue by organising a Blitz Defence Committee under the Chairmanship of Mr. A. D Mani, M.P., Chief Editor of Hitavada, it would have been difficult for the respondent to engage the services of top legal luminaries of Nagpur whose names are printed therein.

11. Having thus pointed out the great difficulty in defending himself and the generous help that he received from the Defence Committee consisting of eminent people of Nagpur, the respondent proceeds to observe that something immediate and drastic has to be done to prevent "social workers" of the brand of the complainant from continuing to put responsible laws of the land to public ridicule. Then follows the observations for which an explanation was called for. The respondent says that he would urge both the enlightened and forward-looking Chief Minister of Maharashtra and Chief Justice of the Bombay High Court to institute an enquiry into the circumstances of the Nagpur case. The revelations that would result from such a probe, he assures them, would be "as astounding as they would be rewarding". We would pause here and consider the effect of this article. The subsequent paragraph which is more in the nature of a personal attack on the judge and his judgment, may be kept aside for the time being. We have no doubt that the last portion which we have kept aside for the time being, has the result of heightening the effect of the earlier portion. If the present defamatory matter is against the Judge and amounts to contempt of Court, the use to which that portion is being put in the article as a whole is undoubtedly to create deeper and more heightened impression upon the mind of the common reader.

12. We have practically summarised all the relevant matters in the article. According to us, the article read as a

whole has the tendency to undermine the prestige of the lower judiciary as a whole. We are aware that the respondent is trying to give compliments to the appellate Court but even those compliments serve the purpose of contrasting the judgment of the lower Court as against the judgment of the appellate Court. The effect on the mind of the normal reader is to make him feel that judgments of the trial courts are harsh and unwarranted. They do not take proper view of the provisions of law. The judgments are based upon whimsicality and one is to have not only financial but other resources including power for obtaining justice. The necessary implication of such a criticism therefore is that something other than an objective and impartial examination of the record of the case is responsible for the judgments of the lower Courts. If such extraneous factors are influencing the judiciary and if that is the impression that is conveyed to a common man who is likely to believe the printed words we are sure that uncalculated harm is going to follow so far as the function of the judiciary is concerned. When we put a query to the learned Counsel for the respondent as to what is meant by 'other resources' and what is again meant by people with money and power alone getting justice, he made an effort to point out that this has reference to the formation of the Defence Committee and nothing else. He also assured us that this was all in the mind of the respondent. Assuming for the arguments sake that the reference to other resources may mean the assistance which the respondent got from the Defence Committee consisting of local luminaries, how is the reference to power explained? Had this Committee any power in it by which it obtained the judgment of acquittal? The reference to factors like 'other resources and power' is sinister and indicated that the judiciary is likely to be influenced by outside factors. It is the criticism of this type and the tone of this article in ridiculing the lower judiciary as a whole that according to us aggravated the situation. If against such a background a common reader reads the passage relating to a probe or enquiry and the assertion that the revelations that would result from such a probe would be as astounding as they would be rewarding, undoubtedly it would lead to great distrust in the judiciary. To say in arguments now or to put an affidavit that the probe merely related to the complainant's conduct and his enmity towards the respondent is to make an attempt to water down the effect of the paragraph in its setting in the argument. Mr Manohar argued that in the petition filed by the petitioner there is no reference to this paragraph relating to probe. It, therefore, means

that it did not occur to the complainant that this was an objectionable portion of the article. Thus he pointed out to us as a support for his argument that this portion has nothing to do with the judge or his judgment. It may be that the complainant knew the entire record of the case including the statement of the accused under section 342 of the Code of Criminal Procedure. He knew the defence of the accused and his reading of the article is likely to be slightly different from the reading of a common man who has no knowledge of the background of the case. It was argued before us that the judgment was printed as a whole in an issue of the Blitz dated October 7, 1967. It is well known that the newspaper matter even if read exhaustively is forgotten soon. The time lag between October 7, 1967 and April 20, 1968 was so great that no reader would remember the judgment as such. We are making the most liberal concession to the respondent that the judgment though printed as a whole is also read by the common reader on October 7, 1967. Even on that footing we think that while reading this article in April 1968 beyond a vague memory he would have no recollection of the details of that judgment. The moment this article was read in Court on July 30, 1968, the first reaction of the Bench was that here was an implied or sly reference to the judge himself and if an enquiry was called for it would disclose something astounding. We are not therefore impressed by the explanation offered on behalf of the respondent by Mr Manohar.

13. We also think that the reference to an enquiry is deliberately so worded as to make the reader wonder what dramatic matter is hidden behind the screen. However, the respondent has now given a full explanation regarding the background of the case. Stated shortly he wants to say that the complainant is a pro-Pakistani whose loyalty to this country is doubtful. He is assisted by some others of the same type who entertain grudge against Blitz for publishing the pictures on cover pages or other writings. Hence the motive behind the complaint is anything but pure. If this is all that was to be discovered by the Chief Minister and the Chief Justice after the suggested probe we wonder whether this could even be described as either astounding or rewarding. On the contrary the deliberate choice of dramatic words and deliberate suppression of this background from the article throws considerable light on the mentality of the writer and his desire to corrupt the mind of the reader.

14. This portion again falls in between the earlier criticism of the lower Courts as such and the ridicule of the judge's judgment in the last paragraph. So far

as the last paragraph is concerned, the respondent says that the "PIN UP" case was not without its funny side even before the case went up in appeal to the higher Court. The respondent claims that after the full text of the judgment was printed, a friendly member of the judiciary made a query to him in writing whether it was a genuine reproduction of the judgment really delivered or it was some kind of April-fool joke that the respondent was making at the expense of the Magistrate. The respondent had to reassure the judicial friend that it was a verbatim reproduction of the authorised copy of the judgment duly signed by the Magistrate without any attempt by Blitz to hold it up to contempt or ridicule.

15. We made a query with the learned Counsel for the respondent whether his client was willing to disclose the name of the so-called "judicial friend". Mr. Manohar stated that his client would suffer the consequences himself and not disclose the name. We may, however, point out that in the initial affidavit filed by the respondent explaining the background of the article, it is not asserted on oath that there was in fact a "judicial friend" who wrote the alleged letter. In the absence of an assertion on oath we have our own doubts whether there is in fact such a letter writer, or whether reference is a fake one made to cut one more joke at the cost of the Magistrate.

16. The sum total of the effect, according to us, therefore, is that a common reader, when he keeps the issue aside after reading this article, will think that the particular judgment of conviction was funny judgment written whimsically and the judgment was a harsh and unwarranted one, that judgments of lower Courts are generally of this type and normally justice though available in higher Courts requires, money and other resources including power, and that if the suggested enquiry was held, it would disclose some thing alarming about the trial of the case by the Magistrate and set right the wrong that has been done in administration of justice and thus improve the tone of the judiciary at large. The least that can be said is that the article is calculated to shatter the confidence of the common reader in the impartiality, integrity and efficiency of the lower judiciary.

17. If this is the effect of the article read as a whole, the only conclusion to which we can reach is that this is a contempt of a very grave type. Though a large number of judgments of various Courts were referred to us, considerable number of them were cited on either side only to point out that a particular punishment is meted out and rarely substantive sentence under the provisions of the Contempt of Courts Act has been resorted to.

The point relating to the quantum of punishment will be dealt with by us at the end of the judgment. We might now refer usefully to two judgments which bring into relief the quality and nature of contempt when certain acts are committed. So far as the criticism against the judiciary is concerned, we may refer to *Aswini Kumar v. Arabinda Bose*, AIR 1953 SC 75. Those contempt proceedings were initiated by the Supreme Court against the respondent for writing an article in the *Times of India Daily* of October 30, 1952. In that article, extraneous motives and things of policies and politics were alleged against the Supreme Court Judges in the matter of their desire to abolish the dual system prevailing on the original side of some of the High Courts. The Supreme Court points out that if the article had confined itself merely to preach to the Courts of law the sermon of divine detachment, nothing was lost. But to impute motives and to allege that extraneous considerations go to the decision of the cases by the Supreme Court, is bound to undermine the administration of justice and is calculated to lead to greater mischief than can possibly be imagined. The observations of the Supreme Court in that behalf may be quoted:

"If an impression is created in the minds of the public that the Judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined."

Their Lordships of the Supreme Court clearly point out that this is not to suppress all criticism against the judges and the judiciary. In fact, they quote with approval a passage from the judgment of the Privy Council in *Andre Paul v. Attorney-General*, AIR 1936 PC 141. The observations of Lord Atkin which are so often quoted in such cases are fully approved by the Supreme Court. They do believe that "the path of criticism is a public way and the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune." It is pointed out that "justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men".

18. Against this background, it is pointed out that when criticism not only exceeds the legitimate bounds but is based upon a personal attack most unjustifi-

ed and vilification of a class of judges without any justification whatsoever the effect is bound to be that the prestige and position of the judiciary will be undermined. In another judgment in the case of *State of Madhya Pradesh v Reva Shankar* AIR 1959 SC 102 the Supreme Court classifies the innumerable ways by which attempts could be made to hinder or obstruct the due administration of justice in Courts. Having pointed out the two broad categories of contempt of Court they observed that where the unjustified criticism is in substance an attack on individual judges or the Court as a whole with or without reference to particular cases causing unwarranted and defamatory aspersions upon the character and ability of the judges such conduct is punished as contempt for the reason that it tends to create distrust in the popular mind and impair the confidence of the people in the Courts which are of prime importance to the litigants in the protection of their rights and liberties.

19 Several other judgments were brought to our notice but since they contain more or less similar observations relating to the nature of contempt and the manner in which it is to be held proved it is not necessary to duplicate references. However we think that a judgment of Mr Justice Bose as he then was in the case of *Sub Judge First Class Hoshangabad v Jawahar Lal Ramchand* AIR 1940 Nag 407 may be usefully referred to in the matter of approaching the offence of contempt of Court and the view the Court should take about the punishment that is to be inflicted. The learned Judge has particularly drawn attention to the peculiar position of the lower judiciary. In that case Sub Judge First Class Hoshangabad had passed a certain order in the Judicial proceedings and a party litigant wrote a threatening letter to him. He challenged the legality of the act that was ordered to be done at the instance of the learned Judge and told him that he was doing so on his own responsibility and that the order was against law. That step is taken by the judge to cause loss to the defendant and if he succeeded in the appeal, the judge will be responsible for making good the entire loss. When proceedings in contempt of Court were taken out against the writer of that letter the learned Judge points out that it is necessary to take a particularly serious view of such contempts when they relate to the members of the lower judiciary. It would be better to point out the reasons thereof in the words of the learned Judge himself.

But I feel that it is necessary to take a serious view of the matter in order to protect Judges in the lower Courts who

are not as favourably situated as we are here and who have difficulties and obstacles to overcome from which we are happily free also in order to leave no mistake or misunderstanding in the mind of the general public that this sort of attempt at intimidation will not be lightly passed over.

20 In view of the observations cited from the above judgments and bearing in mind the circumstances of the case we think that the offence committed by the present respondent is not only of a grave nature but serious view requires to be taken thereof. Judgments of conviction by one Court and acquittal by the higher Court or a judgment of acquittal by the lower Court and a conviction by the higher Court is a routine matter in judicial proceedings. No grievance can be made simply because the judgment has gone against a particular party. No Judge can ever decide a case in a manner which will please both sides. It is because of this that often it is said that a compromise is the best manner in which a litigation could be terminated. Then alone the parties feel satisfied because each has agreed to the final decision. The duties of a judge are in the circumstances serious and he must be in a position to discharge them without any fear or favour. Any attempt at intimidation or bullying or holding out a threat of unjustified criticism or an unwarranted attack undermining his prestige must therefore be put down with a strong hand.

21 We might now consider usefully some references made before us to the circumstances in which punishment is to be meted out when the offence of contempt of Court appears to be committed. Mr Manohar referred us to 1968 SC (Notes) No 383 in the case of *Debabrata Bandopadhyaya v State of West Bengal* Cri Appeal No 55 of 1965 dt 27/6/68 = AIR 1969 SC 189. He particularly drew our attention to the observations of the learned Judges of the Supreme Court that punishment under the law of contempt is called for when the lapse is deliberate and is in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged. Undoubtedly those are the only circumstances in which an act of contempt is not only looked with disfavour but is required to be put down with a strong hand. If the lapse is not deliberate but is by a slip or by an error of judgment and that explanation appeals to a Court of law, we have no doubt that in the circumstances the contempt should be styled as technical contempt and a sincere apology would be enough to purge such contempt. If the action to be taken is in the case of a deliberate lapse which is in disregard

of duty and is also in defiance of authority, then undoubtedly, appropriate punishment is called for.

22. Examining now the respondent's article from that point of view, we find that the weekly newspaper Blitz has a circulation of two lac copies as was stated at the bar on behalf of the respondent. It was because of a query by us that the answer came to be given. In the context of calculating the harm that is done by such publication, the extent of publicity is a relevant factor. It is in that context we made the query as to what was the circulation of this paper. If the circulation is to the tune of about two lac copies per week, it must be said that the respondent, as the editor of such a widely circulated paper, has great responsibility. In common man's language, this paper will have to be described as a popular paper. The more popular the paper is, the greater is going to be the effect of writing in proportion to the stability, prestige and circulation of the paper, and the responsibility of the editor and those who manage it is proportionately heightened. Criticism from people placed in such position has got to be reasonable and must exhibit a high tone. When the respondent wrote this article, it could not be said that he was not familiar at all with the Courts, their position and the law relating to contempt of Court. On a query by us again, Mr N. Kamlakar, learned counsel appearing for the petitioner, referred us to a judgment of the Madhya Pradesh High Court in *Babulal Shukla v Shivprasadsing*, AIR 1957 Madh Pra 152. He particularly emphasised an observation of that Court that while considering whether the apology alone is sufficient to purge the contempt, the past conduct of the person accused of having committed contempt and the nature of impugned publication must be taken into account. He, therefore, pointed out to us in that context that the respondent had previously to face such proceedings on some occasions. We, therefore, asked the learned Counsel for the respondent to make a statement after enquiry with the respondent whether he was in fact involved in such proceedings and what were the results thereof. It was stated at the bar on behalf of the respondent that on one occasion in 1952, a show cause notice was issued against the respondent by this Court in Bombay. He said that some reports of a pending case were published in the columns of this weekly. The contempt proceedings arose from the publication of those reports. The original litigation of which reports were published, was between Chester Bowles, the American Ambassador on the one hand and Mr. R K. Karanjia the present respondent, and one Mr Karaka on the other. The apology was then ten-

dered and was accepted. The other occasion was when a similar proceeding was initiated against the respondent in the Madhya Pradesh High Court and which case is reported in *Padmawati Devi v R. K. Karanjia*, AIR 1963 Madh Pra 61. That case arose out of publication of certain reports even when the police investigation was continuing. One of the points raised was whether publishing such reports before the filing of the charge sheet amounts to an interference with the course of justice. The Madhya Pradesh High Court then considered whether the apology sent by the respondent through post should be accepted. They held that it was no apology at all as no regrets were expressed for the wrong done. There was also an attempt to justify the publication of the material. Under the circumstances, the respondent was fined. The learned Counsel for the petitioner Mr. N. Kamlakar, therefore, urged before us that here is a respondent who is not only the editor of a widely circulated paper but is fully conversant with the law of contempt. He said that it is often said that experience is the best teacher, but the respondent in this case does not seem to have profited by his past experience. These circumstances are stated before us only to point out that the lapse committed by the respondent could not be said to be an accidental slip but it appears to be a deliberate and calculated assault on the dignity of the lower Court. It is particularly necessary for us to examine this position because Mr Manohar in his persuasive manner made a very strenuous effort to point out to us that the respondent is really feeling remorse and this contempt should be deemed to have been purged by accepting this apology. We may at once point out as has been observed in several judgments of the Supreme Court as well as in the judgment of Mr Justice Bose as he then was in the case of AIR 1940 Nag 407, that an apology is not a weapon of defence forged to purge the guilty of their offences. It is not an additional insult to be hurled at the heads of those who have been wronged. It is intended to be evidence of real contriteness, the manly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrong-doer's power. Mr. Dharmadhikari particularly emphasised this approach and says that the circumstances under which the so-called apology has been tendered by the respondent may be examined. An apology, which is unreserved, clean and immediately offered at the earliest opportunity is an apology which undoubtedly must be given greater weight than a belated apology. If an unreserved, unconditional and unqualified apology is not tendered immediately on the realisation

of the mistake committed but if after some discussion in the Courts and after getting a possible feeling that the matter may lead to grave consequence an apology comes to be offered it loses much of its grace. An apology which as Mr Justice Bose as he then was says should be evidence of real contriteness and mainly consciousness of the wrong done it ceases to be so if it is belated and it becomes instead to borrow the language of Mr Justice Bose again the cringing of a coward shivering at the prospect of the stern hand of justice about to descend upon his head. When we examined the circumstances under which the apology comes to be tendered in this case we find that the so-called apology tendered on the first day of hearing namely July 30 1968 is not an unreserved and unconditional apology at all. In the first paragraph of the affidavit filed on that day there is an attempt to explain the circumstances under which the article came to be written. That portion may smack of an attempt to justify but it is at once explained that the respondent without entering into any lengthy discussion of the article or attempting to justify the same was tendering an apology. When we say that the apology tendered does not appear to be an unreserved and unconditional apology it would be better to quote the wording of the respondent himself so that what it contains may be notified by the words used by the respondent himself.

Without entering into any lengthy discussion of the article or attempting to justify the same I hereby tender my unqualified apology to your Lordships for any word sentence or para which may be construed as contempt of Court and pray that your Lordships may be pleased to accept the same and discharge the rule nisi.

23 When this Bench was seized of this matter and the case opened on August 19 1968 we told Mr Manohar that the apology which we have quoted above does not appear to us to be the kind of unreserved and unconditional apology that is expected from a wrong doer who really feels remorse. He does not exhibit anywhere the consciousness that he has done a wrong. He does not plainly admit his responsibility for the wrong and show the preparedness to minimise that wrong or to wash away the effect of his conduct by an unqualified unreserved and sincere apology. What he says at best is that he is tendering an unqualified apology for any word sentence or para which may be construed as contempt of Court. By necessary implication and after reading this affidavit as a whole the impression that is created is that the respondent does not think that there was anything

objectionable in the article. He does not admit that he has done a wrong which is to be retrieved by repentance. What he says is that for any word sentence or para which may be construed as contempt of Court he has an apology to tender. When we told Mr Manohar of what we think of such an apology Mr Manohar said that he had tendered another apology at the beginning of the day which in the circumstances could not be circulated in the papers earlier. He therefore brought to our notice another apology. As luck would have it even this affidavit of the apology had the same wording which we may reproduce.

I further tender and convey my unqualified unreserved and unconditional apology to their Lordships and the members of the judiciary for any word sentence passage or paragraph in the said articles which may construe as contempt of Court.

Here the improvement only consists of referring to the members of the judiciary at large and the addition of one more adjective namely unreserved. In the operative part it had again reference to the same position namely that the apology is tendered for any word sentence passage or paragraph in the said article which may be construed as contempt of Court. Since this was not materially different we asked Mr Manohar how is this apology different from the first. Mr Manohar said that there appeared to be a typing mistake which was immediately corrected. The present apology is as follows.

I further tender and convey my unqualified unreserved and unconditional apology to their Lordships and the Members of the Judiciary for every word sentence passage or paragraph appearing in the said article and plead guilty to the charge.

We will not make any fetish at all of the typing error that crept in the second apology which was first filed in Court in the beginning of the day on August 19 1968 and we accept the word of Mr Manohar as representing the truth. We will assume that the last apology which we have quoted above was the second apology tendered by the respondent on the 19th of August 1968 when the hearing of this case began before in this Bench. The only question that remains to be considered is whether this apology which is tendered on the 19th of August 1968 should be accepted and should be deemed enough to purge the contempt that is committed.

24 It may now be appropriate to refer to the approach of Mr Manohar in the matter of punishment in contempt proceedings. Both sides refer to several decided judgments which are reported.

By a statistical survey of these judgments, Mr Manohar said that, in most of the cases, the apology was accepted as sufficient amends. In gross cases, the punishment was that only a fine was imposed. We are aware that the contempt proceedings are a special type of proceedings where summary justice is meted out. This proceeding is to be sparingly used only when the gravity of the occasion demands it. However, a statistical approach to punishment could not be considered to be either proper or judicial approach. The punishment in any case for the matter of that is primarily a matter of discretion. When the Legislature lays down that a particular offence is punishable upto a certain punishment in the form of substantive sentence as well as fine, a wide margin is available to the Courts to exercise their discretion. This discretion is judicially exercised and the punishment meted out has got to be commensurate with the occasion that demands the exercise of jurisdiction. Undoubtedly, the punishment should not be unduly harsh or severe, but it also need not be so light as to create an impression that whatever the gravity of the offence, one could always escape lightly. A norm is, therefore, to be struck by examining the facts and circumstances of a particular case. It is only against this background that we think that we have before us a contemner who has indulged himself into a most unwarranted and most unhealthy criticism of an entire class of Judges, namely, the lower judiciary. He has given to this unwarranted criticism of very wide publicity, because his paper is widely circulated paper. When it was brought to his notice by a show cause notice that he has committed a contempt and why action should not be taken against him, he has not come before the Court with the kind of genuine remorse accompanied by unreserved apology which alone is the kind of apology that is given due consideration by Courts. When he realised the possible grave consequences on the second occasion, he comes forward with an apology which for the first time suggests that he (the respondent) is admitting that he has done a wrong. When a belated apology comes from a person, who is an experienced journalist and who claims to be the head of a popular weekly and who had on two previous occasions known what contempt proceedings are, we do not think that even the belated apology should be considered as indication of real contriteness. It had its origin more in the fear of consequences that might be meted out to him rather than in any genuine feeling of remorse for having unnecessarily bestowed harm and injury upon the members of the lower judiciary. In the circumstances, we think that the

apology tendered by the respondent should not be accepted. Accordingly we do not accept that apology. In the circumstances which we have described above, we are of the opinion that this case calls for a sentence which will be commensurate with the nature of the harm done by the article.

25. We accordingly convict the respondent under section 3 of the Contempt of Courts Act and sentence him to suffer simple imprisonment for 15 days and to pay a fine of Rs 2000/-. In default of payment of fine, he will suffer further simple imprisonment for 15 days. The respondent is given three weeks' time to pay the fine as well as to surrender himself.

26. At this stage Mr. Manohar, learned Counsel for the respondent, prays for leave to appeal to the Supreme Court which is refused.

Order accordingly.

1970 CRI. L. J. 193 (Vol. 76, C. N. 42) =
AIR 1970 ALLAHABAD 119 (V 57 C 12)
D. P. UNIYAL AND C B CAPOOR JJ.

Chandi Prasad, Applicant v. Chaudhari Chandra Pratap Singh, Opposite Party.

Criminal Revn No 269 of 1966, D/-6-3-1968 against judgment of Addl S. J. Basti, D/-17-2-1966

(A) Criminal P. C. (1898), S. 146 (1) — Reference of dispute to Civil Court — In judging whether Magistrate had sufficient ground what has to be seen is substance and not form of order of reference — Order disclosing that Magistrate found it difficult to decide on question of possession — Held, it could not be said that order of reference was incompetent. (Para 8)

(B) Criminal P. C. (1898), S. 146 (1-B) and (1-D) — Order under S. 146 (1-B) passed after adopting finding of civil Court on question of possession referred to it — It is no more open to party to assail order of reference to Civil Court. (Para 10)

(C) Criminal P. C. (1898), Ss. 146 (1-B), (1-D) and 439 — Order of Magistrate under S. 146 (1-B) — It cannot be set aside in revision: AIR 1963 Pat 243 (FB) held impliedly overruled by AIR 1966 SC 1888.

The finding given by the Civil Court in pursuance of the provision of sub-section (1-B) of Section 146 is a finding of a Court of civil jurisdiction, and as such, it is not subject to the jurisdiction of criminal court. In so far as sub-section (1-D) bars appeal from such finding and prohibits review or revision of such finding, it clearly envisages that in so far as the order of the Magistrate is based on the finding of Civil Court the same cannot be interfered with in any way.

BM/FM/A773/69/RSK/B

The order being an integral part of that finding cannot be set aside in revision AIR 1963 Pat 243 (FB) held impliedly overruled by AIR 1966 SC 1888 (Para 12)

Cases Referred Chronological Paras

(1967) 1967 All LJ 649 = ILR

(1967) 2 All 386 Guru Prasad Pandey v State 4

(1966) AIR 1966 SC 1888 (V 53) =

1966 All LJ 1122 = 1966 Cri LJ

1514 Ram Chandra Agarwal v State of U P 12

(1963) AIR 1963 Pat 243 (V 50) =

1963 (2) Cri LJ 25 (FB) Raja Singh v Mahendra Singh 12

(1899) 1899 AC 626 = 68 LJ PC

148 Madden v Nelson and Fort Sheppard Railway 10

B C Saxena and K C Saxena for Applicant A G A for Opp Party

UNIAL J — This application in revision arises out of proceedings under Section 145 Criminal P C and is directed against an order passed by the Magistrate in terms of Section 146 (1-B) of the Code of Criminal Procedure

2 The dispute related to a plot of land which each party claimed to be in his exclusive possession. On being satisfied that there was an apprehension of the breach of the peace in respect of the land in question the Magistrate attached the property and followed the procedure laid down in sub-clause (1) of Section 145 Criminal P C. After perusing the written statements, affidavits and other documents filed by the parties concerned the Magistrate came to the conclusion that it was a fit case which should be referred to the Civil Court under sub-section (1) of Section 146 Criminal P C. The parties were directed to appear before the Civil Court and they adduced evidence in support of their respective claims as respects of the fact of possession of the subject of dispute. The Civil Court recorded a finding that the opposite party was in possession of the disputed plot on the date of the preliminary order as also two months next before the date of such order

3 On receipt of the finding of the Civil Court the Magistrate proceeded to dispose of the proceeding under Sec 146 (1-B) Criminal P C in conformity with the decision of the Civil Court and passed an order directing the delivery of possession to the opposite party

4 The applicant filed a revision in the Court of the Sessions Judge against the order of the Magistrate but the same was dismissed. He then came up in revision to this Court and the matter was heard by our brother Rajeshwari Prasad J who observed that in view of the Division Bench decision of this Court in Guru Prasad Pandey v State 1967 All LJ 649 an order passed by the Magistrate in conformity with the decision of the Civil

Court was not amenable to the revisional jurisdiction of the Sessions Judge and the High Court. He was however of the view that it was not clear from the said decision whether what was intended was to lay down that no revision petition was entertainable against the order of the Magistrate or whether it was intended that the correctness of the finding of the Civil Court was not liable to be challenged by way of revision. He therefore directed the case to be laid before a larger Bench for decision and that is how the matter has come before us.

5 The learned counsel for the applicant advanced three contentions before us first that the Magistrate had no jurisdiction to make the reference to the Civil Court. Secondly that if it was shown that the reference made by the Magistrate to the Civil Court was itself illegal the order passed by him under Sec 146 (1-B) would become vitiated and the High Court was entitled to interfere in revision. Lastly it was contended that the order of the Magistrate which was based on the finding recorded by the Civil Court was liable to be challenged by way of revision.

6 Before we proceed to examine the above contentions it is necessary to read the relevant provisions of the Code of Criminal Procedure.

7 Section 146 Criminal P C as amended by Act 26 of 1955 is as follows.

146(1)— If the Magistrate is of opinion that none of the parties was then in such possession or is unable to decide as to which of them was then in such possession, of the subject of dispute he may attach it and draw up a statement of the facts of the case and forward the record of the proceeding to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in sub-section (4) of S 145 and he shall direct the parties to appear before the Civil Court on a date to be fixed by him.

Provided that

(1-A) On receipt of any such reference the Civil Court shall peruse the evidence on record and take such further evidence as may be produced by the parties respectively consider the effect of all such evidence and after hearing the parties decide the question of possession so referred to it.

(1-B) The Civil Court shall as far as may be practicable within a period of three months from the date of the appearance of the parties before it conclude the inquiry and transmit its finding together with the record of the proceeding to the Magistrate by whom the reference was made and the Magistrate shall, on receipt thereof proceed to dispose of the pro-

ceeding under Section 146 in conformity with the decision of the Civil Court

(1-C)

(1-D) No appeal shall lie from any finding of the Civil Court given on a reference under this section, nor shall any review or revision of any such finding be allowed

(1-E) An order under this section shall be subject to any subsequent decision of a Court of competent jurisdiction

8. It will be seen that the Code envisages two situations in which a Magistrate may decide to make a reference to the Civil Court in a proceeding under Section 145, Criminal P. C.

(i) if he is of opinion that none of the parties is proved to be in possession of the subject of dispute; or

(ii) if he is unable to decide as to which of them was in such possession

In the instant case the Magistrate, it appears, was unable to decide as to which of the two parties was in possession of the subject of dispute and he, therefore, considered it to be a fit case to be referred to the Civil Court for recording a finding on the question of possession. It is true that he did not, in so many words, state that he was making the reference because of his inability to determine as to which of the parties was in possession of the subject of dispute. Nonetheless, it is perfectly plain from the order passed by him that he found difficulty in reaching a definite conclusion as to which of them was really in possession. Under the circumstances he was, in our opinion, perfectly justified in making a reference to the Civil Court. In judging whether the Magistrate had sufficient ground to refer the dispute to the Civil Court, what has to be seen is the substance and not the form of the order. The jurisdiction of a Magistrate to refer the question of possession for decision to the Civil Court arises as soon as he is unable to make up his mind as to which of the parties was in possession on the relevant dates. It cannot be said that the order of reference passed by the Magistrate in terms of sub-section (1) of Section 146 was incompetent. We, therefore, overrule the first contention and hold that the Magistrate had acted legally in referring the dispute to the Civil Court for decision.

9. As regards the second contention, whether it is open to a party to challenge the order of reference made by the Magistrate under sub-section (1) of Section 146 by way of revision, we think that the answer must be in the affirmative. In the present case, however, the point raised is purely academic inasmuch as the applicant did not file any revision against the said order of the Magistrate.

10. It remains however to consider whether it is open to a party to assail the validity of the order of reference after

the Civil Court has recorded a finding on the question of possession and that finding has been adopted by the Magistrate by passing an order under sub-section (1-B) of Section 146, Criminal P. C. Prima facie, it seems to us that such a course would result in defeating the purpose which the law seeks to achieve, namely, to expeditiously dispose of the proceedings under Section 145, Criminal P. C. Apart from the fact that the aggrieved party has a right and opportunity to file a revision against the order of the Magistrate making the reference to the Civil Court at the time when it was made, there is the further fact that the applicant having submitted to the jurisdiction of the Civil Court and contested the case before it, it would be contrary to the provisions of sub-section (1-D) of Section 146 to permit a party to challenge the finding of the Civil Court by an indirect method. If once it is held that the finding of the Civil Court is not subject to an appeal or to a review or revision, then it must follow that a party cannot be allowed to do that indirectly which he is prohibited from doing directly. (See *Madden v Nelson and Fort Sheppard Railway*, 1899 AC 626)

11. Coming to the last contention advanced by the learned counsel for the applicant, we are of opinion that the order passed by the Magistrate in terms of sub-section (1-B) of Section 146 cannot be assailed in revision in so far as that order is in conformity with the finding of the Civil Court. By sub-section (1-D) of Section 146 the legislature has put an embargo on appeal being filed against the finding of the Civil Court made on a reference under that section. The legislature has also barred the jurisdiction of the Criminal Court to review or revise any such finding of the Civil Court. It was said that the finding given by the Civil Court had merged in the order of the Magistrate and was no longer the decision of a Civil Court, but was in fact order of the Criminal Court, which is subject to the revisional jurisdiction of the Sessions Judge and the High Court. There is an obvious fallacy in this argument. The Magistrate while acting in pursuance of sub-section (1-B) of Section 146 does not exercise his own judgment but rather accepts and adopts the finding given by the Civil Court as final and conclusive, so that the finding of the Civil Court is an integral part of the order of the Magistrate with the result that the order of the Magistrate cannot be set aside without disturbing the finding of the Civil Court. Indeed, the finding of the Civil Court is inseparable from the order of the Magistrate. Take away the finding and the order of the Magistrate ceases to exist. How can it then be argued with any show of rea-

son that although the finding of the Civil Court is immune from attack, the order of the Magistrate based on such finding is liable to be set aside by way of revision?

12 The learned counsel referred to the case of Raja Singh v Mahendra Singh AIR 1963 Pat 243 (FB) in support of his argument that an order of the Magistrate passed in terms of sub-section (1 B) of Section 146 can be interfered with by the High Court in exercise of its revisional jurisdiction. Dealing with this question Misra J observed

In my opinion however sub section (1 B) cannot be read in that form. If the legislature intended to curtail the power of the High Court in regard to the order passed under Section 146 Cr P C there should have been side by side an amendment of Sections 435 and 439 of the Code. The same not having been done sub section (1 D) must be given a narrow interpretation so as to confine it only to the finding of the Civil Court as such and not to extend it to the position which results when such a finding has been adopted by the Magistrate and order passed upon its basis.

With great respect the reasoning adopted by the learned Judges of the Patna High Court seems to us to be based on a misconception. The learned Judges seemed to think that the bar created by sub-section (1 D) was in respect of the finding of the Civil Court only. The provisions of the Code of the Criminal Procedure relate to procedure in respect of criminal matters such as investigation, inquiry trial or right of appeal or revision etc. The Code does not and cannot make provision for a right of appeal or revision against a finding or order of the Civil Court. That is a matter which falls within the exclusive province of the Code of Civil Procedure. The learned Judges were misled into thinking that the Civil Court recording a finding in terms of Section 146 Cr P C was exercising a criminal jurisdiction and not a civil jurisdiction. At page 246 of their judgment the learned Judges said—

It is true no doubt that against a finding of the Civil Court no appeal review or revision will lie under the Code of Civil Procedure inasmuch as the Civil Court while adjudicating a reference made by the Magistrate does not act as a Civil Court independently but only records a finding as a tribunal which in itself will not be operative unless it is adopted by the Magistrate although the latter is bound to act in conformity with it. The above view of the learned Judges of the Patna High Court is clearly untenable in view of the decision of the Supreme Court in Ram Chandra Agarwal v State of U P 1966 All LJ 1122 =

(AIR 1966 SC 1888) Mudholkar J speaking for the Court stated as follows

No doubt the Magistrate while discharging his function under the Code of Criminal Procedure under Section 145 (1) would be exercising his criminal jurisdiction because that is the only kind of jurisdiction which the Court confers upon the Magistrate but when the Magistrate refers the question to a Civil Court he does not confer a part of his criminal jurisdiction upon the Civil Court. There is no provision under which he can clothe a Court or a tribunal which is not specified in the Criminal Procedure Code with criminal jurisdiction.

There can therefore be no doubt that the finding given by the Civil Court in pursuance of the provision of sub-section (1 B) of Section 146 is a finding of a Court of civil jurisdiction and as such it is not subject to the jurisdiction of Criminal Court. In so far as sub section (1 D) bars appeal from such finding and prohibits review or revision of such finding it clearly envisages that in so far as the order of the Magistrate is based on the finding of the Civil Court the same cannot be interfered with in any way. The order being an integral part of that finding cannot be set aside in revision.

13 We are therefore of the opinion that the points raised by the learned counsel for the applicant are without merit and must fail.

14 The revision application is without merit and is accordingly dismissed.

Revision dismissed

1970 CRI L J 196 (Vol 76 C N 43) =

AIR 1970 ALLAHABAD 122 (V 57 C 13)

B D GUPTA J

Babboo Applicant v State Opposite Party

Criminal Revn No 1743 of 1967 D/ 18.9.1969 against order of S J Allahabad D/ 18.9.1967

(A) Prevention of Food Adulteration Act (1954) Section 13 — Sample of Cow's milk — Schedule of time for deterioration — Sample kept according to Rules — Sample retains its character and is capable of analysis for 10 months — Prosecution before 10 months — Accused held not deprived of benefit of Section 13 — 1968 All LJ 916 Not foll

Sample of Cows milk to which necessary quantity of formaline has been added according to Rules and which has been kept in normal circumstances retains its character and is capable of being usefully analysed for a period of about ten months (Para 4)

GM/HM/C976/69/NNH/D

Hence, where the accused from whom the sample of Cow's milk was taken, was sought to be prosecuted after six months before the expiry of 10 months from the date on which the sample was collected, it could not be said that the accused was deprived of an opportunity to avail himself of the benefit of the provisions contained in Section 13, if the necessary precautions prescribed by the Rules for preserving the same have been taken. Cr. Rev. No 1612 of 1962, D/- 30-9-1965 (All), Foll; AIR 1967 SC 970, Disting, 1968 All LJ 916 held not correctly decided and Not Foll (Para 4)

(B) Prevention of Food Adulteration Rules (1955), Rule 20 — Rule as to addition of preservative mandatory.

Where the prosecution failed to establish that the necessary preservative was added to the sample, it could not be said as to what may have happened to the sample by the time it was examined by the Public Analyst, and no reliance on the result of the analysis by the Public Analyst can be placed for sustaining the conviction (Para 5)

Cases Referred: Chronological Paras

(1968) 1968 All LJ 916 = 1969
All Cri R 172, Net Ram v State 3, 4
(1967) AIR 1967 SC 970 (V 54) =
1967 Cri LJ 939, Municipal Corporation of Delhi v Ghisa Ram 4
(1965) Cri Revn No 1612 of 1962,
D/- 30-9-1965 (All), Gokul Chand v State 4

P. S. Misra, for Applicant; Government Advocate, for Opposite Party.

ORDER:— This is a revision by one Babboo who stands convicted for the offence punishable under Section 16 of the Prevention of Food Adulteration Act, hereinafter referred to as the Act

2. The prosecution case was that, on the morning of the 21st of July, 1966, the applicant was found on the Rewa Road near village Sarangpur, within the jurisdiction of police station Ghurpur in the district of Allahabad, transporting cow's milk for sale, sample whereof was purchased by Sri B L Sharma, a Food Inspector, and, on examination of the said sample by the Public Analyst, the same was found deficient in non-fatty solid contents. The applicant pleaded not guilty and stated that he was transporting the milk for his own use and not for sale. The learned Magistrate accepted the prosecution case, rejected the defence and convicted the applicant, awarding him rigorous imprisonment for a period of one year. An appeal to the learned Sessions Judge having failed the applicant filed this revision.

3. At the hearing of this revision learned counsel for the applicant raised two substantial points. The first was that, by reason of delay in starting the

prosecution of the applicant, the applicant was deprived of the valuable right conferred on him by the provisions contained in Section 13 of the Act to get the sample analysed by the Director of the Central Food Laboratory because by the time the applicant learnt of his prosecution the sample must have deteriorated to such an extent that it would have defied analysis. Reliance in support of this contention, was placed by learned counsel on my decision in the case of Net Ram v State, 1968 All LJ 916. The second point raised by learned counsel was that, on the material on record it could not appropriately be held that when the Food Inspector took the sample he added thereto the necessary quantity of formaline as required by the rules framed under the Act. Having heard learned counsel for the parties I am of the opinion that, whilst the first contention must be negatived, the second must be accepted and this revision must be allowed.

4. The facts relevant to the first contention are that the sample in question was taken on the 21st of July, 1966. The report of the Public Analyst is dated the 3rd of November, 1966. The complaint filed by the Food Inspector, which was duly forwarded to the Court of the Magistrate concerned, is dated the 30th of November, 1966. The case was registered and, on the 14th of December, 1966, summons was directed to be issued to the applicant requiring the applicant to appear on the 27th of December, 1966. Nothing appears to have been done by the office of the learned Magistrate in compliance with the above order with the result that, on the 27th of December, 1966, the learned Magistrate passed another order for the issuance of fresh summons requiring the applicant to appear on the 22nd of February, 1967 and on the latter date the applicant appeared in Court for the first time. Keeping in view the fact that the sample in question was alleged to have been taken from the applicant on the 21st of July, 1966, it was urged that more than six months had passed by the time the applicant had the opportunity to avail himself of the benefit of the provisions contained in Section 13 of the Act and the sample must have deteriorated and analysis thereof by the Director of the Central Food Laboratory must have been rendered useless. This case is no doubt fully covered by the decision recorded by me in the case of 1968 All LJ 916 (supra), in which I applied the schedule of time in regard to deterioration of curd which had been accepted by the Supreme Court in the case of Municipal Corporation of Delhi v. Ghisa Ram, AIR 1967 SC 970 on the basis of evidence given by one Dr. Satya Prakash. Mr Girdhar Malaviya,

appearing for the State however draw my attention to the decision recorded by D S Mathur J on the 30th of September 1965 in Criminal Revn No 1612 of 1962 (All) Gokul Chand v State in support of the contention that in case of cow's milk to which the necessary quantity of formaline had been added and which had been kept in normal circumstances the sample retains its character and is capable of being usefully analysed for a period of about ten months. A perusal of the judgment makes it clear that the above conclusion was recorded by brother Mathur after a thorough investigation into the question and if I may say so with respect I see no reason why the said conclusion should not be accepted as correct and followed in cases dealing with cow's milk. After reading the material set forward by brother Mathur in support of the conclusion recorded by him I have no hesitation in recording my feeling that in accepting in regard to milk the schedule of time accepted by the Supreme Court in regard to curd in the case of AIR 1967 SC 970 (supra) I committed an error and that the schedule of time which should be applied to cases of milk should be the one incorporated by brother Mathur in Criminal Revn No 1612 of 1962 D/- 30-9-1965 (All). It is unfortunate that the above decision even though approved for reporting does not appear to have been reported in any law reports even though more than three years have passed since it was recorded. If this decision had been reported or had otherwise been brought to my notice when I decided the case of 1963 All LJ 916 (supra) my conclusion I trust would have been in line with the result of a thorough investigation into the matter by brother Mathur in Criminal Revn No 1612 of 1962 D/- 30-9-1965 (All) referred to above. Therefore in the present case since only about six months had passed since the date on which the sample of milk was collected by the Food Inspector I am unable to accept that the sample was bound to have deteriorated by the time the accused had the opportunity to avail himself of the benefit of the provisions contained in Section 13 of the Act. The first contention must therefore fail.

5 As regards the next contention learned counsel for the State concedes that apart from such statements of the Food Inspector as are on record there is no other material on record to make out that the required quantity of formaline was added to the sample of milk purchased by the Food Inspector from the applicant. There is no controversy that none of the three bottles into which the sample was divided was before the Court. A perusal of the provisions con-

tained in Section 11 of the Act makes it clear that of the three containers into which the sample is divided one is handed over to the person from whom the purchase is made another is sent for analysis to the Public Analyst and the third container is retained by the Food Inspector for production in case any legal proceedings are taken or for analysis by the Director of the Central Food Laboratory under sub-section (2) of Section 13 of the Act as the case may be. In this case before me the third container which the Food Inspector must have retained for production in case any legal proceedings were taken was however not produced by the Food Inspector at the trial. During the course of his examination-in-chief the Food Inspector Sri B L Sharma made a statement that he had added preservative to the sample purchased by him. He did not mention the substance which he had added as preservative nor the quantity or proportion thereof. The matter was pursued in cross-examination and the Food Inspector stated that there was nothing on the record of the file with him to indicate that preservative had been added to the sample purchased by him. He stated that in the labels which are pasted on the containers a mention is made of the preservative which is added but he confessed that he had before him neither any label nor any container. If he had retained the third container and brought the same with him whilst the trial was going on and had produced the same the label thereon would have disclosed the fact of the adding of preservative as also the nature and quantity of the preservative actually added. Learned counsel for the State has been unable to place before me any material which might furnish any explanation for this omission on the part of the Food Inspector.

I am thus left with the bald statement made by the Food Inspector more than ten months after the date on which he had purchased the sample of milk that he had added preservative to the sample purchased by him. I find it impossible to accept that the Food Inspector remembered as a fact the adding of preservative to the sample purchased by him from the applicant after a lapse of such a long time. It appears manifest that during this long period in his capacity as Food Inspector he must have taken samples in numerous cases and the best that can be said about his assertion that he had in fact added preservative in the case in question is that this assertion was merely the result of belief that he must have done so and not the result of actually remembering as a fact that he had done so on the date and time when he purchased the sample in question. The provisions contained in Rule 20 are manda-

tory and I find it impossible to accept that the prosecution has established compliance with the rule. Failure on the part of the prosecution to establish that the necessary preservative was added would lead to the result that it cannot be said as to what may have happened to the sample by the time it was examined by the Public Analyst, and no reliance on the result of the analysis by the Public Analyst can, therefore, be placed for sustaining the conviction of the applicant.

6. Accordingly this revision is allowed and the conviction of the applicant and the sentence of one year's R. I. awarded to him are set aside. The applicant is on bail. He need not surrender. His bail bonds are discharged.

Revision allowed.

1970 CRI. L. J. 199 (Vol. 76, C. N. 44) =

AIR 1970 ANDHRA PRADESH 47

(V 57 C 7)

SHARFUDDIN AHMED

AND VENKATESWARA RAO, JJ.

In re, P. Bapanaiah, Accused Petitioner.

Criminal Revn Case No. 26 of 1967; Criminal Revn. Petn. No. 24 of 1967, D/- 24-11-1967, from order of Principal S. J.; Hyderabad at Secunderabad, D/- 31-10-1966.

(A) Defence of India Act (1962), S. 3 (1)—Defence of India (Part XII-A, Gold Control) Rules (1962), R. 126-A — Rules are within rule-making power conferred by S. 3 (1)—Burden of proving invalidity of Rules lies on person who challenges their validity.

The Gold Control Rules do serve some, at least, of the purposes mentioned in Section 3 (1) of the Act and are consequently not in excess of the rule-making powers of the Central Government.

(Para 8)

The power conferred under S. 3 (1) to make rules can be exercised by the Central Government if only it is necessary or expedient to do so for securing any one or more of the objects specified therein. The connection that is required to be established between the rules framed and the purposes prescribed under S. 3 (1) must be a real one and not far-fetched, problematical, hypothetical or too remote though it need not necessarily be proximate.

(Para 6)

There is a real connection between the purposes mentioned in Section 3 (1) and the objects sought to be achieved by the Gold Control Rules. The control, under Rule 126-P (2), on possession etc., of gold even by private individuals may not

directly promote the defence of India or the other objects enumerated in S. 3 (1) but it does certainly and substantially help the Government in securing some at least of those objects as the rules do promote, though indirectly but not remotely, the defence of India and the maintenance of supplies essential to the life of the community. Since the Legislature has considered framing of rules necessary for controlling the possession etc. of the subjects mentioned in item 33 of Section 3 (2), the burden of proving the invalidity of the Rules lies heavily on the person who challenges the validity of the Rules. AIR 1966 Bom 70 and AIR 1962 SC 316, Rel. on.

(Para 6)

(B) Defence of India Act (1962), S. 3 (2)—Scope — Sub-section does not confer any additional power — It is subject to limitation imposed by sub-section (1).

The rule-making power conferred by sub-section (2) of S. 3 is subject to the same limitations as are imposed by sub-section (1) of Section 3 as the clauses thereunder are only illustrative of the matters pertaining to which rules could be framed. The Legislature simply sought to give guidance to the Central Government by means of this sub-section, on the question as to what it can do for securing the purposes mentioned in sub-section (1). Section 3 (2) would neither add to nor take away the powers conferred by Section 3 (1). The mere fact that rules are framed in relation to one or other of the subjects mentioned in sub-section (2) does not by itself render them valid if they are not referable to the powers conferred on the Central Government by sub-section (1). (Obiter).

(Para 9)

(C) Constitution of India, Arts. 21, 22, 352 (1), 359 (1) — Defence of India (Part XII-A Gold Control) Rules (1962), R. 126-P (2) and (4) — Person charged with offence under Rule 126-P (2) — Cannot take recourse to Court during period of emergency, even if his rights under Article 21 are infringed.

(Para 11)

(D) Defence of India (Part XII-A Gold Control) Rules (1962), Rule 126-P (4) read with R. 126-P (2) — Criminal P. C. (1898), Ss. 5, 260, 262 (2) — Summary trials — Sentence of imprisonment not exceeding three months under S. 262 (2) — Applies only to offences under S. 260 and not to offences under any special enactment — Rule 126-P (2) cannot be questioned on that ground — Rule 126-P (4) prescribes procedure — Rule 126-P (2) read with R. 126-P (4) is not repugnant to Art. 13 (2) of Constitution — Constitution of India, Art. 13 (2).

There is really no conflict between the provisions of Rule 126-P (4) read with Rule 126-P (2) and Ch. XXII of Crimi-

nal P C (1898) relating to summary trials (Para 1)

In view of Section 5 (2) Cr P C the maximum sentence of three months provided in Section 262 (2) Cr P C is applicable only to the offences under S 260 Cr P C and not to the offences which are rendered summarily triable by virtue of the provisions of special enactments such as the Defence of India Rules. So when an enactment provides for summary trial of an act or omission which is an offence thereunder it refers only to the procedure to be adopted and not to punishment also. This inference is further strengthened by the use of the words 'in the case of any conviction under this Chapter' occurring in Section 262 (2) of the Code. It is further settled law that a special enactment overrides a general one.

(Para 12)

Rule 126 P (4) specifically provides for summary trial of offences under R 126 P (2) notwithstanding that Section 262 (2) Cr P C limits the sentence to three months. It is thus clear that Rule 126 P (4) simply prescribes the procedure and that Rule 126 P (2) which prescribes a minimum punishment of six months cannot be questioned having regard to the fact that the minimum sentence referred to in Section 262 (2) Cr P C is applicable only to offences enumerated in Section 260 of the Code. For the same reason, it cannot also be said that the provisions of those Rules are repugnant to Art 13 (2) of the Constitution. AIR 1950 Bom 273 Rel on AIR 1954 Mad 833 Disting.

(Paras 12 14)

(C) Defence of India (Part XII A Gold Control) Rules (1962) Rule 126-P (2) — Constitution of India, Art 14 — Rule 126 P (2) is not discriminatory and does not offend Art 14 — Criminal P C (1898) S 262 (2).

Rule 126-P (2) is not discriminatory and does not offend Art 14 of the Constitution. (Para 14)

While Art 14 forbids class legislation it does not prohibit reasonable classification, subject of course to the condition that it is founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group and that differentiation has a rational relation to the object sought to be achieved by the statute in question. AIR 1958 SC 538 Foll.

(Para 15)

The mere fact that certain offences against Gold Control Rules are punishable with imprisonment of not less than six months while under Section 262 (2) Cr P C no sentence of imprisonment for a term exceeding three months can be passed in the case of a conviction under Chapter XXII relating to sum-

mary trials does not by itself justify the contention that the classification in question is unreasonable.

The Defence of India Act and the rules made thereunder are intended to prevent the commission of certain types of offences during the emergency to ensure the security of the country and the interests of the community. It would not be possible to achieve this object unless higher penalties and deterrent sentences are prescribed for certain types of offences including offences against the Gold Control Rules which are necessary and expedient for securing the defence of India and maintenance of supplies and services essential to the life of the community among other things.

(Para 15)

(F) Defence of India (Part XII A Gold Control) Rules (1962) Rr 126 L (16) (aa), 126 M (20) (aa) 126 P (2) — Constitution of India, Art 20 (2) — Imposition of penalty besides confiscation of gold on a person by customs authority — Neither confiscation nor infliction of penalty amounts to prosecution contemplated in Art 20 (2) — Prosecution of such person under S 135 of Customs Act (1962) and Rule 126-P (2) — Art 20 (2) not attracted — Customs Act (1962) S 135 (2) — (Criminal P C (1898) S 403)

Prosecution of a person on whom, besides confiscation of contraband gold, penalty has been imposed under S 135 of Customs Act (1962) and Rule 126 P (2) does not offend Art 20 (2) of the Constitution. (Para 17)

Confiscation of the contraband gold does not amount to prosecution or punishment of the person. Confiscation of the goods is an order in rem dealing with goods and not a punishment imposed on the person. AIR 1958 SC 845 Rel on.

(Para 16)

Imposition of penalty by Customs Authorities does not amount to prosecution contemplated by Art 20 (2) of the Constitution. The term 'prosecution' means a proceeding either by way of indictment or information in the criminal Courts in order to put an offender upon his trial. The Deputy Collector Central Excise can by no stretch of imagination, be equated to a Court for the simple reason that he is vested with certain powers in the matter of effecting searches and seizures compelling attendance of witnesses and the like by the Rules. The legislature was aware of the distinction between a proceeding before the Customs Authorities and the criminal proceeding before a Magistrate and therefore in the absence of one of the three essential conditions laid down in clause (2) of Art 20 of the Constitution viz prosecution the prohibition against double jeopardy would

not become operative. AIR 1959 SC 375, Rel on. (Para 17)

(G) General Clauses Act (1897), S. 26 — Prohibition under, is against punishment twice for same offence — Simultaneous prosecution under more than one enactment is not barred—Choice of enactment or enactments for prosecution is with prosecutor or authority concerned.

It can be seen from the language employed in section 26 that the emphasis is on the word "punishment" and not so much on "prosecution" as what is ultimately prohibited is imposition of punishment twice for the same offence. The words "shall be liable to be prosecuted and punished under either or any of those enactments" would show that there is no bar against simultaneous prosecution under more than one enactment. If the prosecution is restricted to only one enactment, there would be no question of rendering the offender liable for punishment twice for the same offence. It is therefore obvious that what is intended is prevention of punishment twice for the same act or omission which is an offence under more enactments than one and not prosecution also. It is left to the prosecutor or the authority concerned to choose under which enactment or enactments an offender shall be prosecuted when the act or omission alleged against him constitutes an offence under two or more enactments. But in the event of the prosecution being launched under two or more enactments, the punishment should be under one alone of those enactments (Para 18)

Cases Referred: Chronological Paras

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| (1966) AIR 1966 Bom 70 (V 53)=
67 Bom LR 234, Amichand v.
G. B Kotak | 6, 7, 11 |
| (1962) AIR 1962 SC 316 (V 49)=
1962 (1) Cri LJ 364, Collector of
Customs v. Sampathu Chetty | 6 |
| (1959) AIR 1959 SC 375 (V 46)=
1959 Cri LJ 392, Thomas Dana v.
State of Punjab | 17 |
| (1958) AIR 1958 SC 538 (V 45)=
1959 SCR 279, Ram Krishna Dal-
mia v Justice S R Tendolkar | 15 |
| (1958) AIR 1958 SC 845 (V 45)=
1958 Cri LJ 1355, Sewpujanrai
Indrasanrai Ltd v. Collector of Cus-
toms | 16 |
| (1954) AIR 1954 Mad 833 (V 41)=
1954 Cri LJ 1267, In re, Guruviah
Naidu | 13 |
| (1950) AIR 1950 Bom 273 (V 37)=
51 Cri LJ 1303, Emperor v. Narji
Bhalji | 12 |
| T. V. Sarma, for Petitioner; Addl
Public Prosecutor, for State. | |

VENKATESWARA RAO, J.: This criminal revision petition, which arises out of a prosecution under Section 135 of the

Customs Act and Rule 126-P (2) of the Defence of India Rules, 1962 (Part XII-A Gold Control) has been referred to the Bench by our learned brother, Mohammed Mirza, J, for decision "in view of the important question of law raised" in the case

2. The facts of the case may briefly be set out here. On receipt of information that Pabbati Bapanaiah, the petitioner herein, would be leaving Hyderabad for Kothagudem by bus on 3-2-65, with contraband gold, the Deputy Superintendent, Customs and Central Excise, Hyderabad, with some members of his staff, lay in wait at the Gowliguda Bus Depot in Hyderabad. The petitioner arrived there at 9 A M with a holdall in his hand. On a search of his person and belongings, it was found that he concealed in a pillow, four gold slabs with foreign markings "Johnson Mathey 999-O London 10 tolas". Those slabs were seized and further investigation revealed that no permit was issued to the petitioner, who is a licenced dealer in gold, to import them from abroad. After necessary enquiry, the Deputy Collector, Central Excise, Guntur, imposed a penalty of Rs. 5,000/- on the petitioner under Rule 126-L (16) (aa) of the Defence of India Rules, 1962 (Gold Control) and also ordered confiscation of the gold as provided in R 126-M (2) (aa) of the same Rules, on 24-7-65. The Assistant Collector, Central Excise, thereafter preferred a complaint against the petitioner before the 4th City Magistrate, Hyderabad for contravening the provisions of section 135 of the Customs Act, 1962 and Rule 126-P (2) of the Defence of India Rules, 1962 (Part XII-A Gold Control). A preliminary objection was raised before the learned Magistrate that the prosecution is untenable in view of the mandatory provisions of Article 20 (2) of the Constitution of India and Section 403, Cr P C as the Deputy Collector of Central Excise, Guntur, had already imposed a penalty of Rs 5,000/- on the petitioner besides confiscating the gold by his order dated 24-7-1965. It was further urged before him that the prosecution is barred by clause 26 of the General Clauses Act also. The learned Magistrate overruled those objections whereupon the petitioner carried the matter in revision to the Principal Sessions Judge, Hyderabad at Secunderabad. In addition to the pleas raised before the Magistrate, it was urged before the learned Sessions Judge that the prosecution of the petitioner under Rule 126-P (2) of the Defence of India Rules infringes the right guaranteed to him under Article 21 of the Constitution and is consequently bad. The learned Sessions Judge dismissed the petition negating all the contentions urged for the petitioner and hence this petition

3 It may be stated at the outset that besides the pleas urged in the Courts below the learned counsel for the petitioner has raised before us yet another contention that Rules 126 A to 126 Z contained in Part XII A of the Defence of India Rules which will hereinafter be referred as Gold Control Rules are in excess of the rule making powers of the Central Government and are therefore liable to be struck down

4 We will first take up for consideration the learned counsel's argument that the Central Government exceeded the rule making power conferred on it by subsection (1) of S 3 of the Defence of India Act in promulgating the Gold Control Rules. It will be useful to extract here the relevant provisions of S 3 of the Act.

3 Power to make rules

(1) The Central Government may by notification in the official gazette make such rules as appear to it necessary or expedient for securing the defence of India and civil defence the public safety the maintenance of public order or the efficient conduct of military operations or for maintaining supplies and services essential to the life of the community

(2) Without prejudice to the generality of the powers conferred by subsection (1) the rules may provide for and may empower any authority to make orders providing for all or any of the following matters namely

xx xx xx

(33) controlling the possession, use or disposal of or dealing in coin, bullion, bank notes currency notes securities or foreign exchange

It might be recalled that the President of India declared on the 26th of October 1962 that a grave emergency existed whereby the security of India was threatened by external aggression as by then there was large scale Chinese invasion against the Indian borders. On the same day he promulgated The Defence of India Ordinance in exercise of his powers under Art 123. This Ordinance was later replaced by the Defence of India Act 1962 (51 of 1962). It is in exercise of the powers conferred by S 3 (1) of this Act that the impugned rules were made.

5 As already stated Sri T V Sarma the learned counsel for the petitioner contends that the Gold Control Rules including Rule 126 P (2) which renders possession of any quantity of gold in contravention of any of the provisions of Part XII A (Gold Control Rules 1962) punishable with imprisonment and fine are in excess of the rule making powers vested in the Central Government by virtue of Section 3 (1) of the Act. The learned Public Prosecutor has on the other hand

argued that the rules in question are perfectly within the competence of the Central Government as according to him they are made with the avowed object of securing one or more of the purposes specified in Section 3 (1) of the Defence of India Act and that the validity of the rules cannot in any view be questioned in view of the fact that the Legislature in enacting subsection (2) of Section 3 has declared its intention that rules made under any one or more of the clauses of that subsection would necessarily be for securing the purposes mentioned in sub-clause (1) of Section 3 and as item 33 listed under subsection (2) of S 3 provides for framing rules for controlling possession use disposal etc of bullion which includes primary gold gold ornaments and gold in any of its forms. We will now proceed to examine the respective merits of these contentions.

6 Going back to Section 3 (1) of the Act it will be seen that the power conferred thereunder to make rules can be exercised by the Central Government if only it is necessary or expedient to do so for securing any one or more of the objects specified therein viz the defence of India civil defence the public safety maintenance of public order or the efficient conduct of military operations and for maintaining supplies and services essential to the life of the community. It is urged by Sri Sarma that the Gold Control Rules do not in any way contribute to the realisation of any one of the objects specified in Section 3 (1) and that Rule 126 P (2) in particular which seeks to control possession of gold even by individuals for their personal use such as making ornaments is totally unrelated to the purposes to achieve which alone the Central Government is empowered to make rules. There is no gain saying that the connection that is required to be established between the rules framed and the purposes prescribed under S 3 (1) of the Defence of India Act must be a one and not far fetched or problematical hypothetical or too remote though it need not necessarily be proximate. But it must at the same time be remembered that the burden of proving the invalidity of the impugned rules lies heavily on the petitioner in view of the inclusion of item 33 under subsection (2) of S 3 indicating that the Legislature considered framing of rules for controlling the possession etc. of bullion and the other subjects mentioned in item 33 to be necessary or expedient for securing one or the other of the objects specified in Section 3 (1).

In the first blush the contention put forth by Sri Sarma that control over possession of gold by individuals for their personal use has absolutely no connection or bearing on the objects sought

to be secured by Section 3 (1). But a careful examination of the matter would reveal that there is a real connection between the purposes mentioned in Section 3 (1) and the objects sought to be achieved by the Gold Control Rules. The control or possession etc, of gold even by private individuals may not directly promote the defence of India or the other objects enumerated in Section 3 (1) of the Act but it does certainly and substantially help the Government in securing some at least of those objects as was held by their Lordships of the Bombay High Court in *Amichand v C. B. Kotak*, AIR 1966 Bom 70. After referring to the contentions raised before him and adverting to the observations of their Lordships of the Supreme Court in *Collector of Customs v. Sampathu Chetty*, AIR 1962 SC 316 about the need for stringent methods, both legal and administrative, to minimise the evil of smuggling which has a deleterious effect on the national economy by adversely affecting India's position relating to foreign exchange, Tambre, J., made the following observations at page 36 of the decision referred to above:

"The import of gold into India has been stopped from the year 1939. There is very little production of gold in India. Gold available in the internal markets in India is gold which has been brought from countries other than India. People of India have the habit of preparing ornaments and articles of gold as well as of hoarding gold. The prices of gold in India are, therefore, necessarily very high and lucrative as compared with prices of gold in other countries, and that is an incentive and inducement to people to smuggle gold. If gold is to be made available to people in sufficient quantity at prices prevailing in other countries to meet the demands, the Central Government would have to expend about 50 to 60 crores of rupees per year. That would result in expending foreign exchange to that extent for the purchase of gold. The various legislations made have not been sufficiently effective to check smuggling of gold. Smuggling of gold is adversely affecting to a great extent of India's foreign exchange reserves. For arresting these mischiefs, it was necessary to control the internal market and business in gold for the purpose of conservation of foreign exchange which was very essential in the times of emergency, for the defence of India as well as for maintenance of essential commodities and services, and it is for this reason and to achieve these objects that the Gold Control Rules have been promulgated. In other words, the said rules which, inter alia, drastically restrict dealings in gold have been framed to arrest the root cause that has made gold smuggling such a

lucrative business and thereby conserve foreign exchange which is so essential for the defence of India."

It is thus clear that there is a reasonable nexus between the object sought to be achieved by the Gold Control Rules and the purposes mentioned in Section 3 (1) of the Act as the rules do promote, though indirectly but not remotely, the defence of India and the maintenance of supplies essential to the life of the community as indicated in AIR 1966 Bom 70.

7. We feel unable to agree with Sri Sarma that control or possession of gold by individuals for their personal use such as making ornaments can, by no stretch of imagination, be considered necessary for securing the objects specified in Section 3 (1) of the Act, as so long as the unabated demand for gold, consequent on the lure which the people of India have for it, continues unchecked, the smuggling operations would go on merrily and affect the defence of India by causing a drain on the foreign exchange potentialities of the country besides involving the nation in loss of considerable revenue by way of customs duty and also avoidable expenditure on a vast establishment for the purpose of preventing smuggling. The amount that could be saved in the absence of smuggling could be utilised with advantage for the defence of the country and maintenance of supplies and services essential to the life of the community as contemplated by Section 3 (1) of the Act. It will be useful in this context to extract the observations of Naik, J., also who, by a concurring though separate judgment, held in AIR 1966 Bom 70, that the validity of the Gold Control Rules is not open to question (page, 106).

"It is undisputed that smuggling of gold involves a heavy drain on the foreign exchange resources of India. Smuggling therefore, has to be checked. The measures undertaken under the Sea Customs Act and the Foreign Exchange Regulations have not achieved the purpose of checking smuggling. Once gold is successfully smuggled into this country, it is very easy for the same to find a place in the internal market. It can be easily turned into ornaments and once transformed in the shape of ornaments, it is impossible to recognise that the ornaments have been prepared out of the smuggled gold. The ornaments thus prepared can easily pass off as having been made out of the existing stock or out of indigenous gold. This capacity for quick transformation into ornaments is the principal difficulty in the way of preventing smuggling. Smuggling will continue notwithstanding the enactment of stringent measures so long as it is profitable to smuggle. The trade of smuggl-

ing will continue to be profitable so long as the people have a hankering or a lure for gold. The best method of preventing smuggling therefore is to bring about a shrinkage in the demand for gold. It is for that purpose that the control and restriction on the manufacture and sale of gold ornaments appears to have been devised.

8 We have therefore no hesitation in agreeing with the learned Public Prosecutor that the Gold Control Rules do serve some at least of the purposes mentioned in Section 3 (1) of the Act and are consequently not in excess of the rule-making powers of the Central Government.

9 In the view expressed above it is unnecessary to go into the question as to whether the validity of the Gold Control Rules is not open to question even if it should be found that they do not serve to achieve any one of the purposes mentioned in sub-section (1) of Section 3 of the Act as the Legislature by enacting sub-section (2) has declared its intention that rules made under any one or more of the clauses of that sub-section would necessarily be for securing the purposes mentioned in sub-clause (1) of S 3 and the Gold Control Rules are framed for controlling possession etc of gold as provided in item 33 of sub-section (2). We may however observe in passing that the rule-making power conferred by sub-section (2) is subject to the same limitations as are imposed by sub-section (1) of Section 3 as the clauses thereunder are only illustrative of the matters pertaining to which rules could be framed. The Legislature simply sought to give guidance to the Central Government by means of this sub-section on the question as to what it can do for securing the purposes mentioned in sub-section (1). Section 3 (2) would neither add to nor take away the powers conferred by Section 3 (1). The mere fact that rules are framed in relation to one or other of the subjects mentioned in sub-section (2) does not by itself render them valid if they are not referable to the powers conferred on the Central Government by sub-section (1). There is however no such difficulty in the instant case as it was already seen that the impugned rules are perfectly within the competence of the Central Government and are not in excess of its powers as they are necessary to secure the defence of India and maintenance of supplies and services essential to the life of the community.

10 It was next contended that R 126-P (2) read with R 126 P (4) of the Gold Control Rules would infringe the rights guaranteed to the petitioner by Art 21 of the Constitution of India. Rule 126 P (4) lays down that notwithstanding anything contained in the Code of Cri-

iminal Procedure 1898 (V of 1898) an offence under (this) Rule committed after the date of commencement of the Defence of India (7th Amendment) Rules, 1962 shall be tried summarily by a Magistrate. Rule 126 P (2) renders possession or control purchase acquisition or acceptance etc of any quantity of gold in contravention of the provisions of Part VII A of the Defence of India Rules punishable with imprisonment for a term not less than 6 months and not more than 2 years and also with fine. But Section 262 (2) Cr P C lays down that no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Chapter XXII of that Code relating to summary trials. As Rule 126 P (4) provides for summary trial of offences coming within the purview of Rule 126 P (2) which prescribes for such offences a minimum punishment of six months imprisonment and as this term of imprisonment is in excess of the maximum sentence that could be awarded under Section 262 (2) Cr P C it is argued that Rules 126 P (2) and (4) are unconstitutional as offending Article 21 of the Constitution. It was urged that the procedure prescribed by Rule 126 P (4) can not be considered to be procedure established by law unless Section 262 (2) Cr P C is repealed altered or amended by a competent legislature as it continues to be good law till then by virtue of Article 373 of the Constitution and cannot be overriden by rules framed by the executive providing for a minimum sentence of six months under Rule 126 P (2). It was further contended that Rule 126 P (2) prescribing a minimum sentence of six months is violative of the petitioner's rights under Article 13 (2) also of the Constitution which lays down that the State shall not make any law which takes away or abridges the rights conferred by Part III of the Constitution and that any law made in contravention of the same shall to the extent of the contravention be void.

11 In the first place the petitioner is not entitled to invoke the aid of Article 21 of the Constitution even if the impugned rules should deprive him of his personal liberty otherwise than in accordance with procedure established by law as the President in exercise of his powers under Article 359 (1) of the Constitution of India declared by a gazette notification dt 3 11 62 that the right of any person to move any Court for the enforcement of the rights conferred by Article 21 and Art 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Art 352 thereof on the 26th October 1962 is in force if such person has been deprived

of any such rights under the Defence of India Ordinance, 1962 or any rule or order made thereunder. (vide AIR 1966 Bom 70 (Page 73)).

12. Even otherwise, the contention in question cannot be sustained as there is really no conflict between the provisions of Rule 126-P (4) read with Rule 126-P (2) and Chapter XXII of the Criminal Procedure Code relating to summary trials. Section 260, Cr. P C enumerates the offences that could be tried summarily to which Section 262 (2) thereof limits the maximum sentence that could be imposed in the case of any conviction under Chapter XXII to three months. Section 5 (1) of the Code no doubt provides for all offences under the Indian Penal Code being investigated, enquired into, tried and otherwise dealt with according to the provisions "hereinafter" contained but clause 2 of this section, which deals with offences under any other law, lays down that they shall be tried etc. according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Rule 126-P (4) specifically says that notwithstanding anything contained in the Code of Criminal Procedure, an offence under that rule committed after the date of the commencement of the Defence of India Rules, 1962 shall be tried summarily by a Magistrate. This rule thus provides for summary trial of offences under Rule 126-P (2) notwithstanding that Section 262 (2), Cr. P C limits the sentence to three months. It is further settled law that a special enactment overrides a general enactment. This part, sentence of imprisonment, not exceeding three months, prescribed by Section 262 (2), Cr. P C, is applicable only to offences enumerated in Section 260, Cr. P. C, and not offences which are rendered summarily triable by virtue of the provisions of special enactments such as the Defence of India Rules. So, when an enactment provides for summary trial of an act or omission which is an offence thereunder, it refers only to the procedure to be adopted and not to punishment also. A similar view was expressed by a Division Bench of the Bombay High Court in *Emperor v Narji Bhalji* AIR 1950 Bom 273. That case arose out of a conviction awarded under the provisions of the Bombay Prohibition Act which prescribes a minimum sentence of imprisonment in excess of three months for several offences while providing at the same time that those offences shall be tried summarily. It was therefore contended that the accused could not be awarded a sentence of imprisonment exceeding three months in view of Section 262 (2), Cr. P C Re-

pealing this contention, Chainani, J. observed as follows at page 274

"I do not think that this contention is sound. The words 'any conviction under this Chapter' in sub-section (2) of S 262, show that this sub-section applies only in those cases which are tried summarily by reason of the provisions contained in that Chapter XXII, that is, in the case of conviction for any of the offences specified in Ss 260, 261 of the Code. The question of sentence is also not a matter of procedure. . . . Section 110 prescribes the procedure for the trial of cases arising under the Prohibition Act. Sub-section (2) of S 262 will, therefore, not apply in such cases."

It is thus clear that Rule 126 P (4), which lays down that offences punishable under Rule 126-P (2) shall be tried summarily, simply prescribes the procedure and that Rule 126-P (2) cannot be questioned having regard to the fact that the minimum sentence referred to in S 262 (2), Cr. P C is applicable only to offences enumerated in Section 260 of the Code. This inference is further strengthened by the use of the words "in the case of any conviction under this Chapter" occurring in Section 262 (2) of the Code. The sentence, if any, to be awarded to the petitioner would be one under the provisions of Rule 126-P (2) and not Chapter XXII of the Code of Criminal Procedure and so, Section 262 (2) of the Code limiting the term of imprisonment to three months does not in any way conflict with what is contained in Rule 126-P (2) of the Gold Control Rules.

13. In re, Guruviah Naidu, AIR 1954 Mad 833, cited for the petitioner has no application to the facts of the case on hand. It was held in that case that Section 16-A of the Madras General Sales Tax Act was unconstitutional as it deprived the person brought to book for alleged default in payment of Sales Tax of the right to explain and plead his non-liability therefor either by reason of the invalidity of the assessment or on account of his having discharged the liability by payment and the like. The right to be absolved of liability by pleading or explaining in the course of a statement under Section 342, Cr. P C is a substantive right and not a matter of mere procedure. It was therefore held that Section 16-A of the Madras General Sales Tax Act should be considered to be void as it hits against the rights of the accused under the Criminal Procedure Code, the Evidence Act, and the fundamental principles of criminal justice and is also repugnant to Article 14 of the Constitution of India.

14. There is likewise no force in the plea that the provisions of Rule 126-P (2) read with Rule 126-P (4) have the effect of taking away or abridging the

petitioners right not to be sentenced to a term exceeding three months as provided in Section 262 (2) Cr P C and are consequently repugnant to Article 13 (2) of the Constitution as it was already seen that the limit of sentence prescribed by Section 262 (2) Cr P C is applicable only to offences enumerated in Section 261 of the Code and not to offences under other Acts which are triable summarily by virtue of the provisions contained in those Acts

15 It was next contended that singling out of offenders against Gold Control Rules for being punished with a minimum sentence of six months imprisonment notwithstanding the provision in Rule 126-P (4) for their summary trial cannot be considered a reasonable classification made on any rational basis and is therefore repugnant to Article 14 of the Constitution which lays down that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. We are however unable to see much force in this contention either. It is now well settled that while Art 14 forbids class legislation, it does not prohibit reasonable classification subject of course to the condition that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that that differentia has a rational relation to the object sought to be achieved by the statute in question (vide *Ram Krishna Dalmia v Justice S R Tendolkar* AIR 1958 SC 538). It was indicated in the aforesaid decision that a law may be constitutional even though it relates to a single individual if on account of special circumstances or reasons applicable to him and not applicable to others that single individual may be treated as a class by himself.

The mere fact that certain offences against Gold Control Rules are punishable with imprisonment of not less than six months while under Section 262 (2) Cr P C no sentence of imprisonment for a term exceeding three months can be passed in the case of a conviction under Chapter XXII relating to summary trials does not by itself justify the contention that the classification in question is unreasonable as the preamble to the Defence of India Act shows that the provisions of that Act and the rules made thereunder are considered necessary to ensure the public safety and interest the defence of India and civil defence and the trial of certain offences and of matters connected therewith during the subsistence of the grave emergency whereby the security of India is threatened by external aggression. It is thus manifest that the Defence of India Act and the Rules made thereunder are intended to

prevent the commission of certain types of offences during the emergency to ensure the security of the country and the interests of the community. It would not be possible to achieve this object unless higher penalties and deterrent sentence are prescribed for certain types of offences including offences against the Gold Control Rules which as already stated are necessary and expedient for securing the defence of India and maintenance of supplies and services essential to the life of the community among other things. We cannot therefore agree that Rule 126-P (2) of the Gold Control Rules is discriminatory and offends Article 14 of the Constitution.

16 It was next urged that the prosecution of the petitioner under the provisions of Section 135 of the Customs Act and Rule 126-P (2) of the Defence of India Rules offends Article 20 (2) of the Constitution inasmuch as the Deputy Collector Central Excise Guntur had already imposed a penalty of Rs 5000/- on the petitioner besides confiscating the gold seized from him pursuant to the provisions of Rule 126-L (16) (aa) and Rule 126-M (20) (aa) of the Gold Control Rules. Article 20 (2) of the Constitution lays down that no person shall be prosecuted and punished for the same offence more than once. But it cannot for a moment be said that confiscation of the contraband gold would amount to prosecution or punishment of the person viz the petitioner nor was any such contention put forth by Sri Sarma the learned counsel evidently because confiscation of the goods is an order in rem dealing with goods and not a punishment imposed on the person as was held in *Sewpujanrai Indrasanrai Ltd v Collector of Customs* AIR 1958 SC 845.

17 The next point that remains to be considered is as to whether the petitioner can be considered to have been prosecuted and punished by the Deputy Collector Central Excise when he imposed on him a penalty of Rs 5000/-. Their Lordships of the Supreme Court who had occasion to deal with a similar question in *Thomas Dana v State of Punjab* AIR 1959 SC 375 held that proceedings before the Sea Customs Authorities under S 167 (8) of the Sea Customs Act are not 'prosecution' within the meaning of Art 20 (2) of the Constitution and that the fact that in such proceedings the Customs Authorities have confiscated the goods and also inflicted a penalty on the person does not therefore bring into operation the provisions of Article 20 (2) so as to prevent his prosecution and imprisonment under S 167 (81) of the Act read with S 23 and S 23-B Foreign Exchange Regulation Act and under Section 120 B Penal Code. Their Lordships also observed that the term prosecution

means a proceeding either by way of indictment or information in the Criminal Courts in order to put an offender upon his trial, that the Chief Customs Officer or any other officer lower in rank than him in Customs department is not a Court, that the legislature was aware of the distinction between a proceeding before the Customs Authorities and the criminal proceeding before a Magistrate and that in the absence of one of the three essential conditions laid down in clause (2) of Art 20 of the Constitution viz., prosecution, the prohibition against double jeopardy would not become operative. His Lordship, Subba Rao, J., as he then was no doubt pointed out in his dissenting judgment in AIR 1959 SC 375 that the word "Prosecuted" is comprehensive enough to take in a prosecution before an authority other than a magisterial or a criminal Court; but we are bound by the majority view which, as already stated, is that imposition of penalty by Customs Authorities does not amount to prosecution contemplated by Art 20 (2) of the Constitution. The learned counsel, Mr. Sarma tried to argue that on the facts of that particular case, their Lordships of the Supreme Court held that the Chief Customs Officer or his Subordinate was not a Court but that the Deputy Collector, Central Excise, who imposed penalty of Rs 5,000/- has all the trappings of a Court and that it should therefore be deemed that the petitioner was prosecuted and punished by a Court. We however feel unable to appreciate this contention as the Deputy Collector, Central Excise, can, by no stretch of imagination, be equated to a Court for the simple reason that he is vested with certain powers in the matter of effecting searches and seizures, compelling attendance of witnesses and the like by the Rules. It may also be noted that the powers of the concerned authorities both under the Sea Customs Act and the Gold Control Rules are almost similar. It therefore follows that the decision in AIR 1959 SC 375 that infliction of penalty by the Customs Authority does not amount to prosecution of the person so as to attract Article 20 (2) of the Constitution holds good in the instant case also. The plea based on Art 20 (2) of the Constitution is therefore untenable.

18. There is likewise no substance in the contention that the petitioner's prosecution both under the Sea Customs Act and the Gold Control Rules is contrary to Section 26 of the General Clauses Act. Section 26 of this Act reads:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but

shall not be liable to be punished twice for the same offence."

It can be seen from the language employed in this section that the emphasis is on the word "punishment" and not so much on "prosecution" as what is ultimately prohibited is imposition of punishment twice for the same offence. The words "shall be liable to be prosecuted and punished under either or any of those enactments" would show that there is no bar against simultaneous prosecution under more than one enactment. If it is intended to create an absolute bar not only against punishment for an act or omission which constitutes an offence under two or more enactments but also against prosecution, there would be no need for the words "but shall not be liable to be punished twice for the same offence". If the prosecution is restricted to only one enactment, there would be no question of rendering the offender liable for punishment twice for the same offence. It is therefore obvious that what is intended is prevention of punishment twice for the same act or omission which is an offence under more enactments than one and not prosecution also. It is left to the prosecutor or the authority concerned to choose under which enactment or enactments an offender shall be prosecuted when the act or omission alleged against him constitutes an offence under two or more enactments. But in the event of the prosecution being launched under two or more enactments, the punishment should be under one alone of those enactments. The trial before the Magistrate has not yet commenced in this case and it is still open to the Magistrate to confine trial of the petition to one of the two enactments alone. Even if he should try the petitioner under both the Customs Act and the Gold Control Rules, the propriety thereof can still not be questioned if ultimately the petitioner is not rendered liable for punishment under both the enactments. We are inclined to think that it is enough if the Magistrate is directed to bear this in mind but that the legality of the prosecution both under the Customs Act and the Gold Control Rules cannot however be assailed at this stage.

19. Though it was urged in the grounds of revision that Section 403, Cr P C is also a bar to the prosecution of the petitioner under the provisions of the Customs Act and the Gold Control Rules, no argument was advanced to this effect obviously because this section comes into play only after the acquittal or conviction of the petitioner of the offences in question and if and when he is thereafter sought to be tried once again for the same offence or on the same facts for a different offence while the acquittal or conviction are in force.

20 For the several reasons stated supra we feel unable to agree with the petitioner that the order sought to be revised is vitiated by any illegality.

21 In the result therefore the petition fails and is dismissed.

Petition dismissed

1970 CRI L J 208 (Vol 76, C N 45) =

AIR 1970 CALCUTTA 81 (V 57 C 9)

N C TALUKDAR J

Supriyo Sarkar Accused Petitioner v
Sunil Ranjan Sarkar Complainant Opp
Party

Criminal Revn No 208 of 1969 D/ 9 6
1969

Criminal P C (1898) S 185(1) and (2)

—Fields of consideration under sub section (1) and sub section (2) are different

—Grounds of earlier commencement and of general convenience can be considered in case falling under sub section (1) —

Presence of additional accused in one proceeding has no bearing — (Civil P C (1908) Pre — Interpretation of Statutes

—Redundancy to be ruled out)

The provisions contained in S 185(1) of Criminal P C do not fetter in any way the discretion of the High Court by enjoining any condition precedent for deciding as to in which of the two or more courts subordinate to the same High Court the enquiry or trial shall proceed. In sub-section (2) of the said section however the sine qua non for such interference is as to where the proceedings 'were first commenced'. The Legislature could not have intended placing such a fetter on the courts' discretion under sub section (1). The canons of interpretation of statute enjoin that some meaning and effect must be given to the significant absence of the expression 'were first commenced' in sub section (1) and the specific presence thereof in sub section (2) of Section 185 of the Criminal P C. The principles of interpretation of statutes rule out redundancy.

(Para 4)

The dominant consideration of an earlier commencement has been incorporated in sub section (2) because it refers to a different state of circumstances where the two or more subordinate courts taking cognizance of the same offence are not subordinate to the same High Court and therefore to eliminate possible confusion and conflict the principle of earlier commencement has been enjoined as the proper criterion irrespective of any ground of general convenience or of any other sufficient reason for ultimately determining as to which of the two High Courts would direct the trial of such of-

fender to be held in any court subordinate to it. The same is not however the position as enjoined under sub-section (1) of Section 185 of the Code where the two Courts concerned are subordinate to the same High Court. The field of consideration is therefore wider and includes not only the ground of earlier commencement but also the ground of general convenience and any other sufficient reason, thereby not whittling down in any way the discretion of the High Court in deciding as to which of the two subordinate courts shall enquire into or try the offence. (Paras 4 and 5)

Further upon ultimate analysis the question of general convenience does not include the complainant and can only refer to the accused in such proceedings and the same again must depend on the facts of each case. Hence where one of the accused applied for dropping of proceedings in court A which was opposed not by the co accused but by the complainant held that the opposition by the complainant could not be upheld.

(Para 5)

It was further held that the fact that in the proceedings pending before one of the courts there were other persons proceeded against would not make any difference and had no bearing upon the point for consideration under Section 185 (1) AIR 1917 Cal 137 (FB) AIR 1920 PC 181 at p 186 and AIR 1964 SC 766 at p 772. Fol.

(Para 6)

Cases Referred Chronological Paras

(1964) AIR 1964 SC 766 (V 51) =

(1964) 1 SCJ 121 Ghanshyamdas v Regional Assistant Commr of Sales Tax Nagpur 4

(1920) AIR 1920 PC 181 (V 7) ; Quebec Railways Light Heat and Power Co Ltd v Vandry 4

(1917) AIR 1917 Cal 137 (V 4) = 21

Cal WN 320 (FB) Charu Chandra

Majumdar v Emperor 3 5

Prasun Chandra Ghosh Birendra Nath Panerjee for Petitioner Manoranjan Das Dipanjan Ghosal Rabiranjana Roy Gopal Chandra Ghosh for Respondent No 1 Dipak Kumar Sengupta for State

ORDER. — This Rule arises out of an order dated the 7th February 1969 passed by Shri S C Roy Additional Chief Presidency Magistrate Calcutta in case No C/833 of 1968 upon an application filed by the accused petitioner Shri Supriyo Sarkar for dropping the prosecution holding that the point raised in the said petition can only be decided by the High Court under Section 185(1) of the Code of Criminal Procedure and directing the accused petitioner to move the said Court for the necessary decision.

2 The facts leading on to the present Rule can be put in a short compass. A novel named Patak, written in Bengali

by the accused no 1, Shri Samaresh Basu, was printed and published by the present petitioner, Shri Supriya Sarkar in the Puja Number of the "Amrita" in the year 1375 B. S. In course of reading the said novel, the complaints concerned were of the view that the said novel contained several vulgar, indecent and obscene passages tending to corrupt the minds and morals of the young and to degrade the culture of the society. One such complaint was lodged under Secs 292/293 I P C against two accused persons viz, Shri Samaresh Basu, the writer and Shri Supriya Sarkar, the printer and publisher of the magazine, by Shri Sunil Ranjan Sarkar, Advocate, who described himself as a litterateur and a lover of Bengali Literature, on 14-12-68 in the court of the Additional Chief Presidency Magistrate Calcutta, being case No C/833 of 1968. The case was sent for judicial enquiry and on a perusal of the same, summonses were issued on the 6th January, 1969, by the learned Additional Chief Presidency Magistrate, Calcutta against the accused no 1, Shri Samaresh Basu under S 292, I P C and the accused no 2, Shri Supriya Sarkar, the present petitioner, under Ss 292 and 293, I P C. Another complaint being case no C 3409 of 1968 was also filed in the Court of the Police Magistrate, Alipore, 24 parganas by Sri Deb Kumar Ghosh, Secretary, Nityananda Library, Chetla and a member of the Cine Film Reform Association of India against the above-mentioned two accused and also Shri Tushar Kanti Ghosh the Editor of the "Amrita" under Sections 292 and 293 I P C read with Section 114, I P C relating to the same novel called "Patak". The Police Magistrate, Alipore, examined the complainants on solemn affirmation and summoned all the three accused persons under Secs 292/293 I P C. Both the cases thereafter have been pending respectively before the learned Additional Chief Presidency Magistrate, Calcutta and the learned Police Magistrate, Alipore, 24-Parganas, two subordinate courts under the jurisdiction of the same High Court. An application was filed on 25-1-69 by the co-accused Shri Supriya Sarkar in the case pending before the learned Additional Chief Presidency Magistrate, Calcutta, submitting inter alia that the offences alleged in both the cases being identical, there cannot be two separate proceedings over the same issue and accordingly the proceedings pending before the learned Additional Chief Presidency Magistrate, Calcutta, may be dropped. An objection thereto was made on behalf of the complainant opposite-party no 1, Shri Sunil Ranjan Sarkar. After hearing both the parties the learned Additional Chief Presidency Magistrate, Calcutta, held by his order dated the 7th February 1969 that

the continuance of the two different proceedings in the two different Courts over the same offence may lead on to double jeopardy under Art 20(2) of the Constitution of India and as the point involved in the petition can only be decided by the High Court, he directed the accused in the proceeding pending before him to move the Hon'ble High Court for a decision of the point under Section 185(1) of the Code of Criminal Procedure and in that view he adjourned the case to 25-3-69 for further orders. An application for revision was accordingly moved on the 10th March, 1969 and the present Rule was obtained by the accused-petitioner. After the matter was heard in part it transpired that Shri Samaresh Basu, the accused no. 1 in the case, was not added as a party by the petitioner and on the prayer of the learned Advocate appearing on behalf of the petitioner, and in the interests of justice, the said accused was directed to be added as the opposite-party no 2. Shri Samaresh Basu, however, did not ultimately appear though he was served upon.

3. Mr Prasun Chandra Ghosh, Advocate (with Mr Birendra Nath Banerjee, Advocate) appearing on behalf of the accused no 2, the petitioner, has made a two-fold submission. The first contention of Mr. Ghosh is that in view of the pendency of two separate proceedings over the same offence in two different courts, the same would only lead on to double jeopardy and as such the proceedings pending in the court of the Additional Chief Presidency Magistrate, Calcutta, as prayed for, by the petitioner, should be dropped. The second contention of Mr. Ghosh is that the dominant consideration for interference under Section 185(1) of the Code of Criminal Procedure is the ground of convenience of the accused and not the factum of earlier commencement as enjoined under Section 185(2) of the said Code. In this context and in support of his contention, Mr. Ghosh relied on the enunciation made in Art 705 in Kenny's Outlines of Criminal Law (19th Edn) as also on the case of Charu Chandra Majumdar v. Emperor, reported in 21 Cal WN 320 = (AIR 1917 Cal 137) (FB). Mr. Monoranjan Das, Advocate (with Messrs Dipankar Ghosal, Rabiranan Roy, Gopal Chandra Ghosh, Advocates) appeared on behalf of the complainant opposite-party no 1 after the arguments were heard in part but in the interests of justice, I adjourned the case to enable Mr. Das to make his submissions. An affidavit-in-opposition was also filed on behalf of the opposite-party no. 1 and was kept on the record. Mr Das contended that the question of convenience of the accused is immaterial and the sine qua non for an interference under Section 185(1) of the Code of Criminal Pro-

cedure is as to which proceedings 'were first commenced as enjoined under Section 185(2) of the Code of Criminal Procedure. The question according to Mr Das is one of law and relates to the interpretation of Section 185(1) of the Code of Criminal Procedure. In this context Mr Das further submitted that the proceedings before the learned Additional Chief Presidency Magistrate Calcutta were started first as cognizance was taken on the 14th December 1968 whereas in the case before the learned Police Magistrate at Alipore such cognizance was taken on the 18th December 1968. Mr Das also contended that the number of accused persons is not the determining factor for holding as to in which of the two courts subordinate to the same High Court an enquiry or trial for the offence shall go on. Mr Dipak Kumar Sengupta Advocate appearing on behalf of the State has supported the Rule and has contended that the concept of an earlier commencement as enjoined under Section 185(2) of the Code of Criminal Procedure cannot be imported into Section 185(1) for the purpose of determining as to in which of the two subordinate courts the enquiry or trial should go on. Mr Sengupta further contended that it should not be overlooked that in the Alipore case there are three accused persons and not two as in the proceedings pending before the learned Additional Chief Presidency Magistrate Calcutta and that the question being one of convenience of the accused the proceedings in Alipore should continue as prayed for by one of the accused himself and not objected to by the other.

4. Having heard the learned Advocates appearing on behalf of the respective parties and having considered the materials on the record I will now proceed to determine the point at issue in the light of the same. The point involved in this Rule is of some importance and relates to the interpretation of Section 185(1) of the Code of Criminal Procedure. It is pertinent in this context to refer to the language of sub-section (1) of Section 185 of the Code which runs as follows: "whenever a question arises as to which of two or more courts subordinate to the same High Court ought to inquire into or try any offence it shall be decided by that High Court. The provisions of sub-section (2) of the said section would also be relevant in this connection. It lays down that where two or more courts not subordinate to the same High Court have taken cognizance of the same offence the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct trial of such offender to be held in any court subordinate to it and if it so decides altogether proceedings against

such persons in respect of such offence shall be discontinued'. It will appear therefore that the provisions contained in Section 185(1) of the Code of Criminal Procedure do not fetter in any way the discretion of the High Court by enjoining any condition precedent for deciding as to in which of the two or more courts subordinate to the same High Court the enquiry or trial shall proceed. In sub-section (2) of the said section however the *sine qua non* for such interference is as to where the proceedings were first commenced. The point for determination therefore is whether the concept of an earlier commencement as enjoined in sub-section (2) can be imported into sub-section (1) of Section 185 of the Code of Criminal Procedure which is otherwise silent on the same. If it can be so imported and be deemed to be the only ground for interference thereunder it is the Presidency Magistrates Court wherein the proceedings were first commenced that should be the court where the proceedings should continue in preference to the other proceedings pending in the court of the learned Police Magistrate at Alipore. On an interpretation of the relevant provisions of the Code I however hold that it is not so and that it had never been the intention of the legislature that it should be so. The canons of interpretation of statute enjoin that some meaning and effect must be given to the significant absence of the expression 'were first commenced' in sub-section (1) and the specific presence thereof in sub-section (2) of Section 185 of the Code of Criminal Procedure. The principles of interpretation of statutes rule out redundancy and as was observed by Lord Sumner in the case of *Quebec Railway Light Heat and Power Co Ltd v Vandy* AIR 1920 PC 181 at p 186 that effect must be given if possible to all the words used for the legislature is deemed not to waste its words or to say anything in vain. Mr Justice Subbarao (as His Lordship then was) also observed in the case of *Ghanshyamdas v Regional Assistant Commissioner of Sales Tax, Nagpur* AIR 1964 SC 766 at p 772 that 'A construction which would attribute redundancy to a legislature shall not be accepted except for compelling reasons'. I respectfully agree with the same and I hold that the dominant consideration of an earlier commencement has been incorporated in sub-section (2) of Section 185 of the Code of Criminal Procedure for good reasons because the said sub-section refers to a different state of circumstances where the two or more subordinate courts taking cognizance of the same offence are not subordinate to the same High Court and therefore to eliminate possible confusion and conflict, the principle of earlier commencement has been

enjoined as the proper criterion, irrespective of any ground of general convenience or of any other sufficient reason, for ultimately determining as to which of the two High Courts would direct the trial of such offender to be held in any court subordinate to it. The same is not, however, the position as enjoined under sub-section (1) of Section 185 of the Code where the two courts concerned are subordinate to the same High Court. The field of consideration is therefore wider and includes not only the ground of earlier commencement but also the ground of general convenience and any other sufficient reason thereby not whittling down in any way the discretion of the High Court in deciding as to which of the two subordinate courts shall enquire into or try the offence. If the legislature wanted to lay down that the sole ground for interference under Section 185(1) of the Code of Criminal Procedure is merely that of an earlier commencement of the proceedings concerned, it could have said so in express words. In view of the same and in consonance to the rules of interpretation of statute, a true and proper effect must be given to the provisions as incorporated in sub-section (1) to Section 185 of the Code. In my view the discretion conferred under the said sub-section is unfettered and untrammelled by any consideration of an earlier commencement only. The factum of earlier commencement may be one such consideration but not the only consideration or an inflexible consideration for exercising the discretion of the court conferred under Section 185(1) of the Code of Criminal Procedure. In that context undoubtedly the question of convenience of the parties may be a material consideration, the nature of the case and the facts thereof will also be another yard-stick for exercising the said discretion; and last but not the least, sufficient reason is also one of the criteria for such determination.

5. So far as the ground of convenience of the parties is concerned, there is no question however, of the complainant being inconvenienced because the complainants are different in the two different proceedings and as such, whoever may be the complainant will not be inconvenienced in any way wherever the proceedings may ultimately take place. Upon ultimate analysis the question of general convenience does not include the complainant and can only relate to the accused in such proceedings and the same again must depend on the facts of each case. In the instant case one of the accused is the petitioner and on his ground of convenience and prejudice he has prayed for the proceedings at Presidency Magistrate's Court, Calcutta to be dropped. The co-accused, who has been made a party, has not appeared to object

but it is only the complainant who had objected to the prayer in the court below and has reiterated the said objection in this Court. In this connection Mr. Ghosh appearing on behalf of the accused-petitioner, Shri Supriya Sarkar has referred to Art 705 in Kenny's Outlines of Criminal Law (19th Edn.). The said article refers to venue. It has been observed therein that "At common law an offence can only be tried by the court within whose jurisdiction it (or a part of it) was committed, but by Section 11 of the Criminal Justice Act, 1925, as modified by the Magistrates Courts Act, 1952, S- 2(4), it is provided that a person charged with any indictable offence may be proceeded against, indicted, tried and punished in any place in which he was apprehended, or is in custody, or has appeared to a summons, on that same charge, just as if the offence had been committed there; unless it appears to the examining justices that the accused would suffer hardship if he were indicted and tried in such place." A further reference in this connection may be made to the case of 21 CWN 320=(AIR 1917 Cal 137) (FB). It is undoubtedly true that the said case was decided in the context of the old Act before amendment of Act 18 of 1923, which not only amended sub-section (1) of Section 185 but also added sub-section (2) to the said section to set at rest the conflict in decisions between the Calcutta and the Madras High Courts. But the principles laid down therein relating to the ground of general convenience would hold good. The majority of the Full Bench held that Section 185 is not restricted to cases in which there is doubt as to whether one court or another has jurisdiction but includes cases in which the doubt is on the point where the choice between the two courts both of which have jurisdiction should be decided on the ground of general convenience. I respectfully agree with the observations made by the Full Bench and I hold that the ground of convenience is also one of the factors which should determine ultimately as to in which of the two or more courts subordinate to the same High Court, the offence shall be enquired into or tried. I uphold therefore the contentions raised in this behalf by Mr. Prasun Chandra Ghosh.

6. Before I part with the case, I must refer to another submission that was made on behalf of the petitioner viz that in the proceedings pending at Alipore there are three accused persons and as such for a proper determination, the said proceedings should be allowed to continue. It was also prayed for by Mr. Das on behalf of the opposite-party no. 1 that if it be so necessary, he may be permitted to add the name of the third accused in the proceedings pending before the learned Additional Chief Presidency Magis-

trate Calcutta The learned Additional Chief Presidency Magistrate Calcutta has rightly held that the inclusion of a third accused in the proceedings at Alipore does not make any difference and has no bearing upon the point for consideration under Section 185(1) of the Code of Criminal Procedure I agree with the said finding and this contention accordingly fails

7 In the result I make the Rule absolute and I direct that of the two courts subordinate to this court Shri M B Mukherjee Police Magistrate Alipore shall try the case pending against the three accused persons under Ss 292/293 I P C being case No C 3409 of 1968 expeditiously and in accordance with law

Petition allowed

1970 CRI L J 212 (Vol 76, C N 45) =

AIR 1970 CALCUTTA 88 (V 57 C 11)

A K DAS AND K K MITRA JJ

Atul Chandra Pal and others Accused
Petitioners v The State Opposite Party
Criminal Revn Case No 999 of 1966
D/ 14-1 1969

(A) Essential Commodities Act (1955)
S 7(1)(a)(n) — Rice (Eastern Zone) Movement Control Order (1959) S 4 — Transport of rice from place in border area to place in Eastern Zone outside border area is not prohibited under S 4 of 1959 Order — Transport — What is

Transport of rice from a place in the border area to a place in the Eastern Zone outside the border area is not prohibited under S 4 of the Rice (Eastern Zone) Movement Control Order 1959 S 4 speaks of transporting from any place in the border area to any other in that area and this involves the question of destination The use of the word transport connotes movement from one place to another and the mere fact that the normal route is along the border area does not either indicate that it was transported to another place in the same area, while the known destination is elsewhere that is a place in the Eastern Zone outside the border area To hold otherwise is to hold that goods on transit are transported to every point between the starting point and its destination (Paras 5 and 6)

(B) Penal Code (1860) S 40 — Mens rea — When not essential for conviction

The well established rule is that unless a statute clearly or by necessary implication rules out mens rea as a constituent part of crime the defendant could not be held guilty of an offence under a criminal law unless he has guilty mind

(Para 9)

DM/JM/B878/69/JHS/B

Cases Referred Chronological Paras

(1966) AIR 1966 SC 43 (V 53) = 1966

Cri LJ 71 Nathulal v State of M P 9

(1961) AIR 1961 Cal 240 (V 48) =

1961 (1) Cri LJ 488 Madanlal Arora v State 9

S S Mukherjee and K K Mukherjee for Petitioners F M Sanyal for Opposite Party

DAS J — This is a revisional application against an order of conviction under Section 7(1)(a)(u) of Act X of 1955 The petitioners were sentenced to R I for three months each and the rice seized was confiscated There was an appeal against the order but the learned Sessions Judge dismissed the appeal

2 The facts leading to the prosecution are as follows —

On April 5 1964 the petitioners were detected moving with six cart-loads of rice in a field in mouza Laha within the five mile border area between West Bengal and Bihar The Cordonning Officer intercepted the carts which were being driven by petitioners 2-5 who told that the rice belonged to petitioner no 1 who was also moving with the carts The carts with the men were taken to the police Station where a written complaint was filed by the Inspector Investigation started and charge-sheet was submitted against parties

3 Defence was a plea of innocence and the petitioners contended that rice was being taken to Burdwan in West Bengal and not to Bihar

4 The learned Magistrate held on the evidence that rice was being smuggled to Bihar at that unearthly hour along routes seldom used by the villagers The learned Sessions Judge held that

it is an offence if any person transports rice to any place within the area of five miles of Bihar Border The evidence is that the accused persons were found carrying rice within 2½ miles of the border area without permit

He therefore dismissed the appeal

5 Admittedly the parties had no license or permit for movement of paddy or rice Sec 4 of the Rice (Eastern Zone) Movement Control Order 1959 reads as follows:

No person shall transport attempt to transport or abet the transport of rice—

(a) to any place in the border area from any place in the Eastern Zone outside that area or

(b) from any place in the border area to any other place in that area except under and in accordance with a permit issued by the State Government or any Officer authorised by that Government in this behalf

This provision speaks of restrictions on

transport of rice to or within the border area. Border area means the area falling within a five mile belt all along the border of the Eastern Zone which means the territory comprising the States of Orissa and West Bengal. Section 4 prohibits transport of rice,

(I) to any place within the border area from any place in the Eastern Zone outside that area, or

(II) from any place in the border area to any other place in that area without license or permit

The prohibition, therefore, does not relate to transport from any place in the border area to any area in the Eastern Zone outside the border area. The defence version is that they were transporting the rice to Banduang which is within the Eastern Zone but outside the border area. Mr Palit at one stage argued that Banduang is within the border area but there is no evidence to that effect. Transportation to Banduang from any place in the border area is not prohibited and therefore no offence was committed

6. Mr Palit next argued that the rice in carts were intercepted at village Laka within border area and it was being brought from village Sindri within the same area. The movement was therefore from one place in the border area to another place in the same area where it was intercepted. Section 4, however, speaks of transporting from any place in the border area to any other place in that area and this involves the question of destination. According to defence, it was being transported to Banduang and even prosecution witnesses conceded that it was the normal route to Banduang. The use of the word 'transport' in our view connotes movement from one place to another and the mere fact that the normal route is along the border area does not either indicate that it was transported to another place in the same area, while the known destination is elsewhere. To hold otherwise is to hold that goods on transit are transported to every point between the starting point and its destination

7. Mr. Palit drew our attention to definition of the word 'transport' in Cl (f) of Section 2 but it speaks of mode of transport merely obviously to include manual movement by individuals

8. Prosecution failed to show by evidence that the parties either transported or attempted or abetted the transport to any other place in the border area and therefore the conviction cannot be justified. The idea is to prevent smuggling outside the Eastern Zone and not against transport to other parts of the Eastern Zone outside the border area and the manner in which the carts were inter-

cepted did not satisfy the requirements for a successful prosecution

9. Mr. Mukherjee, learned Advocate for the petitioner also challenged the learned Judge's finding regarding mens rea. The learned Judge held on the authenticity of a decision of this Court reported in AIR 1961 Cal 240 that mens rea is not necessary for a conviction under Sec 7 of the Essential Commodities Act. This question was considered by the Supreme Court in a decision reported in 1966 Cr. LJ 71=(AIR 1966 SC 43), Nathulal v. State of M. P. where it was held that the mere fact that the object of the statute is to promote social welfare activity or to eradicate a grave social evil is not by itself decisive to exclude mens rea. Only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that mens rea may, by necessary implication, be excluded from a statute. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof. The well established rule is that unless a statute clearly or by necessary implication rules out mens rea as a constituent part of crime, the defendant could not be held guilty of an offence under a criminal law unless he has guilty mind. The cartmen, petitioners 2-6 are hired labourers and had not necessarily a guilty knowledge as transporting with licence or permit is permissible

10. We have, however, already seen that the prosecution has failed to prove that the rice was being transported from a place in the border area to another place within such area and no offence was therefore committed

11. The petition is, therefore, allowed and the Rule is made absolute. The conviction and the sentence passed against petitioners are set aside and they are acquitted. They are discharged from bail bond

12. K. K. MITRA, J.:— I agree

Petition allowed.

1970 CRI. L. J. 213 (Vol. 76, C. N. 46) =

AIR 1970 DELHI 29 (V 57 C 6)

FULL BENCH

I. D. DUA, C.J., S. K. KAPUR AND
HARDAYAL HARDY, JJ

Flying Officer S. Sundarajan Petitioner
v Union of India and others Respondents
Criminal Writ Petn. No 20 of 1968, D/-
17-3-1969

(A) Constitution of India, Art. 141 —
Question neither raised nor discussed in
Supreme Court judgment — Principle of

HM/IM/D511/69/TVN/D

binding nature cannot be deduced by implication — (Civil P C (1908), Preamble — Precedents — Supreme Court decision)

Under Art 141 of the Constitution, the law declared by the Supreme Court is binding on all the courts and therefore even the principles enunciated by the Supreme Court including its obiter dicta when they are stated in clear terms have a binding force. But when a question is neither raised nor discussed in a judgment rendered by the Supreme Court no principle of a binding nature can be deduced from it by implication

(Para 21)

(B) Constitution of India Art 226 — Conviction and sentence before court-martial — Habeas Corpus petition — Court need not in every case call for the record to examine legality of conviction — Proceedings, however not entirely immune from court's scrutiny — Writ not issued for examining mere errors of procedure — Provision under R 15 of the Air Force Rules one of procedure — Non-compliance not affecting jurisdiction will not vitiate trial and ultimate conviction — Prayer disallowed (Criminal P C (1898), S 491) (Air Force Act (1950) S 189 — Air Force Rules 1950 R 15)

While dealing with a petition for a writ of habeas corpus the court is not bound to call for the record and proceedings of every case in which a court of competent jurisdiction or a duly convened and constituted court-martial has recorded a finding of guilt and passed a sentence of imprisonment and examine the legality of conviction and sentence. This is not to say that the proceedings of a court-martial are entirely immune from scrutiny by the High Court. This had been so even before the Constitution and the writs of habeas corpus were issued under Section 491 of Criminal P C when the jurisdiction of the court-martial concerned was under challenge. The enquiry was however directed to ascertain whether the person held in custody was subject to military law or the court itself was properly convened and constituted. That jurisdiction continues to exist in the High Court even today. Art. 226 of the Constitution cannot be said to have enlarged the ambit of that jurisdiction in any way. The remedy of a writ of habeas corpus is not available to test the propriety or legality of the verdict of a competent court. The court is not entitled to go into the regularity of steps taken by the court-martial in the course of trial or by the confirming authority in the finding and the sentence which do not go to their jurisdiction and confirming. Interference is possible only where the irregularity or illegality affects the jurisdiction of the court-martial or the confirming authority.

(Paras 21, 22 & 26)

The petitioner alleged that the violation of R 15 of the Air Force Rules and the denial of opportunity to the delinquent vitiated the proceedings before the court-martial and hence a writ of habeas corpus should be issued to set him at liberty.

Held that R 15 was only a sort of preliminary investigation by the Commanding Officer with a view to ascertain whether a prima facie case existed to justify the detention of the accused in custody beyond the period of 48 hours prescribed in R 14. Any irregularity at that initial stage might have a bearing on the veracity of witnesses examined at the trial or on the bona fides of Commanding Officer or on the defence that might be set up by the accused at the trial but the irregularity could by no means be regarded as affecting the jurisdiction of the court to proceed with the trial. Hence even if violation of R 15 were to be assumed the non-observance of the Rule was not such as to vitiate the trial and ultimate conviction of the petitioner. AIR 1969 SC 414 & AIR 1950 SC 27 Ref & AIR 1968 Delhi 156 & Cr Writ No 1-D of 1963 D/-13-5-1963 (Punjab) and AIR 1967 SC 1335 & (1917) 2 KB 254 Rel on

(Paras 32, 33, 35 & 36)

(C) Constitution of India Art 226 — Habeas corpus — Petition may be by a person other than the prisoner (Criminal P C (1898), S 491)

It is well settled that a person illegally imprisoned or detained in confinement without legal justification is entitled to apply for a writ of habeas corpus but it is not essential that the application should proceed directly from him. Proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment may also be instituted by a person other than the prisoner (in the instant case by the wife) who may have some interest in him (1850) 15 QB 988 & (1860) 30 LJ MC 19 & Halsbury's Laws of England 3rd Edn Vol 11 Foll

(Para 39)

(D) Air Force Act (1950) S 189 — Air Force Rules 1950 Rr 48(b) and 15 — Charges framed at the stage of R 15 not final — Addition, alteration or omission of charges possible at subsequent stages under R 48(b)

(Para 37)

(E) Constitution of India, Art 226 — Certiorari — Petition if can be moved by person not directly affected or aggrieved by order (Quære) — Case Law Ref

(Para 44)

Cases Referred Chronological Paras

(1969) AIR 1969 SC 414 (V 56) =

Writ Petn. No 118 of 1963 D/-20-9-1968 = 1969 Cri LJ 663 Som

Datt Datta v Union of India

2

(1968) AIR 1968 Delhi 156 (V 55) =

1968 D LT 256 = 1968 Cri LJ 1059

S P N Sharma v Union of India

22

(1967) AIR 1967 SC 1335 (V 54)=
1967 Cri LJ 1204=(1967) 2 SCR
271, Ghulam Sarwar v. Union
of India 22
(1964) AIR 1964 Mys 159 (V 51)=
(1963) 2 Mys LJ 383, Dr P S.
Venkataswamy Setty v. Univer-
sity of Mysore 43
(1963), Cri Writ No 1-D of 1963, D/-
13-5-1963 (Punji), Mrs Saroj
Prasad v Union of India 22
(1962) AIR 1962 SC 1044 (V 49)=
(1962) Supp 3 SCR 1, Calcutta
Gas Co. Ltd v State of West
Bengal 42
(1957) 55 LGR 129, R v. Thames
Magistrates' Court Ex parte
Greenbaum 40
(1950) AIR 1950 SC 27 (V 37)=
51 Cri LJ 1383=1950 SCR 88,
A K. Gopalan v State of Madras 23
(1917) 1917-2 KB 254=86 LJ KB
1514, Rex v Governor of Lewes
Prison Ex Parte Doyle 25
(1870) 5 QB 466=39 LJMC 145,
R v Surrey Justices 40
(1860) 30 LJMC 19=6 H & N
193, In re Thompson 39
(1850) 15 QB 988=117 ER 731,
Cobbett v Hudson 39
Mrs Shvamala Pappu, Miss Bundra
Thakur, for Petitioner, O. P. Malhotra
for Respondents.

HARDAYAL HARDY, J.:— The peti-
tioner S. Sundarajan who is under going
a term of imprisonment in Central Jail
Kanpur as a result of his conviction by a
General Court-martial on charges of crimi-
nal misappropriation of monies belong-
ing to the Air Force Public Fund Accounts
moved this petition for a writ of habeas
corpus under Article 226 of the Constitu-
tion and Section 491 Criminal Procedure
Code, 1898 through his wife Shrimati
Saraswati on the ground that his deten-
tion and conviction are illegal

2. When Rule nisi was issued by the
Motion Bench the petitioner's counsel had
cited an unreported decision of the
Supreme Court in *Som Datt Datta v.*
Union of India (Writ Petn. No. 118 of 1968,
D/- 20-9-1968)=(Since reported in AIR
1969 SC 414) The case was therefore,
ordered to be heard by a Full Bench of
three Judges. That is how the case was
laid before us

3. The petitioner's allegations broadly
are that he was working as Senior Acco-
unts Officer at No 4 Base Repair Depot
Air Force, Kanpur since June 1966 under
the command of Group Captain A S Sri-
vastava. During the course of his employ-
ment in the said depot some defalcations
came to light whereupon the authorities
ordered two Courts of Enquiry to be as-
sembled. The reports submitted by the
Courts of Enquiry held Group Captain
A S Srivastava to be responsible for irre-
gularities in accounts. However on

15-6-1968 the petitioner was served with
a charge-sheet consisting of 31 charges
alleging criminal misappropriation of
various sums of money totalling Rs.
29,000/- by him

4. The petitioner complains that when
he was ordered to appear before the Com-
manding Officer the charges were merely
read over to him and no effective opportu-
nity was given to him to meet those
charges. He submits that under sub-r. (a)
of R. 15 of the Air Force Act Rules, 1950,
it is incumbent on the commanding
Officer to hear the accused in defence of
each charge and also to give him full op-
portunity to cross-examine any witness
against him before any further proceed-
ings are taken. But no such opportunity
was given to the petitioner, all that the
Commanding Officer did thereafter was to
have a summary of evidence prepared
and to follow it up in due course by the
arraignment of the petitioner for trial
before a court-martial

5. The petitioner alleges that he
brought this lapse in procedure to the
notice of the authorities as soon as the
court-martial was convened and also to
the notice of the Court at the commence-
ment of the trial pointing out that the
trial could not proceed as the requirement
of Rule 15 had not been complied with.
The petitioner further alleges that he had
also pointed out that in respect of
charges 5 and 6 he had not been heard at
all. He had also submitted that unless he
was tried jointly with Group Captain A.
S. Srivastava no justice could be rendered
in the case. He however contends that his
objections were overruled although the
Judge-Advocate had clearly directed the
members of the Court that if they came
to the conclusion that Rule 15 had not
been complied with the Court would have
no jurisdiction to try the case

6. The petition also refers to two other
irregularities at the trial; one relates to
his alleged confessional statement having
been admitted in evidence while the
other relates to his defence witness Flt.
Lt S C Bhately having been cross-exa-
mined by the Prosecutor although he had
been summoned only to prove the records
of the Courts of Enquiry.

7. In the return to the Rule, besides
traversing the petitioner's averments on
facts, a preliminary objection has been
taken to the maintainability of the peti-
tion on the ground that the remedy of
habeas corpus is not available to a pri-
soner who is serving a legal sentence pass-
ed by a Court-martial and that the peti-
tioner's conviction having been properly
recorded after a valid trial and confirma-
tion, the matter is entirely within the
jurisdiction of the confirming authority
and cannot be challenged before this
Court in exercise of its power under Arti-
cle 226 of the Constitution.

8 On merits the petitioner's allegations about non compliance with the requirements of Rule 15 have been denied and it is contended that the said Rule was complied with in letter and spirit and its compliance was duly proved at the trial by the petitioner's own witness Flt Lt S C Bhateley

9 The return admits that charges 5 and 6 were admitted subsequently to the charges that had previously been framed by the Commanding Officer but it is contended that charges preferred before a Commanding Officer are tentative in nature and may be altered amended or added to in the final charge sheet on which the accused person is brought to trial before Court martial

10 As regards petitioner's allegations against involvement of A S Srivastava the return affidavit states that the Court of Enquiry had no doubt taken the view that the officer had not properly carried out periodical check of Public Fund Accounts as he should have done and there was lack of supervision on his part but as a result of due investigation the Central Bureau of Investigation had come to the conclusion that there was no evidence on which the charge of misappropriation or making of false entries in documents could be substantiated against him In the circumstances the entire blame fell on the petitioner and as such there was no question of any joint trial of the petitioner with Group Capt Srivastava

11 With regard to the admission of the petitioner's confessional statement in evidence it is stated that the same was admitted by the Court after taking into account the relevant circumstances and evidence and on holding that it was voluntary As respects cross examination of Flt Lt S C Bhateley it is asserted that the witness having been examined by the petitioner on oath the prosecution was fully justified in cross examining him

12 The affidavit in support of the return, also shows that the findings and sentence passed by the Court martial were duly confirmed by the Chief of the Air Staff and promulgated according to law and it was after such confirmation and promulgation that the petitioner was committed to Central Jail Kanpur to undergo the terms of five years rigorous imprisonment awarded to him by the Court martial

13 The petitioner maintains in his rejoinder affidavit that this Court has jurisdiction to examine the legality of conviction and detention which were not in accordance with the procedure established by law He has also amplified his earlier submission regarding non compliance with Rule 15 by stating that before the Air Officer Commanding only seven prosecution witnesses including the peti-

tioner were marched in and charges were given to the petitioner in their presence All the seven witnesses were simultaneously asked what they had to say in the matter and since the evidence of each witness was not recorded separately there was obviously no opportunity to cross-examine them On the other hand elaborate statements were made by as many as twenty witnesses at the stage of summary of evidence and subsequent trial

14 As regards charges 5 and 6 the petitioner contends that there is no provision for amending or adding to the charges that had already been framed and that the very act of addition to the charges at a subsequent stage showed the mala fides of the respondents

15 I have already stated that in the return the petitioner's allegations about non compliance with the provisions of Rule 15 have been controverted and it is stated that the requirements of that Rule were fully satisfied As this is challenged before us by the petitioner's counsel we should have ordinarily declined to go further into this matter But considering the importance of the question raised in the preliminary objection taken by the respondents we allowed the counsel for the parties to address arguments on the point as to how far it was open to this Court while dealing with a petition for a writ of habeas corpus to go into the legality of a conviction and sentence recorded by a duly convened and constituted court martial and also on the scope of Rule 15 of the Air Force Act Rules 1950

16 The petitioner's counsel conceded that normally a writ of habeas corpus cannot issue to question the correctness of a decision of a court of competent jurisdiction for it is not a writ of error nor does a High Court in habeas corpus proceedings strictly speaking sit as a court of appeal or of general superintendence to review the order of conviction She however submitted that that was the position in law before the advent of the Constitution when it was recognised all round that a writ of habeas corpus could not be granted to a person committed to prison after he had been convicted by a duly constituted Court martial and the proceedings and sentence were confirmed by a competent authority The inclusion of Article 21 in the Constitution however brought about a radical change in the situation inasmuch as the said Article in terms provides that no person shall be deprived of his life or personal liberty except according to procedure established by law If it was therefore held that the procedure prescribed by Rule 15 of the Air Force Act Rules 1950 had not been complied with in the instant case the order of conviction passed by the Court martial would not stand in the way of the

petitioner's right to regain his liberty as in that case his conviction and detention could not be held to be in accordance with the procedure established by law.

17. Learned counsel further submitted that in exercise of its powers under Article 226 of the Constitution it is always open to this Court to order that the records of a particular case be removed to it on a writ of certiorari with a view to enable it to examine the legality of the proceedings and to quash the order if it is satisfied that a case had been made out for the exercise of its powers in that behalf.

18. She submitted that although the petition in the present case purported to be for a writ of habeas corpus, it was in reality a petition for a writ in the nature of certiorari, as its object was to call up and to quash the proceedings before the General Court-martial. In this connection the learned counsel invited our attention to the abovecited judgment of the Supreme Court. The petitioner in that case was found guilty of charges under Sections 304 and 149 Indian Penal Code and sentenced to six years R I and cashiered. His conviction and sentence were confirmed by the confirming authority under Section 164 of the Army Act, 1950. The petitioner then moved the Supreme Court under Article 32 of the Constitution and obtained a rule asking the respondents to show cause why a writ in the nature of certiorari should not be issued.

19. An examination of the judgment however does not make it clear if the petitioner's prayer in that case was also for a writ of habeas corpus. Even so the petition in terms asked for a writ in the nature of certiorari under Article 32 of the Constitution and Section 491 Criminal Procedure Code was not invoked at all. The question raised in the petition and considered by their Lordships was also a pure question of jurisdiction inasmuch as it was contended that the offence with which the petitioner was charged was a civil offence as defined in Section 3(ii) of the Army Act 1950, which subject to the provisions of Sections 125 and 126 of the said Act could be tried either by a Court-martial or by a criminal Court. The contention urged on behalf of the petitioner was that the Court-martial had no jurisdiction to try and convict the petitioner having regard to the mandatory provisions of Section 125 of the Act and having regard to the fact that the Officer Commanding of the unit had in the first instance, decided to hand over the matter for investigation to the civil police. Certain other questions relating to the legality of the procedure followed at the trial of the case and the necessity of a speaking order by the confirming authority were also raised. The learned Judges went into those questions and ultimately dismiss-

ed the petition holding that there was neither any error of jurisdiction nor any error of law on the face of the record which entitled the petitioner to a writ of certiorari for quashing the order.

20. The question of maintainability of the petition was neither raised before their Lordships nor discussed by them. In any event, the prayer in the petition was in terms for grant of a writ of certiorari and there is no indication in the judgment at all that there was any prayer for a writ of habeas corpus. The petition was also filed by the petitioner himself who was personally aggrieved and affected by the order.

21. It is true that under Article 141 of the Constitution the law declared by the Supreme Court is binding on all the courts and therefore, even the principles enunciated by the Supreme Court including its obiter dicta, when they are stated in clear terms, have a binding force. But when a question is neither raised nor discussed in a judgment rendered by the Supreme Court it is difficult to deduce any principle of a binding nature from it by implication. I cannot therefore agree with the learned counsel that the case is an authority for the proposition that while dealing with a petition for a writ of habeas corpus the court should call for the record and proceedings of every case in which a court of competent jurisdiction or a duly convened and constituted Court-martial has recorded a finding of guilt and passed a sentence of imprisonment and examine the legality of conviction and sentence.

This is not to say that the proceedings of a Court-martial are entirely immune from scrutiny by this Court. In fact, that was not the position even before the advent of the Constitution and there are several reported cases where a writ of habeas corpus was issued under Section 491 Cr. P. C. when the jurisdiction of the Court-martial concerned was under challenge. The inquiry in all those cases was however directed to ascertain whether the person held in custody was subject to military law or the court itself was properly convened and constituted. That jurisdiction the High Court always had and has it even today. The question for decision however is whether the ambit of that jurisdiction has in any way been enlarged by Article 226 of the Constitution.

22. On behalf of the respondents, Mr. O. P. Malhotra, has referred to us to a Bench decision of this Court in *S. P. N. Sharma v. Union of India*, 1968 DLT 256 = (AIR 1968 Delhi 156). In that case the petitioner's trial by General Court-martial and the finding and sentence by the said Court as also the confirmation of the sentence by the confirming authority were challenged on the ground of infringement of Articles 14, 21, 22 (1) & (2) of the Constitution and

violation of some of the provisions of the Air Force Act and the Rules framed thereunder. Founded on these main challenges the petitioner's prayer was that he be set at liberty. The Bench approvingly referred to an earlier judgment of my Lord the Chief Justice sitting singly as a Judge of the Punjab High Court in *Mrs Saroj Prasad v Union of India* (Criminal Writ No 1-D of 1963) D/- 13-5-1963 (Pun) and also referred to a short extract from a concurring note added by Bachawat J in the Supreme Court's judgment in *Ghulam Sarwar v Union of India* AIR 1967 SC 1335 where it was said —

'It is to be noticed that the present petition does not challenge the validity of an order of imprisonment passed in a criminal trial. I must not be understood to say that the remedy of a writ of habeas corpus is available to test the propriety or legality of the verdict of a competent Criminal Court.'

And finally summed up the position in the following words —

'The principle that a writ of habeas corpus is not grantable in general when the party is convicted in due course of law is attracted with greater strictness to a person convicted by a duly constituted Court-martial the finding and sentence of which have in due course been confirmed by a competent authority. Nothing has been shown which would induce us to hold that the finding and the sentence as confirmed are tainted with such a serious jurisdictional infirmity that they should be described as non est and ignored. We may repeat that we are not entitled to go into the regularity of steps taken by the Court-martial in the course of trial or by the Confirming authority in the finding and the sentence which do not go to their jurisdiction and confirming. If we may say so with respect we have not been persuaded to hold that there was any such irregularity or illegality which would go to the jurisdiction of the Court-martial or the confirming authority.'

23. Learned counsels only criticism of this judgment was that there is no discussion in it of the High Court's power to examine the legality of conviction and sentence on a writ of certiorari in the light of Article 21 of the Constitution. According to the learned counsel the expression 'procedure established by law' means procedure prescribed by the law of the State as observed by *Kania C J* in *A K Gopalan v State of Madras* AIR 1950 SC 27 at p 39 and since the rules made under the Air Force Act 1950 form part of the procedure established under the Act a conviction resulting from a trial held in contravention of those rules necessarily amounts to depriving the convicted person of his liberty contrary to the procedure established by law. She further argued that a material irregularity

in procedure affects the jurisdiction of the Court and therefore renders its decision illegal for want of jurisdiction.

24. Learned counsel also relied on the following statement of law in *Halsbury's Laws of England* (Simonds Edition) Vol 11 Para 268 page 142 —

'Where the inferior tribunal has acted without jurisdiction certiorari to quash the proceedings may be granted. Want of jurisdiction may arise from the nature of the subject matter so that the inferior tribunal had no authority to enter on the inquiry or upon some part of it. It may also arise from the absence of some essential preliminary proceedings. Thus although the inferior tribunal may have jurisdiction over the subject matter of the inquiry it may be a condition precedent to the exercise of its jurisdiction that the proceedings should be begun within a specified time or that some step should have been previously taken by the person who institutes proceedings before the tribunal.'

25. Our attention was also invited to a judgment of Viscount Reading C J (*Darling and Avory JJ* with him) in *Rex v Governor of Lewes Prison ex parte Doyle* (1917) 2 KB 254 where the point raised on behalf of the prisoner was that the warrant of commitment and the conviction were/or alternatively one or the other was bad and that the proceedings were invalid on the ground that the Field General Court-Martial had heard the case in camera.

25-A. Learned counsel argued that although the question of holding the trial in camera was merely a question of procedure yet the validity of conviction and commitment was allowed to be canvassed in that case on that ground. As would appear from the following passage in the judgment of the learned Chief Justice the actual decision far from supporting the argument of the learned counsel goes against it. The contention regarding invalidity of the trial on the ground of its having been held in camera was repelled and after citing two earlier decisions the Learned Chief Justice observed —

Those two authorities clearly support the principle that we are entitled and I think bound to look at the conviction in the present case and it is stated on the face of it that Doyle is a person subject to military law. That being so it establishes that he could be tried by a field general Court martial and that therefore there is no ground for saying that the conviction is wrong. It would cure any defect (if there was any) in the warrant of commitment, and I come to the conclusion both as regards the warrant of commitment and also as to the form of conviction that the contentions fail.

26. Counsel for the petitioner next referred us to some cases dealing with the

grounds on which the decisions of Tribunals exercising judicial and quasi-judicial functions have been quashed on certiorari. No decided case was, however, brought to our notice in which a writ of certiorari was issued for quashing a decision on the ground of error in procedure of the kind with which we are concerned in the present case. Subject to the locus standi of the person moving the petition, a writ of certiorari or a direction or order under Art 226 of the Constitution may perhaps be issued for the purpose of examining the record and proceedings of a duly constituted Court martial having jurisdiction over the person and also over the subject matter of the charge provided other conditions, such as error of law apparent on the face of the record or violation of principles of natural justice, are satisfied. No final opinion need however, be expressed on that point in the present case. But I am not at all prepared to hold that such a writ or order can ever be issued for examining mere errors of procedure.

27. This brings me to the question relating to the scope of Rule 15 of the Air Force Act Rules. In order to appreciate the content and scope of this Rule it is necessary to discuss its salient features.

28. The Rule forms part of Section 1 of Chapter IV which deals with investigation of charges and remand of the accused for trial. Rule 14 enjoins upon every Commanding Officer to take care that a person under his command, charged with an offence is not detained in custody for more than forty-eight hours after the committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him impracticable having regard to the exigencies of public service. The rule further provides that every case of a person who is detained in custody for a period beyond forty-eight hours must be reported by the Commanding Officer to the officer to whom application is required by law to be made to convene a general or District Court-martial for the trial of the person charged. Such report has to be accompanied by a statement of reasons for detention.

29. Rule 15 deals with investigation of charges within the period mentioned in Rule 14. The requirement of sub-rule (a) is that the charge must be heard in the presence of the accused and the accused must have full opportunity to cross-examine any witness against him and to call any witness and make any statement in his defence.

30. Sub-rule (b) makes it obligatory on the Commanding Officer to dismiss a charge brought before him if in his opinion, the evidence does not show that some offence under the Act has been committed. He may also do so if in his discretion he

thinks that the charge ought not to be proceeded with. Sub-rule (c) lays down that at the conclusion of the hearing of a charge if the Commanding Officer is of the opinion that the charge ought to be proceeded with, he shall, without unnecessary delay, either dispose of the case summarily or refer the case to the superior Air Force authority or adjourn the case for the purpose of having the evidence reduced to writing.

31. Sub-rule (d) deals with the preparation of the Summary of Evidence and requires that the evidence of the witnesses who were present and gave evidence before the Commanding Officer, whether against or for the accused shall be taken down in writing in the presence and hearing of the accused. The recording of the Summary of Evidence may be before the Commanding Officer himself or before such other officer as he may direct.

31-A. Sub-rules (e) to (g) deal with the manner of recording evidence at that stage.

32. It will thus be seen that by its very nature the hearing of evidence by the Commanding Officer at the initial stage when the person charged with an offence is brought before him is for the purpose of ascertaining whether the charge should be dismissed or should be proceeded with. If the Commanding Officer is of the opinion that the charge ought not to be proceeded with, the person charged with the offence has to be released forthwith. On the other hand if the Commanding Officer is of the opinion that the charge ought to be proceeded with he may then follow one of the three courses open to him under sub-rule (c).

33. The object of the rule is therefore, to hold a sort of preliminary investigation by the Commanding Officer with a view to ascertain whether a prima facie case exists to justify further detention of the accused in custody beyond the period of forty-eight hours prescribed by Rule 14. The investigation contemplated by R 15 does not require that the evidence of witnesses examined by the Commanding Officer should necessarily be reduced to writing. Its only requirement is that the charge should be heard in the presence of the accused and he should be given an opportunity not only to cross-examine any witness against him but also to call any witnesses and make any statement in his defence.

34. Once the Officer Commanding comes to the conclusion that the charge ought to be proceeded with then there must be a formal recording of statements of witnesses as provided by sub-rules (d) to (g). Rule 16 provides inter alia for the remand of the accused for trial by Court martial.

35. It is thus implicit in the procedure prescribed by R 15 that any error or ir-

regularity at a stage before the case is adjourned for the purpose of having the evidence reduced to writing will not vitiate the subsequent trial as the guilt of the accused has to be established not on the basis of what the Commanding Officer might have done or might not have done at the initial stage. Any irregularity in procedure at that initial stage might have a bearing on the veracity of witnesses examined at the trial or on the bona fides of the Commanding Officer or on the defence that may be set up by the accused at the trial but the irregularity can by no means be regarded as affecting the jurisdiction of the Court to proceed with the trial.

36 I am therefore of the opinion that in the instant case even if it is assumed that there has been non-compliance with the requirements of Rule 15 in the manner alleged by the petitioner the non-observance of the Rule is not such as to vitiate the trial and ultimate conviction of the petitioner.

37 The petitioner's grievance about the addition of charges 5 and 6 at a subsequent stage has also no substance as the charges framed at the stage of proceedings under Rule 15 are not final. Subject to the right of amendment envisaged in Rule 48 it is only the charge-sheet on which the accused is arraigned before the Court which is material as it is that charge-sheet alone which forms the basis of the trial and not any other charge-sheet which may have been prepared at the initial stage. Even the charge-sheet on which the accused is arraigned before the Court can be amended under sub-rule (b) of Rule 48 which runs as under—

If on the trial of any charge it appears to the Court at any time before they have begun to examine the witnesses that in the interests of justice any addition to omission from or alteration in, the charge is required they may report their opinion to the convening authority and may adjourn and the convening authority may either direct a new trial to be commenced or amend the charge and order the trial to proceed with such amended charge after due notice to the accused.

38 In the course of argument, one other point was mooted but since we have not had the advantage of a full argument which the point deserves I should not like to express a definite opinion on it and would only state the point and refer to a few cases which appear to me to have a bearing on the controversy. The point is one of locus standi to maintain the present petition and was thus put in argument. It was urged that if the petition in this case was to be treated as one for grant of a writ of certiorari then such a petition could only be

filed by the petitioner himself and not by his wife on his behalf as in the eye of law no personal right of hers had been affected by the impugned order and as such she had no locus standi to maintain the petition.

39 The question for consideration therefore is whether the petition as presented in this Court can be treated as one for a writ of habeas corpus only or also for a writ of certiorari. It will be noticed that the petition has been moved by the prisoner through his wife Shrumati Sarswati. It is also described as a petition for a writ of habeas corpus under Art 226 of the Constitution and Sec 491 Criminal P C. It is well settled that a person illegally imprisoned or detained in confinement without legal justification is entitled to apply for a writ of habeas corpus but it is not essential that the application should proceed directly from him. Proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment may also be instituted by a person other than the prisoner who may have some interest in him. In *Cobbett v Hudson* (1800) 15 QB 988 a wife was held entitled to apply for such a writ on behalf of her husband. In *re Thompson*, (1860) 30 LJ MC 19 father was held entitled to apply on behalf of his son. Both these cases are mentioned in foot-note to Para 65 at page 37 of Halsbury's Laws of England 3rd Edition Vol 11. Even the right of a stranger has been recognised to make such an application provided he has authority to appear on behalf of the prisoner or has a right to represent him. In the foot-note referred to above there is reference to an un-reported case in *re Klimowicz* (1954). The foot-note shows that in that case a writ was granted on the application of the Home Secretary, directed to the master of a Polish ship lying in the Thames upon which a person seeking political asylum in the United Kingdom was being detained.

40 These cases are a clear authority for the maintainability of the present petition for a writ of habeas corpus moved by the petitioner's wife. The question however is whether a petition for grant of a writ of certiorari can also be moved by a person who is not directly affected or aggrieved by the order. The question is not free from difficulty and its solution is made more complex by the variety of views expressed by Judges in different cases. The primary rule as to who may be granted certiorari, as formulated by Blackburn J in *R v Surrey Justices* (1870) 5 QB 466 was stated by Parker J (as he then was) in the following words in *R v Thames Magistrates Court, ex parte Greendaum*, (1957) 55 LGR 129.

Anybody can apply for it—a member of the public who has been inconvenienced

ed, or a particular party or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. Where, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies *ex debito justitiae*."

41. S A de Smith in his latest book on "Judicial Review of Administrative Action" (1968 Edition) after noticing a number of cases has summed up the position as follows—

"It is thought that the present law may properly be stated as follows. Certiorari is a discretionary remedy, and the discretion of the Court extends to permitting an application to be made by any member of the public. A person aggrieved, i.e., one whose legal rights have been infringed or who has any other substantial interest in impugning an order, may be awarded a certiorari *ex debito justitiae* if he can establish any of the recognised grounds for quashing, but the Court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief. Only in highly exceptional circumstances would the Court exercise its discretion in favour of an applicant who was not a person aggrieved."

42. The Supreme Court's view is reflected in its decision in *Calcutta Gas Co. Ltd. v State of West Bengal*, AIR 1962 SC 044 where it was held:—

"Article 226 in terms does not describe the classes of persons entitled to apply hereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. The existence of the right is the foundation of the exercise of jurisdiction of the High Court under Art 226. The legal right that can be enforced under Art. 226 like Art 32, must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified".

43. In *Dr. P S Venkataswamy Setty v University of Mysore*, AIR 1964 Mys 159 while dealing with the position under Art. 226 of the Constitution the learned Judges (N. Sreenivasa Rau, C. J. and A. Narayana Pai J) observed:—

"In India, unlike England, there is nothing like a writ of right because, the issue of any type of writ, order or direction under Art. 226 is clearly a matter of discretion with the Court. The question therefore, whether the petitioner has or has no locus standi to make the petition

to seek the issue of a writ appropriate to the facts of his case is necessarily related to the nature of the relief he seeks. The only general proposition which can be stated on the question of locus standi of petitioners in writ petitions or petitions under Art. 226 of the Constitution is that ordinarily a petitioner will have to make out some personal interest which the law recognises as sufficient, unless having regard to the nature of the relief and particular facts and circumstances of the case the petitioner is merely in the position of an informer or a relator and the situation is such that it becomes the duty of the Court to act in public interest or to uphold the Constitution".

44. Similar dicta are to be found in the decisions of almost all the High Courts. An examination of those cases however, shows that most of them have failed to provide a full exposition of the relevant principles and many of the dicta are ambiguous. It may be that one day the question is directly raised in an appropriate case and is exhaustively dealt with by the Supreme Court. Till then no useful purpose will be served by dealing with this matter at length, especially when we have not had the benefit of full argument from the counsel and we have also decided to dismiss the petition.

45. The result of the foregoing discussion is that the petition fails and is accordingly dismissed.

46. **INDER DEV DUA, C. J.:** I agree.

47. **S. K. KAPUR J.:** I agree.

Petition dismissed.

1970 CRI. L. J. 221 (Vol. 76, C. N. 47)

(DELHI HIGH COURT)

S. N. SHANKAR, J.

Municipal Corporation of Delhi, Petitioner,
v. Ram Dayal, Respondent.

Criminal Revn. No. 189 of 1967, D/6.11.1967.

(A) Prevention of Food Adulteration Act (1954), S. 16 (1) (a) — Prevention of Food Adulteration Rules, 1954, Rr. 23, 26 and 28—Adulteration by addition of prohibited colouring matter — Conviction — Essentials—Mention in Public Analyst's report of specific substance used for colouring not essential.

The combined effect of Rules 26 and 28, read with rule 23 of the rules is that the addition of any colouring matter to any article of food, except as specifically permitted by Rules 26 and 28, is prohibited, and their addition

BL/FL/A879/68/GGM/Z

would amount to adulteration to attract the penalty under S 16 (1) (a) (i) of the Act. In order, therefore, to sustain conviction under this provision it is wholly irrelevant to find as to what actually was the substance that had been used for the purpose of colouring a particular article of food if it is proved that the colouring matter used is not one of those which had specifically been permitted by the rules. Where the accused is charged with using the colouring material that is not permissible under R 23 it is not at all necessary for the public analyst to investigate and report as to the identity of the substance that had actually been used for the colouring nor is it necessary for him to record a finding in his report as to the quantity or percentage of the material that had been used. AIR 1962 Punj 524 Rel on AIR 1964 Punj 475 & 1962 Ker L T 865 & AIR 1958 All 84 Dist (Paras 6 and 10)

(B) Prevention of Food Adulteration Act (1954), S 13 (2) — Report of Public Analyst—Evidentiary value — Non compliance with procedure under sub s (2)—Refusal by Court to summon Public Analyst for cross examination under S 510 (2) Cr P C — There is no irregularity since Analyst is not chemical examiner. AIR 1963 Punj 175, Rel on — (Criminal P C (1898), S 510 (2)) (Para 13)

(C) Prevention of Food Adulteration Act (1954) Ss 10 and 12 — Provision of S 12 apply when person sending sample is not a Food Inspector—Sample so sent must be deemed to be sample submitted under the Act. AIR 1934 Cal 858 and AIR 1937 Cal 60, Rel on (Para 18)

Cases Referred Chronological Paras

- (1961) AIR 1961 Punj 475 (V 51)
1964 (2) Cri L J 578 State v Gunj Lal 5 7
(1968) AIR 1968 Punj 175 (V 50)
1962 64 Pun L R 919 1968 (1) Cri L J 475 Municipal Committee Ambala v Besshi Ram 18
(1962) 1962 Ker L T 865 ILR (1962) 2 Ker 219 Food Inspector, Kozhikode v Mathurawamy Nadar 5 8
(1962) A I P 1962 Punj 524 (V 49)
1962 64 Pun L R 799 1962 (2) Cri L J 778 Municipal Corporation of Delhi v Sat Pal Kumar 10
(1958) AIR 1958 All 84 (V 45) 1958 Cri L J 8 State v Sabati Ram 5 9
(1955) AIR 1955 S O 698 (V 42)
1955 Cri L J 1410 U J S Chopra v State of Bombay 4
(1937) AIR 1937 Cal 60 (V 21) 88 Cri L J 715 Maanendra Nath Banerjee v Jyotish Chandra Datta 16

(1934) AIR 1934 Cal 858 (V 21) 86
Cri L J 872 Sawai Ram Agarwala v Emperor 16
T O B M Lal and V D Misra for Petitioner,
Ghansham Das for Respondent

ORDER — This is a reference by the learned Additional Sessions Judge Delhi recommending an enhancement of the sentence awarded to the accused

2 Brief facts are that the accused is a sweetmeat seller. On 1st of September, 1965, Shri Bakhat Singh Sethi Food Inspector appointed by the Central Government under S 9 of the Prevention of Food Adulteration Act (hereafter called the Act) visited his shop and found that he was selling coloured Laddoos. Shri Bakhat Singh Sethi purchased 1500 grams of these Laddoos by way of sample and paid him Rs 9/- as their price vide receipt Exhibit P A. The sample was divided into three parts and was put into three separate bottles. One bottle was given to the accused one was sent to the Public Analyst and the third was retained by the Food Inspector. On 10th of September 1965 the Public Analyst analysed the sample and gave the following report

Butyro Refractometer reading at 40°C of the fat extracted from sweets — 60.0 Baudouin test of the extracted fat—positive Reichert value of the extracted fat—7.59 Colour—unpermitted

the same is adulterated due to 7.0 excess in Butyro Refractometer reading at 40°C of the fat extracted from sweets 20.41 deficiency in Reichert value of the extracted fat Baudouin test of extracted fat being positive and also coloured with unpermitted colour

After receipt of the report of the Public Analyst a complaint was filed under section 7/16 of the Act by the Municipal Corporation, Delhi, against the accused. The learned trial Magistrate by his judgment dated 17th October 1966, found the accused guilty and sentenced him to imprisonment till the rising of the Court and to pay a fine of Rs 1000/- in default of payment of the fine the accused was further to undergo rigorous imprisonment for a term of six months. The conviction was based on the finding that the sample recovered from the accused was adulterated and contained artificial colouring material in contravention of the requirements of the Act

3 Aggrieved from this order the Municipal Corporation moved the Sessions Judge for reference and the learned Sessions Judge after hearing the parties has recommended that the accused having been found to be guilty under the provisions of section 16 of the Act should have been awarded a minimum sentence of six

months and a fine of Rs. 1,000/., and that the order of the learned trial Magistrate, sentencing him to imprisonment till the rising of the Court and the fine of Rs. 1,000/- was not in accordance with the mandatory provisions of S. 16 of the Act.

3A. The learned counsel for the Municipal Corporation, appearing in support of the reference, has drawn my attention to S. 16 of the Act, the relevant part of which reads as under :

"16. (1) If any person :

(a) whether by himself or by any other person on his behalf imports into India or manufactures for sale, or stores, sells or distributes any article of food :

(i) which is adulterated or misbranded or the sale of which is prohibited by the Food (Health) Authority in the interest of public health.

× * * +
* * * *

he shall, in addition to the penalty to which he may be liable under the provisions of S. 6, be punishable with "imprisonment for a term which shall not be less than six months, but which may extend to six years, and with fine which shall not be less than one thousand rupees :

Provided that :

(i) if the offence is under sub-clause (i) of clause (a) and is with respect to an article of food which is adulterated under sub-clause (1) of clause (i) of section 2 or misbranded under sub-clause (k) of clause (ix) of that section, or

(ii) if the offence is under sub-clause (ii) of clause (a) the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or of fine less than one thousand rupees or of both imprisonment for a term of less than six months and a fine of less than one thousand rupees "

Sub-clause (1) of clause (i) of section 2 of the Act reads as under :

"2. In this Act unless the context otherwise requires,—

(i) 'Adulterated'—an article of food shall be deemed to be adulterated—

(1) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits or variability;"

The contention of the learned counsel is that in the instant case the offence found against the accused was that the Laddoos had been adulterated by him with unpermitted

colour and, as such, even though, covered by section 16 (1) (e) (i) the offence did not fall under section 2 (i) (1) of the Act, and, therefore, the trial Magistrate had no jurisdiction to award a punishment lesser than the minimum sentence prescribed in the Act. He contended, and I think rightly, that the sub-clause (1) of clause (i) of section 2 of the Act related to cases concerning the quality or purity of the article found to be below the prescribed standard or when its constituents were in excess of the prescribed limits, and did not cover a case where an unauthorised colouring material was found to be mixed with the article sold. Such an adulteration will clearly fall within sub-clause (i) of section 2 (i) of the Act. The learned counsel for the accused has not said a word to controvert this position. Under these circumstances, I am of the view that the learned trial Magistrate should have convicted the accused to a minimum sentence of six months' imprisonment in addition to a fine of Rs. 1,000/.

4. The learned counsel for the accused, relying on sub-section (6) of section 439 of the Code of Criminal Procedure, has, however, urged that he is entitled to show cause against the conviction, and contends that on the material on this record, the learned trial Magistrate should have recorded a clear acquittal against his client. Reliance is placed by him on *U. J. S. Chopra v. State of Bombay*, AIR 1955 SC 693, wherein their Lordships held that even though the appeal filed by the accused in that case had been dismissed by the High Court and that order of dismissal was final and no further revision could be initiated by the accused against the conviction, but as soon as the State applied for enhancement of the sentence and a notice was issued to the accused, he became entitled under section 439 (6) to again challenge his conviction, and the previous dismissal of his appeal in the circumstances would have no bearing on the new situation created by the enhancement application. The learned counsel for the Municipal Corporation has not controverted this position and, under these circumstances, the whole matter has been argued de novo on merits.

5. The first contention raised by the learned counsel for the accused is that the certificate of the Public Analyst is vague in so far as it does not state the precise unpermitted colour with which the Laddoos in question are stated to have been adulterated, nor does it give the exact percentage of quantity of the colouring material, alleged to have been used. He has placed strong reliance on *State v. Gunj Lal*, AIR 1964 Punjab 475; *Food Inspector, Kozhikode v. Mathuswamy Nadar*, 1962 Ker L T 865; and *State v. Sahati Ram*

AIR 1958 All 34 The submission of the learned counsel is that the certificate of the Public Analyst should contain the factual data which the analysis should reveal and not merely his opinion as to what that data indicate. He says that if the certificate merely gave the final opinion of the Public Analyst it would not be sufficient to base conviction because having regard to the special provisions contained in this Act relating to the nature and effect of this report it will tantamount to a decision of the point in issue by the Public Analyst and not by the Court.

6 The contention raised *prima facie* sounds very plausible but the proposition enunciated is not at all attractive to the facts of this case. As stated earlier what the accused has been found guilty of is adulteration of the Laddoos sold by him with colouring material other than that prescribed in or authorised by the Act. Rule 23 of the Prevention of Food Adulteration Rules 1955 (hereafter called 'the Rules') framed under the Act reads as under:

'23 The addition of a colouring matter to any article of food except as specifically permitted by these rules is prohibited.

This rule in positive terms prohibits the addition of any colouring matter to any article of food except as specifically mentioned in the Rules that followed Rule 26 then enumerated a nine natural colouring principles that could be used in or upon any article of food. Rule 23 further names the coal tar dyes or a mixture thereof which could lawfully be used in food. The combined effect of Rr 26 and 28, read with R 23 of the Rules therefore is that the addition of any colouring matter to any article of food except as specifically permitted by Rr 26 and 23 is prohibited and their addition would amount to adulteration to attract the penalty under S 16 (1) (a) (i) of the Act. In order therefore to sustain conviction under this provision it is wholly irrelevant to find as to what actually was the substance that had been used for the purpose of colouring a particular article of food if it is proved that the colouring matter used is not one of those which had specifically been permitted by the Rules.

7 In *Gunj Lal Jeaya Shas* case AIR 1964 Punj 475 (supra), relied upon by the learned counsel for the accused the article in question was chillies in respect of which, under R 5 of the Rules made under the Act it was in terms provided in Appendix B that chillies could contain not more than 1 per cent foreign organic matter not more than 8 per cent total ash and not more than 1.25 per cent ash insoluble in hydrochloric acid.

The operative part of the report of the Public Analyst in that case read as follows:

'It is highly adulterated with extraneous vegetable matter.

Under these circumstances the learned Judges held that as the presence of foreign organic matter in the chillies was not wholly ruled out it was essential for the Public Analyst to specify the percentage of the organic matter found by him, to prove the offence charged against the accused. There is no question of any percentage of the colouring material being permissible in the present case, and as such, it was not at all necessary for the Public Analyst to specify or to give the percentage of the colouring material present in the Laddoos.

8 *Mathu wamy Nadar* case, 1962 Ker L T 865 (supra) the second case relied upon, related to sweets. The sample on analysis, was found to contain a coal tar dye but, the use of coal tar dye other than those enumerated in R 28 was permissible. Under these circumstances the learned Judges observed that the report of the Public Analyst should have specified the particular coal tar dye with which the accused was alleged to have altered the sweets.

9 Similarly, in *Sabati Ram* case AIR 1958 All 84 (supra) the third case relied upon by the learned counsel for the accused the facts were wholly different. The operative part of the report of the Public Analyst in that case simply stated that in my opinion this sample is adulterated. In the second line of the same report it was further stated: 'In my opinion the greater part of this sample consists of fat or oil which is foreign to the pure substance. It was under these circumstances that the learned Judges observed that the report of the Chemical Analyst should contain factual data which the analysis should reveal and not merely the opinion of the Public Analyst as to what the data indicates about the nature of the article of food.

10 In the case before us the colouring material used by the accused was not one of those permissible under the Act and, therefore it was not at all necessary for the Public Analyst to investigate and report as to the identity of the substance that had actually been used for the colouring nor was it necessary for him to record a finding in his report as to the quantity or percentage of the material that had been used. I find support for my conclusion in regard to the contents of the report in this case from the observations in the Division Bench judgment in *Municipal Corporation of Delhi v Sst Pal Kanur*, 1962 64 Pun L R 799 (AIR 1962 Punj 524), where the learned Judges of the Punjab High

Court held that it was not necessary in every case for the Public Analyst to state the exact quantity of foreign substance present in the sample sent to him and that when the foreign substance happened to be one, the presence of which was absolutely prohibited, it was unnecessary to state its quantity.

11. In view of the above discussion, I do not find any merit in the contention of the learned counsel for the accused.

12. The second contention, raised by the learned counsel, was that the accused had applied to the learned trial Magistrate for the summoning of the Public Analyst for cross-examination under the provisions of sub-section (2) of section 510 of the Code of Criminal Procedure, but this request was not acceded to. This, the learned counsel contended, was a material irregularity, which resulted in grave prejudice to the accused and vitiated the entire proceedings against him.

13. I find little substance in this submission also. Section 510 of the Code deals with the report of a Chemical Examiner. Sub-section (1) of this section provides that any document purporting to be a report of the Chemical Examiner or Assistant Chemical Examiner to Government or the Chief Inspector of Explosives or the Director of Finger Print Bureau or an officer in the Mnt, may be used as evidence in any enquiry. Sub-section (2) of this section then gives a right to the parties to apply to the Court to summon and examine any such person as to the subject-matter of his report. This sub-section, very obviously, envisages the summoning and examining of only those persons, who are specified in sub-section (1) of this section. The Public Analyst, appointed under the Act, is not a Chemical Examiner or an Assistant Chemical Examiner to Government, as contemplated by sub-section (1) of section 510. The application of the accused under section 510 of the Code was thus clearly misconceived and was rightly rejected.

In cases, where the accused desired to challenge the report of the Public Analyst under the Act, he had to follow the procedure provided in section 13. Sub-section (2) of section 13 provides that in such a case the accused-vendor should make an application to the Court for sending the part of the sample, delivered to him under section 11 (1) (c), to the Director of the Central Food Laboratory for his examination and certificate, who, in turn, was bound to furnish a certificate to the Court in the prescribed form containing the result of his examination and such a certificate would operate to supersede the certificate of the Public Analyst.

Reference in this connection may be made to Municipal Committee, Ambala v. Basakhi 1970 Cri.L.J. 15.

Ram, 1962-64 Pun L R 949 : (AIR 1963 Punj 175), where the provisions of section 13 of the Act, came up for consideration and it was held that section 13 (2) of the Act prescribed a procedure for the accused to challenge the report of the Public Analyst, and, the remedy provided having not been adopted, the report of the Public Analyst was a good piece of evidence and could not be ruled out. There is, thus, no force in the grievance of the accused that the proceedings are vitiated because the Public Analyst had not been called for cross-examination.

14. The third contention raised by the learned counsel for the accused related to the third sample taken in compliance with section 11 of the Act and retained by the Food Inspector, which, he said, was deliberately not produced by the prosecution in Court and which, according to him, vitiated the whole trial. The contention of the learned counsel was that a reference to rules 15 and 16 of the Rules framed under the Act showed that all bottles or jars or other containers containing the samples for analysis had to be properly packed and labelled in the manner prescribed by the Act, and that the purpose of the third sample was to show that this packing and the labelling by the prosecution had been properly done, and that it was necessary for the prosecution to produce this third sample in Court in proof of the due packing and labelling. This contention also is without substance. The Act nowhere enjoins a duty on the prosecution to produce the third sample in Court even when it is not asked for.

Sub-section (2) of section 13 further throws light on the purpose for which the third sample is taken and retained by the Food Inspector. It reads as under :

"13. (1) * * * * *

(2) After the institution of a prosecution under this Act, the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the court for sending the part of the sample mentioned in sub-clause (i) or sub-clause (in) of clause (c) of sub-section (1) of section 11 to the Director of the Central Food Laboratory for a certificate, and on receipt of the application, the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and may then despatch the part of the sample under its own seal to the Director of the Central Food Laboratory, who shall thereupon send a certificate to the Court in the prescribed form within one month from the date of receipt of the sample, "specifying the result of his analysis."

15 A reference to the statement of P W 2, dated 2nd March 1966 shows that the sample retained by the Food Inspector in this case was always available and could be produced but no request was made on behalf of the accused for its production nor was it ever suggested on his behalf during the trial that the samples had not been properly packed and labelled. Under these circumstances, the non production of the third sample in Court does not in any manner vitiate the conviction of the accused in this case.

16 Lastly the learned counsel very strenuously urged that no proper report of the Public Analyst had been obtained in this case because Shri Bakhat Singh Sethi, who sent the sample to the Public Analyst for analysis, was not a validly appointed Food Inspector entitled to do so under the powers conferred by cl (b) of sub s (1) of S 10 of the Act. It was urged that the relevant notification appointing him to act as a Food Inspector was issued on 6th April 1961 when he held two shares of Rs 10 each in D M C Co-operative Society which running a store dealing in the business of milk butter and ghee and therefore had a financial interest in the sale of articles of food and, as such his appointment was hit by the proviso to S 9 of the Act.

The learned counsel for the Corporation very strongly refuted the position and contended that the mere fact that Shri Bakhat Singh Sethi on the date of his appointment as Food Inspector was a member of D M C Co-operative Society which carried on the business and which in itself was a body corporate separate and distinct from its members did not tantamount to Shri Bakhat Singh Sethi having a financial interest in the sale of an article of food within the meaning of the proviso to S 9 of the Act. He says that it is also in evidence that Shri Bakhat Singh Sethi had resigned from the membership of this society immediately thereafter and that in September 1965 when he took the sample of the accused and sent the same for analysis he was definitely not a member of the D M C Co-operative Society and therefore could not be said to have been hit by the proviso to S 9 of the Act. It is further maintained that even if the appointment of Shri Bakhat Singh as Food Inspr for was in any manner found to be bad, that did not make any difference because he still remained a member of the public entitled to purchase the Laddoos from the accused and also entitled to have them analysed from the Public Analyst.

17 Reference is invited to S 7 of the Act, and it is contended that what is prohibited by law is that no person shall manufacture for sale or store or sell or distribute any adul-

terated food, and what is punishable under S 16 of the Act is the sale of the adulterated food.

18 It is undoubtedly true that while sub cl (b) of S 10 (1) of the Act confers powers on the Food Inspector to have the sample analysed from the Public Analyst S 12 makes it clear that in spite of this provision in the Act there would be nothing to prevent a purchaser of any article of food even though he may not be a Food Inspector from having such an article analysed by the Public Analyst. The learned counsel for the accused relying on the words 'other than a food inspector occurring in S 12 contends that any sample sent by a person as a Food Inspector, would not be a proper submission of the sample under S 12, if the sender was not a Food Inspector in fact. I do not however see any way to agree to this submission. Section 12 will come into play whenever the person sending the sample is either not the Food Inspector or is not found to be so eventually. A similar question came up for decision before the Calcutta High Court in *Sawai Ram Agarwal v Emperor* AIR 1934 Cal 858 and it was held that even if the Sanitary Inspector, who submitted the samples to the Analyst was not authorized to exercise those powers in that particular place samples submitted must be deemed to have been submitted for analysis under the Act and the special rule of evidence contained in S 14 of the Bengal Food Adulteration Act, 1919 under which the certificate of the Public Analyst was made admissible in evidence without formal proof will apply.

In *Manindra Nath Banerjee v Jyotish Chandra Dutta* AIR 1937 Cal 60 another Division Bench of the same Court held that even though in the case before the learned Judges of the Calcutta High Court it was proved that the Sanitary Inspector, who obtained the sample and sent them for examination was not specially authorized under the Bengal Food Adulteration Act to do so he could still take the sample and send it to the Public Analyst for examination as a private individual. It is therefore not correct to contend that there was no valid report of the Public Analyst as envisaged in the Act and that on that account the conviction of the accused was vitiated.

19 In this view of the matter and as a result of the finding that Shri Bakhat Singh Sethi was competent as an ordinary purchaser to send the sample to the Public Analyst for analysis it is not necessary to go into and examine the other contentions raised by the learned counsel for the Corporation in this regard.

20 The net result therefore, is that in my view the accused has rightly been convicted.

under the provisions of S. 7 read with S. 16 of the Prevention of Food Adulteration Act. Having regard to the mandatory provisions of S. 16 as the offence found proved against him, was not covered by sub-cl. (1) of cl. (i) of S. 2 of the Act, the learned trial Magistrate should have awarded him a minimum sentence of six months and a fine of Rs. 1,000. The learned counsel for the Corporation contends that the facts of this case call for a more deterrent sentence but, as the accused is an old man, the minimum sentence prescribed for the offence will meet the ends of justice in this case.

21. The order of Shri C. R. Negi, Magistrate 1st Class, Delhi, is accordingly modified to this extent and the accused is sentenced to simple imprisonment for a period of six months and to pay fine of Rs. 1,000.

Order accordingly.

1970 CRI. L. J. 227 (Vol. 76, C. N. 48)

(DELHI HIGH COURT)

OM PARKASH, J.

Ayashi Lal, Petitioner v. The State, Respondent.

Criminal Revn. No. 154 of 1968, D/- 2-4-1969.

Prevention of Food Adulteration Act (1954), S. 13—Report of Public Analyst—Correctness—Mode of proof—Accused has no right to summon Public Analyst as defence witness—Court can however summon him under S 540, Cr. P. C—(Criminal P. C (1898) Ss. 257, 540).

Section 18, which makes the report of the Public Analyst, evidence in the case, also prescribes the mode in which that report can be superseded, i.e. the correctness of the report can be challenged. By implication, all other modes of challenging the correctness of the report are excluded. The only method therefore, in which the accused can challenge the correctness of the report of the Public Analyst, is by getting the part of the sample analysed by the Director, Central Food Laboratory. He has no right to call the Public Analyst as a defence witness, under S. 257, Code of Criminal Procedure, for testing the veracity of the report. Criminal Revn. No 10-D of 1964 (Punj) & AIR 1969 Cri L J 221 (Delhi) & AIR 1963 Punj 175, Rel. on; AIR 1964 Punj 520 & AIR 1966 All 91, Dist. AIR 1966 S O 128, Explained.

(Pars 7, 18)

Though the accused cannot, as a matter of right, summon the Public Analyst, as a defence witness, the Court has ample powers, under S. 540, Code of Criminal Procedure to summon him as a witness at the request of the accused or of the prosecution or suo motu, if the Court considers that the evidence of the Public Analyst is necessary to enable it to arrive at the truth or otherwise of the facts under inquiry or for the just decision of the case. However the mere allegation that the Public Analyst had defective vision is not a ground for summoning the Public Analyst as witness under S. 540, Code of Criminal Procedure.

(Paras 9, 10)

Cases Referred: Chronological Paras

- (1969) 1969 Cri L J 221 (Delhi) :
Cri Revn. No. 189 of 1967, Municipal Corporation v. Ram Dayal 18
(1966) AIR 1966 SC 128 (V 58): 1966
Cri L J 106, Mangal Das v. Maharashtra State 15
(1966) AIR 1966 All 91 (V 53) : 1965
All Cri R 319 : 1966 Cri L J 122,
Bechan v. State 17
(1964) AIR 1964 Punj 520 (V 51) :
(1964) (2) Cri L J 723, Municipal Corporation Delhi v. Jai Dayal Jaiwanda Mal 17
(1964) Cri. Revn. No. 10-D of 1964
(Punj), Des Raj v. Municipal Corporation of Delhi 11
(1963) 1969 (1) Cri L J 124 : I L R
(1962) 1 Ker 430, City Corporation Trivandrum v. Antony 16
(1963) AIR 1963 Punj 175 (V 50) :
1962-64 Pun L R 949 · (1963) 1 Cri
LJ 475, Municipality Ambala v. Baskhi Ram 14
Ghan Shyam Das, for Petitioner, Tara
Chand Brijmohan Lal, for Respondent.

ORDER. — This is a reference, made by the learned Additional Sessions Judge, for setting aside an order of the Magistrate, refusing to summon the Public Analyst as a defence witness, in a case under Sec. 7/16, Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act.)

2. A complaint, under Sec. 7/16 of the Act, was filed, by Shri Ganga Ram Sharma, Assistant Municipal Prosecutor, Municipal Corporation, Delhi, against Ayashi Lal petitioner, alleging what a Food Inspector, Shri H. R. Sood, had, on the 11th April, 1967, purchased a sample of milk, without indication, from the petitioner, who was taking the milk for sale and that the sample was, on analysis by the Public Analyst, found to be adulterated.

3. After the close of the prosecution evidence, the petitioner put in a list of defence

witnesses. The only defence witness named therein was Shri S. Bai, Public Analyst, Municipal Corporation, Delhi. The Magistrate refused to summon the Public Analyst on the ground that the report of the Public Analyst was already on the record and that it would not serve any useful purpose to call him as a witness. The Magistrate further observed that if the petitioner was not satisfied with the report of the Public Analyst, it was open to him to make an application under S. 13 (2) of the Act to get the sample analysed by the Director, Central Food Laboratory, Calcutta.

4. Against the above order of the Magistrate, the petitioner went up in revision. The revision was heard by the learned Additional Sessions Judge. He was of the view that under the provisions of S. 257, Code of Criminal Procedure, the Magistrate was bound to summon the witness unless he (the Magistrate) considered that the witness was being summoned for the purpose of vexatious delay or for defeating the ends of justice and that the Magistrate erred in refusing to summon the witness not on any of the above grounds but on the ground that the petitioner could, in case he was dissatisfied with the report of the Public Analyst, get the part of the sample with him analysed by the Director, Central Food Laboratory under S. 13 (2) of the Act. The learned Additional Sessions Judge was further of the view that S. 13 (2) of the Act provided one of the modes in which the correctness of the report of the Public Analyst could be challenged and that that section did not bar either the production of other evidence to contradict that report or the production and examination of the Public Analyst to test the veracity of the report. The learned Additional Sessions Judge has therefore made a reference to this Court recommending that the order of the Magistrate which contravenes the provisions of S. 257, Criminal P. C. be quashed and the Magistrate be directed to summon the Public Analyst as a defence witness.

5. The reference has been supported on behalf of the petitioner while it has been opposed on behalf of the Municipal Corporation, Delhi. The contentions on behalf of the Municipal Corporation are that the only mode in which the report of the Public Analyst can be challenged is the one provided in S. 13 (2) of the Act and that an accused has no right to summon the Public Analyst as a defence witness under S. 257, Criminal P. C. for contradicting the facts stated in the report.

6. Section 18 of the Act reads:

"18. (1) The Public Analyst shall deliver in such form as may be prescribed a report to the Food Inspector of the result of the analysis

of any article of food submitted to him for analysis. (2) After the institution of a prosecution under this Act the accused vendor or the complainant may on payment of the prescribed fee make an application to the court for sending the part of the sample mentioned in sub-cl (1) or sub-cl (iii) of cl (c) of sub s (1) of S. 11 to the Director of the Central Food Laboratory for a certificate and on receipt of the application the court shall first ascertain that the mark and seal or fastening as provided in cl (b) of sub s (1) of S. 11 are intact and may then despatch the part of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the sample specifying the result of the analysis. (3) The certificate issued by the Director of the Central Food Laboratory under sub s (2) shall supersede the report given by the Public Analyst under sub s (1) (4) Where a certificate obtained from the Director of the Central Food Laboratory under sub s (2) is produced in any proceeding under this Act or under Ss. 272 to 276 of the Penal Code (Act XLV of 1860) it shall not be necessary in such proceeding to produce any part of the sample of food taken for analysis. (5) Any document purporting to be a report signed by a Public Analyst unless it has been superseded under sub s (3) or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under Ss. 272 to 276 of the Penal Code (Act XLV of 1860). Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein.

7. The above section makes the report of the Public Analyst as evidence of the facts stated therein without its being proved by calling the Public Analyst as a witness. If the accused is dissatisfied with the report, he can apply to the Court for getting the part of the sample given to him by the Food Inspector analysed by the Director, Central Food Laboratory. The Director is bound to send a certificate containing the result of his analysis. That certificate supersedes the report of the Public Analyst and is conclusive evidence of the facts stated therein. Thus S. 18 which makes the report of the Public Analyst evidence in the case also prescribes the mode in which that report can be superseded, i.e. the correctness of the report can be challenged. By implication all other modes of challenging the correctness of the report are excluded.

The only method, therefore, in which the accused can challenge the correctness of the report of the Public Analyst, is by getting the part of the sample analysed by the Director, Central Food Laboratory. He has no right to call the Public Analyst as a defence witness, under S. 257, Criminal P. O. for testing the veracity of the report.

8. It may be relevant to point out that before the enactment of the Act by the Parliament, there were local enactments in force in various States for the prevention of adulteration of food articles and that at least one of those enactments gave the accused a right to summon the Public Analyst as a witness, vide section 16 of the Bombay Prevention of Food Adulteration Act, 1925. It is, further, relevant to point out that sub-section (2) of section 510, Code of Criminal Procedure, gives the right to an accused to summon as a witness the functionary whose report has been declared to be evidence in the case by sub-section (1) of that section. Had the Parliament intended to give the accused a right to summon the Public Analyst as a witness in a case under the Act, it would have made a provision in the Act for that purpose, like section 16 of the Bombay Prevention of Food Adulteration Act or sub-section (2) of Section 510, Code of Criminal Procedure.

9. It appears, however, necessary to make it clear that though the accused cannot, as a matter of right, summon the Public Analyst, as a defence witness, the Court has ample powers, under section 540, Code of Criminal Procedure, to summon him as a witness at the request of the accused or of the prosecution or suo motu, if the Court considers that the evidence of the Public Analyst is necessary to enable it to arrive at the truth or otherwise of the facts under inquiry or for the just decision of the case. The aforesaid proposition was conceded by the learned counsel for the Municipal Corporation.

10. In the present case, the petitioner had made an application to the Magistrate for summoning the Public Analyst as a witness under section 540 of the Code of Criminal Procedure. It was stated, in the application, that the report of the Public Analyst was unreliable as he had defective vision. The Magistrate rejected the application with the remark that in order to show that the report of the Public Analyst was unreliable, the petitioner could get the part of the sample given to him analysed by the Director, Central Food Laboratory and it was unnecessary to summon the Public Analyst as a witness. In my opinion, the Magistrate rightly rejected the application. The mere allegation that the Public Analyst had defective vision did not

furnish a ground for summoning the Public Analyst as a witness under section 540, Code of Criminal Procedure. It is clear from Rule 7 of the Prevention of Food Adulteration Rules and Form 3, appended to the Rules, that the Public Analyst can cause the sample analysed by his associates and assistants.

11. The cases, cited by the learned counsel for the parties, may now be discussed. The point, whether the accused, in a case under the Act, has a right to summon the Public Analyst, as a defence witness, for showing that the report of the Public Analyst is incorrect, was considered in Criminal Revn. No. 10.D of 1964, *Des Raj v. Municipal Corporation of Delhi (Pun)*. After noticing the provisions of section 18 of the Act, Mr. Justice D. K. Mahajan, observed:

"In any case, there is ample safeguard provided in section 18 of the Act against any incorrect report of the Public Analyst. Three samples are taken at the time when any food is taken by the food inspector for analysis. One sample is retained by the food inspector, the second is sent to the Public Analyst and the third is handed over to the dealer from whom the food is recovered. If the dealer is not satisfied with the report of the Public Analyst he has the right to get the sample with him sent for analysis to the Director of Central Food Laboratory. The Director then examines the sample and submits his report. His report has been made conclusive under section 18 (5) proviso. This clearly indicates that the only method in which the report of the Public Analyst can be challenged is one provided in section 18 (2). The opinion of the Public Analyst, given if he is allowed to appear as a witness, is of no consequence."

12. The aforesaid observations fully support the contention that the only manner in which the report of the Public Analyst can be challenged is the one provided in section 18 (2) of the Act.

13. In Criml. Revn. No. 189 of 1967 : 1969 Cr L J 221 (Delhi), *Municipal Corporation v. Ram Dayal* the accused in a case under the Act had applied for summoning the Public Analyst as a witness under section 510, Code of Criminal Procedure. That application was rejected on the ground that the Public Analyst was not one of the functionaries specified in sub-section (1) of section 510 and could not, therefore, be summoned under sub-section (2). It was, further, observed by S. N. Shankar J., that

"In case, where the accused desired to challenge the report of the Public Analyst under the Act, he had to follow the procedure provided in section 18. Sub-section (2) of section 18 provides that in "such a case the accused vendor should make an application to the Com-

for sending the part of the sample, delivered to him under S 11 (1) (c) to the Director of the Central Food Laboratory for his examination and certificate who in turn was bound to furnish a certificate to the Court in the prescribed form containing the result of his examination and such a certificate would operate to supersede the certificate of the Public Analyst.

14 In *Municipality, Ambala v Basakhi Ram*, 1962 64 Pun L R 949 (AIR 1968 Punj 175) a Division Bench had observed

"It was open to the accused to challenge the report of the Analyst and for that purpose, procedure is prescribed in S 13 (2). He can get the sample given to him sent for analysis to the Central Food Laboratory and the report of the Central Food Laboratory would override the report of the Public Analyst.

15 The learned counsel for the petitioner placed strong reliance on the following observations, made by their Lordships of the Supreme Court in *Mangal Das v Maharashtra State* AIR 1966 SC 128

As regards the failure to examine the Public Analyst as a witness in the case no blame can be laid on the prosecution. The report of the Public Analyst was there and if either the Court or the appellant wanted him to be examined as a witness appropriate steps would have been taken.

16 The learned counsel contended that the aforesaid observations supported his contention that an accused in a case under the Act can summon the Public Analyst as a defence witness. Now the observations relied upon, were made in connection with the view expressed in *City Corporation Trivandrum v Antony ILR (1962) 1 Ker 480 (1963 (1) Cri L J 124)* that the prosecution could have examined the Public Analyst as a witness. Their Lordships of the Supreme Court observed that the report of the Public Analyst was evidence of the facts stated therein and that it was unnecessary to produce him as a witness to prove the report. It was not the contention of the appellant before their Lordships that an accused in a case under the Act has the right to summon the Public Analyst as a defence witness. The observations of their Lordships are to be interpreted in the context in which they were made. Their Lordships may have the provisions of S 540 Criminal P C, in their mind while observing that the appellant in that case would have taken appropriate steps to summon the Public Analyst. The observations of their Lordships cannot be interpreted to mean that an accused has a right to summon the Public Analyst as a defence witness.

17 The other cases *Municipal Corporation Delhi v Jai Dayal Jawanda Mal* AIR 1961 Punj 528 and *Behan v State* 1955 All Cr R 819 (AIR 1956 All 91) do not support the contention of the petitioner. In the Punjab case it was recognised that the Court has ample powers to summon the Public Analyst as a witness. In the Allahabad case the Court had made enquiries about the qualifications of the functionary who had actually analysed the sample. In none of the cases cited, the point that an accused, in a case under the Act, has the right to summon the Public Analyst as a witness was raised or decided.

18 For all the above reasons I am of the view that the Magistrate was right in holding that the only way in which the petitioner could challenge the correctness of the report of the Public Analyst was to make an application under S 13 (2) of the Act and that the petitioner had no right to summon the Public Analyst as a defence witness. The view of the learned Additional Sessions Judge that S 13 (2) provides only one of the modes in which the report of the Public Analyst can be challenged and that it does not bar the testing of the veracity of that report by producing other evidence or by summoning the Public Analyst is not correct.

19 The reference is rejected. The revision petition of the petitioner will stand dismissed.

Revision dismissed

1970 CRI L J 230 (Vol 76, C N 49) =
AIR 1970 JAMMU & KASHMIR 21
(V 57 C 6)

S M FAZL ALI C J AND
M JALAL-UD-DIN J

H Khaliq Dar Applicant v State and another Opposite Party

Criminal Ref No 33 of 1969 D/- 13-8-1969 from order of S J Srinagar D/- 7-9-1968

Criminal P C (1898) Ss 145 (4) First Proviso (9) and 540 — Summoning of witnesses — Power of Magistrate is discretionary — Provisions of sub sections (4) (9) of S 145 and S 540 — Interpretation — Provisions are mutually exclusive — AIR 1961 Punj 187 & AIP 1958 Ori 79 and AIR 1966 Ori 170 & AIR 1959 All 763, Dissented from

Sub-section (4) of S 145 does not bar either the summoning or the consideration of the evidence of witnesses summoned under sub-s (9) of S 145 or under S 540 of the Criminal P C. The first proviso to sub-section (4) sub-s (9) of S 145 and S 540 contemplate three separate categories of cases which are mutually exclusive (Paras 1 7)

HM/IM/D726/69/DVT/P

It may not be possible for a party to obtain the affidavits of some persons either because they do not want to be identified with a party to the dispute or because they are public servants, at the same time such persons may be very competent to speak about possession. A party may in such a case request the Magistrate to ask such a person to swear an affidavit, but the Magistrate has no power to compel such a person to do so. The only other alternative, therefore, for the party is to request the Magistrate to summon such a person and examine him as a witness, and this can be done only under sub-section (9) of S 145. Of course the Magistrate is not bound to comply with the request of the party, but he has to exercise his discretion judiciously, not arbitrarily. Once the Magistrate is satisfied that a case for examining a witness is made out by any of the parties before him, he has the power to summon any witness at any stage even at the argument stage (Para 8)

It is well settled that the Courts must adopt a harmonious rule of interpretation so as to bring about reconciliation between apparent inconsistencies appearing in the provisions of the same statute. It is also equally well settled that whenever the legislature makes a particular provision it must be presumed that there is a certain object behind doing so and the legislature never intends to make provisions which are useless and redundant. Having regard to these golden principles of interpretation it is clear that the first proviso to S. 145 (4) and sub-section (9) refer to two different categories of cases for which provision has been made by the legislature. The first proviso covers the case only of such witnesses who have filed affidavits before the Court. There may, however, be some witnesses whose evidence may be very material but who have not given affidavits for one reason or the other. It is to meet this contingency that sub-section (9) has been engrafted which gives discretion to the Magistrate to summon any witness on the application of either party at any stage of the proceedings. AIR 1961 Punj 187 & AIR 1958 Ori 79 & AIR 1966 Ori 170 & AIR 1959 All 763, Dissented from. Case law discussed (Para 1)

Cases Referred: Chronological Paras

{1968} AIR 1968 Mys 16 (V 56) =
1968 Cri LJ 71, Vijay Rao v. Laxman Rao 6

{1966} AIR 1966 Ori 170 (V 53) =
1966 Cri LJ 935, Raghunath v Purnachandra 5

{1965} AIR 1965 Pat 25 (V 52) =
1965 (1) Cri LJ 69, Sheo Kumar v. Tribhuwan Rai 6

{1964} AIR 1964 Mad 263 (V 51) =
1964 (1) Cri LJ 674, Challamuthu Padayachi v. Rajavel 6

(1961) AIR 1961 Madh Pra 302 (V 48) = 1961 (2) Cri LJ 642, Kanhaiyalal v Devi Singh 6

(1961) AIR 1961 Punj 187 (V 48) = 1961 (1) Cri LJ 708, Jodh Singh v. Bhagambar Das 1, 2

(1960) AIR 1960 Raj 15 (V 47) = 1960 Cri LJ 116, Bahori v. Ghure Balwant 6

(1959) AIR 1959 All 763 (V 46) = 1959 Cri LJ 1384, Bhagwat v State 1, 3

(1958) AIR 1958 Ori 79 (V 45) = 1958 Cri LJ 650, Keshab v Somnath Behera 4

R. N. Vaishnavi, for Applicant, J L Chowdhury and Asst. Ad General, for the State

FAZL ALI C. J. :— This reference raises a substantial question of law regarding the interpretation of sub-s (9) read with sub-section (4) of Section 145 of the Criminal P C — a point on which there appears to be a serious divergence of judicial opinion in India. The reference arises out of proceedings drawn under Section 145 with respect to the land in dispute between the parties. It appears that while the proceedings were going on in the Court of the trial Magistrate, the applicant moved an application before the Magistrate for summoning two witnesses namely the Dy Registrar High Court who was at the time of the dispute the Munsiff Sub-Registrar Srinagar and the Tehsildar of the Nazool Department both of whom had refused to appear in the Court without getting a regular summons from the Court. The learned trial Magistrate rejected the prayer of the applicant on the ground that the applicant had taken a long time to complete the proceedings and had taken several adjournments for arguments. In other words the learned Magistrate rejected the application without considering the same on its merits. Thereafter an application in revision was made to the Sessions Judge Srinagar for making a reference to this Court. This application was resisted by the non-applicants on the ground that the Magistrate had no jurisdiction to summon the witnesses prayed for by the applicant under Section 145 (9) and even if these witnesses could have been summoned their evidence could not be considered by the Court under Section 145 (4) of the Criminal P. C. It was further contended before the Sessions Judge as also before us that as the witnesses sought to be summoned had not given any affidavits, they were debarred from giving evidence in the proceedings. Reliance was placed by the petitioners on a decision reported in Bhagwat v State, AIR 1959 All 763 and Jodh Singh v Bhagambar Das, AIR 1961 Punj 187. It appears however, that the Patna, Rajasthan, Madras and M. P. High Courts have taken a contrary view.

Before considering the authorities on the subject we would like to analyze the relevant provisions of the Criminal P C in order to find out the real purpose scope and ambit of sub sections (4) and (9) of Section 145 of the Criminal P C Section 145 (4) and first proviso runs thus

The Magistrate shall then without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute peruse the state ments documents and affidavits if any so put in hear the parties and conclude the inquiry as far as may be practicable within a period of two months from the date of the appearance of the parties before him and if possible decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject

Provided that the Magistrate may if he so thinks fit summon and examine any person whose affidavit has been put in as to the facts contained therein

It is true that in the main body of Section 145 (4) the Court has been given the power to consider and peruse the state ments documents and affidavits and there is no specific reference to the evidence of the witnesses. Nevertheless the proviso quoted above gives a clear discretion to the Magistrate to summon and examine any person whose affidavit has been put in as to the facts contained therein. Thus by virtue of the first proviso (Supra) the evidence of a deponent can also be considered by the Magistrate in proceedings under Section 145 even though this power is not expressly given to the Magistrate under Section 145 (4) of the Cri P C. It is therefore obvious that even though Section 145 (4) relates merely to perusal of statements documents and affidavits yet by virtue of the proviso an implied power is contained in sub section (4) to consider the evidence of the deponent if examined and recorded—otherwise the first proviso would become absolutely redundant and useless and the very object of engrafting this proviso would be frustrated. Similarly Section 145 (9) runs as under—

The Magistrate may if he thinks fit at any stage of the proceedings under this section, on the application of either party issue a summons to any witness directing him to attend or to produce any document or thing

This proviso also invests the Magistrate with a discretion at any stage of the proceedings to issue a summons to any witness directing him to attend or to produce any document or thing. Such a discretion has to be exercised only on the application of either party and if the Magistrate is satisfied that a fit case for summoning a witness is made out. On a

parity of reasoning given above sub section (4) would impliedly give power to the Magistrate to consider the evidence of a witness summoned by the Magistrate under sub section (9) of the Cri P C. otherwise this provision would become useless and redundant. This mere fact that there is no reference to the evidence to be summoned either in the first proviso or sub section (9) of S 145 does not necessarily lead to the inference that the evidence referred to in these provisions has to be excluded from consideration.

It is well settled that the Courts must adopt a harmonious rule of interpretation so as to bring about reconciliation between apparent inconsistencies appearing in the provisions of the same statute. It is also equally well settled that whenever the legislature makes a particular provision it must be presumed that there is a certain object behind doing so and the legislature never intends to make provisions which are useless and redundant. Having regard to these golden principles of interpretation it seems to us that the first proviso to Section 145 (4) and sub section (9) refer to two different categories of cases for which provision has been made by the legislature. The first proviso covers the case only of such witnesses who have filed affidavits before the Court. In other words the deponents of the affidavits have been put within the framework of the proviso and the Magistrate has been given a discretion to summon them if he thinks fit in order to explain the affidavits given by them. There may however be some witnesses whose evidence may be very material but who have not given affidavits for one reason or the other. It is to meet this contingency that sub section (9) has been engrafted which gives discretion to the Magistrate to summon any witness on the application of either party at any stage of the proceedings. In other words while the first proviso is confined to the deponents sub section (9) is more or less general in character and gives the right to any of the parties to request the Court to summon a witness who cannot be produced by the party at its own instance e.g. an official witness who can appear only through a summons. In order to ensure the attendance of such a witness the assistance of the Court has to be taken and that is what sub-section (9) provides for. Reference has also been made to another provision in the Criminal P C namely Section 540 which runs thus

Any Court may at any stage of any inquiry trial or other proceeding under this code summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined and the Court shall summon and examine or recall and examine any such person if his evidence ap-

pears to it essential to the just decision of the case."

It is not disputed by the counsel appearing for either of the parties nor in any of the authorities cited before us that if the Court summons a witness under this section his evidence would be considered by the Court, although there is no specific power contained in S 145 (4) for considering the evidence of this type, this also supports our view that the power contained in sub-section (4) cannot be strictly limited to the language used therein but has to be construed in a broad and general sense. In other words, where the Criminal P. C. provides for examination of any witness under given circumstances, then there is an implied power to consider the evidence of that witness. Section 540 applies to cases where a witness is examined by the Court and the witness so examined is usually known as the Court witness. The requirement of law in cases contemplated by Section 540 is that the Court must consider the evidence of the witnesses concerned to be essential for a just decision of the case. Thus it would appear that the first proviso to sub-section (4), sub-section (9) of S 145 and S 540 contemplate three separate categories of cases which are mutually exclusive. The first proviso to Section 145 refers to cases of deponents whose affidavits have been filed. Sub-section (9) refers to the power of the Magistrate which is to be exercised on the application of any of the parties and Section 540 confers power on the Magistrate to examine a witness at his own in order to understand the facts of the case. Since the Criminal P. C. has made these three separate provisions, it can safely be presumed that where the witnesses have to be summoned under these provisions, there is an implied power also to consider their evidence. If this harmonious interpretation be put to the provisions (Supra), we feel no difficulty in taking the view that the Magistrate can consider the evidence of any witness whom he summons on the application of the parties under Section 145 (9).

2. We shall now deal with the authorities. In AIR 1961 Punj 187 (Supra) a Division Bench no doubt held that in view of the amended provisions of Section 145 (4) no evidence taken by the Magistrate under Section 145 (9) could be considered. Their Lordships observed as follows

"The object of the changes made by the amending Act obviously appears to be to shorten the proceedings under Section 145 by providing that the evidence to be adduced by the parties may be given by affidavits and that the delay in getting the witnesses summoned and examined orally may be eliminated. For the purpose of elucidating the facts stated in the affidavits put in, power is reserved to the

Court to examine such of the persons orally as he may deem necessary, out of the persons whose affidavits have been put in sub-section (9) which was not touched by the amended Act runs as under.—

"The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing".

In the context of the provisions of sub-sections (1) and (4) as they existed prior to the amendment, sub-section (9) provided a procedure by which, at the instance of either of the parties, the Magistrate could issue a summons for the attendance of the witness 'to attend or to produce any document or thing'. In view of the amendment made in sub-sections (1) and (4), however, the question of the examination of witnesses at the instance of the parties, does not arise, because it has been directed that evidence by the parties shall be adduced by means of affidavits".

Their Lordships appear to have been led away by the fact that as, by virtue of the amendment, the language of sub-section (4) is changed so as to simplify the procedure under Section 145 and sub-section (9) has remained untouched, therefore, there is an apparent inconsistency between sub-section (9) and sub-section (4) of S. 145. Their Lordships opined that as there is no provision for consideration of the evidence summoned under S. 145, the same cannot be considered. With very great respect we would observe that their Lordships have put a very narrow interpretation on the provisions of the two sub-sections. Their Lordships have not considered the various aspects to which we have adverted above. Secondly their Lordships do not appear to have considered the intention of the legislature in leaving the provisions of sub-section (9) which stood before the amendment untouched after the amendment. It is well settled that the legislature must be presumed to know the provisions of a particular Act which it is amending and if it has deliberately left a particular provision untouched or unamended, then there is a particular object behind this. In the present case there can be no doubt that the legislature clearly intended to provide for a contingency where a witness could be summoned by the Court if his evidence was material and if it was not possible for him to give an affidavit. The fact that sub-section (9) was deliberately left untouched clearly shows that sub-section (4) must implicitly contain the power to consider such evidence. For these reasons we express our respectful dissent from the judgment of the Punjab High Court. AIR 1961 Punj 187 (Supra).

3. A view almost similar to that of the Punjab High Court has been taken by

a single judge of the Allahabad High Court in AIR 1959 All 763 (Supra) In that case however the learned Judge held that sub-section (9) did not confer any right upon a party to examine a witness and that this sub-section was confined only to the examination of evidence which was permitted by sub-section (4) and laid down the procedure for examining such a witness With very great respect we find ourselves unable to agree with this interpretation of law which introduces an element of inconsistency in proviso to sub section (4) and sub section (9) but also imports a limitation into sub-section (9) of Section 145 which is not there

4 There is another case which practically follows the Allahabad view In *Keshab v Somenath Behera* AIR 1958 Orissa 79 it was held that the first proviso to Section 145 (4) entitles only those witnesses to be summoned who have given their affidavits It however appears that the attention of the learned C J was not drawn to Section 145 (9) nor was this point raised and argued before him For these reasons this decision does not appear to be of any assistance to us in deciding the point

5 A similar view was taken in *Rughunath v Purna Chandra* AIR 1966 Orissa 170 where also the ambit and the purport of S 145 (9) was not considered

6 On the other hand the view taken by us in this case is amply supported by a Division Bench decision of the Patna High Court in *Sheo Kumar v Tribhuwan Rai* AIR 1965 Patna 25 In that case their Lordships while dissenting from the Punjab Judgment (Supra) observed as follows

With the greatest respect I am unable to agree There is nothing in the language of the proviso to sub section (4) or in that of sub-section (9) to indicate that the former confers a right upon a party to examine a witness orally It will be noticed that the expression, if he thinks fit occurs in both the sub sections and this expression shows that the discretion lies with the Magistrate Further the proviso to sub-section (4) does not speak of the application of a party which fact indicates that the Magistrate may examine a person who has sworn an affidavit either of his own motion or at the request of a party whereas sub-section (9) enables the Magistrate to summon a witness at the request of a party at any stage of the proceedings It will be noticed that the proviso to sub-section (4) contains the provision to summon and examine any person and therefore a separate provision like the one in sub section (9) is not required for exercising the power given by the proviso The view taken in the aforesaid decision can be justified only if sub-section (9) is completely ignored This

sub section was in its present form before the legislature when extensive amendments were made in 1955 in Sections 145 and 146

The retention of sub-section (9) in its old form cannot therefore be due to mere oversight It is true that the amendments aimed at expeditious disposal of a proceeding under Section 145 nevertheless sub-section (9) was retained The newly added proviso to sub section (4) certainly empowers the magistrate to summon and examine any person whose affidavit has been put in but at the same time the legislature also empowered the Magistrate under sub section (9) to summon any witness at any stage of the proceeding on the application of either party Neither in sub section (9) nor in the proviso to sub-section (4) a party has been given any right to examine a witness in either case the discretion lies with the Magistrate and he can summon a person under either of these provisions only if he thinks fit to do so

In my opinion the legislature deliberately allowed sub section (9) to continue for meeting certain contingencies It may not be possible for a party to obtain the affidavits of some persons either because they do not want to be identified with a party to the dispute or because they are public servants at the same time such persons may be very competent to speak about possession What remedy has a party in such a contingency? A party may of course request the Magistrate to ask such a person to swear an affidavit but the Magistrate has no power to compel such a person to do so The only other alternative therefore for the party is to request the Magistrate to summon such a person and examine him as a witness and this can be done only under sub s (9) Of course the Magistrate is not bound to comply with the request of the party but he has to exercise his discretion judiciously not arbitrarily

The same view appears to have been taken by the Madras High Court in AIR 1964 Mad 263 M P High Court in AIR 1961 Madh Pra 302 Mysore High Court in AIR 1968 Mys 16 and the Rajasthan High Court in AIR 1960 Raj 15

7 On a consideration therefore of the authorities mentioned above we prefer to follow the Patna view which has been followed by the Madras Mysore M P and Rajasthan High Courts and which in our opinion is fully in consonance with the language employed in sub sections (4) and (9) of S 145 We therefore hold that sub section (4) does not bar either the summoning or the consideration of the witnesses summoned under sub-s (9) of S 145 or under S 540 of the Cri P C.

8. In ultimate analysis the question is left entirely to the discretion of the learned Magistrate. Once the learned Magistrate is satisfied that a case for examining a witness is made out by any of the parties before him, he has the power to summon any witness at any stage even at the argument stage.

9. In the instant case the learned Magistrate has rejected the application of the petitioner without considering it on merits. In fact the Magistrate has completely over-looked the fact that the two official witnesses namely the Dy Registrar High Court (now Sub-Judge Shopian) and the Tehsildar Nazool being Government servants could not be compelled to give affidavits in favour of the petitioner, nor could they have appeared before the Court without regular summons from it. In these circumstances we accept this reference to this extent that the matter is remitted to the trial Court who will now consider the application of the applicant for summoning the two witnesses mentioned above on its merits and if he thinks fit in the interest of justice to summon the witnesses he will certainly give an opportunity to the applicant to record the statements of the witnesses after issuing regular summons to them. The reference is disposed of accordingly.

10. MIAN JALALUDDIN J.: I agree
Reference answered
accordingly

1970 CRI L. J. 235 (Vol. 76, C. N. 50) =
AIR 1970 MADHYA PRADESH 26
(V 57 C 7)

FULL BENCH

P. K. TARE, K. L. PANDEY AND
SURAJBHAN, JJ.

State of Madhya Pradesh, Appellant v.
Hukumsingh Ramprasad and others,
Respondents

Criminal Appeal No 84 of 1965, D/- 29-7-1969, decided by Full Bench on order of reference made by Shiv Dayal and N. M. Golvalkar, JJ, D/- 3-3-1966.

Criminal P.C. (1898), Ss. 345(6), 369, 430, 403— Trial for offences under Ss. 307, 325, 324, 148 and 149 of I.P.C. — Conviction of some accused for offence under S. 323 only — Subsequent acquittal of those accused under S. 345(6), Cr. P.C. by compounding of offence in appeal without notice to State — State appeal against acquittal of those accused of offences under Ss. 307, 148 and 149 and of remaining accused for offences under Ss. 301, 325, 324, 148 and 149 is not barred.

Where the accused was prosecuted for offences under Ss. 307, 325, 324, 148 and 149 of I.P.C. and some of them were con-

victed for offence under S. 323, an order of their acquittal, in appeal, under S. 345(6) of Criminal P. C. passed on application for leave to compound the offence under S. 323, does not bar a State appeal against their acquittal of offences under Ss. 307, 148 and 149 when such order of acquittal was passed without notice to the State. So also a State appeal against an order of acquittal of the remaining co-accused under Ss. 307, 325, 324, 148 and 149 is not barred, subject to the limitations that the judgment in appeal filed by an accused after notice to the State becomes final Criminal Appeal No 219 of 1966, D/- 30-10-1968 (SC), Foll (Paras 1 and 8)

Cases Referred: Chronological Paras
(1968) Cri Appeal No 219 of 1966
D/- 30-10-1968=1969-2 SCWR 133,
Nirbhay Singh v. State of Madhya Pradesh 7, 8

(1963) AIR 1963 Guj 21 (V 50)=
1963 (1) Cri LJ 168, State v.
Diwanji Gardharji 6

(1958) AIR 1958 Punj 233 (V 45)=
1958 Cri LJ 938 (FB), The State
v. Mansha Singh 6, 7

(1955) AIR 1955 SC 633 (V 42)=
1955 Cri LJ 1410, U. J. S. Chopra
v. State of Bombay 6

(1952) AIR 1952 Madh Bha 81 (V 39)
=1952 Cri LJ 887 (FB), State v.
Kalu 6, 7

(1932) AIR 1932 Nag 121 (V 19)=
28 Nag LR 233=33 Cri LJ 849
(FB), Mohammadi Gul v. Emperor 6, 7

(1914) AIR 1914 All 191 (2) (V 1)
=15 Cri LJ 64, Sailani v. Emperor 5

M. L. Chansoria, Dy. Govt. Advocate,
for the State; Rajendra Singh, S. C. Dutt
and Surendra Singh, as amicus curiae

TARE, J.:— The following questions
have been referred to this Full Bench by
a Division Bench of this Court by order,
dated 3-3-1966 —

(1) Does an order of acquittal under
Section 345(6), Criminal Procedure Code,
passed on an application for leave to com-
pound an offence under Section 323, Penal
Code of which the accused was convicted
by the trial Court, bar a State appeal
against his acquittal of the offence under
Section 307 of the Penal Code, even when
such order under Section 345(6), Criminal
Procedure Code, was passed without
notice to the State?

(2) Does such an order of acquittal bar
a State appeal from his acquittal under
Sections 148 and 149, Penal Code?

(3) Does such an order of acquittal bar
a State appeal from an order of acquittal
of a co-accused under Sections 307, 325,
324, 148 and 149, Penal Code? If so, to
what extent?

2. The said questions arose under the
following circumstances: In Sessions Trial
No 90 of 1964 of the Court of Additional

Sessions Judge Vidisha 10 persons in all by name Hukumsingh Mehtab Lal-singh Moharsingh, Halku Raghuwar-prasad Laxman, Ramnarayan Bala-prasad and Shivcharan were prosecuted for alleged offences under Sections 307 325 324 148 and 149 Indian Penal Code in connection with an incident that took place on 13-10-1963 when the accused were said to have committed the said offences. The trial Judge acquitted the other 6 accused and found Hukumsingh, Moharsingh Halku and Mehtab guilty of the offence under Section 323 Indian Penal Code and sentenced them to rigorous imprisonment for 3 months.

3 Hukumsingh and 3 others who had been convicted by the trial Judge filed Criminal Appeal No 17 of 1965 in the High Court. According to the High Court Rules that appeal went before a Single Bench. In that appeal an application was made for composition of the offence under Section 323 IPC and by order dated 16-2-1965 permission was granted to compound the offence and consequently those 4 accused were acquitted under Section 345(6) Criminal Procedure Code. In that case although notice had been ordered to be issued to the State the order in question came to be passed before the interim date fixed by the office for appearance of the other side i.e. 23-2-1965. Thus the State had no opportunity to put in appearance in that case as the offence had already been allowed to be compounded on 16-2-1965. It is pertinent to note that the application did not bear the signatures of the victims who might have been considered to be complainants nor it was made on their behalf nor had anybody signed on their behalf. However it appears as per the order of the learned Single Judge that complainants had appeared before him.

4 Thereafter on 19-4-1965 the State filed the present appeal i.e. Criminal Appeal No 84 of 1965 against all the 10 accused claiming that they be convicted under Sections 307 325 324 read with Sections 149 and 148, Indian Penal Code. Therefore on behalf of the accused an objection was raised that the present appeal filed by the State was not tenable as the order dated 16-2-1965 in Criminal Appeal No 17 of 1965 filed by 4 accused had become final and the right of the State to file an appeal was lost.

5 Finality to a judgment of a criminal Court has been conferred by Section 369 Criminal Procedure Code which allows merely accidental slips or clerical errors to be corrected and subject to that power a judgment in a criminal case cannot be altered by that Court. Similarly S 430 Criminal Procedure Code makes the appellate judgment in a criminal case final except in cases covered by Sec. 417 Criminal Procedure Code or Chapter

XXXII Criminal Procedure Code. In some types of cases Section 403 Criminal Procedure Code debarring a second trial, may also be relevant. This has been a debatable question in the past on which there was a difference of opinion in some High Courts. In *Saulani v Emperor*, AIR 1914 All 191(2) two persons were tried for causing simple hurt to another person and both the accused were acquitted because of compounding of the offence. Subsequently when the injured person died the Magistrate committed one of the accused to stand his trial for an offence under Section 304 Indian Penal Code and discharged the other accused. The Sessions Judge on perusal of the record directed the commitment of the discharged accused as well to stand his trial for the offence under Section 304 Indian Penal Code. The Magistrate accordingly committed the other accused to Sessions Court. It appears that the bar of S 403 Criminal Procedure Code was pleaded by the discharged accused who had subsequently been committed to the Sessions Court. The learned Judges constituting the Division Bench held that an order of commitment could only be interfered on a question of law and as no question of law arose in that case the commitment could not be set aside. However it appears that the provision of Section 430 Criminal Procedure Code was not specifically advanced nor considered.

6 Thereafter in a Full Bench case namely *Mohammadi Gul v Emperor*, 28 Nag LR 233 = (AIR 1932 Nag 121) (FB) a Full Bench of the Judicial Commissioner's Court was required to consider the instant question when *Macnair J C* and *Subhedar A J C* by a majority judgment held that a High Court would not be precluded from hearing an appeal filed by the Local Government from an acquittal by the mere fact of its having previously decided an appeal by the accused against his conviction in the same trial for a minor offence. In that case *Niyogi A J C* as he then was expressed a contrary opinion which was approved by a Full Bench of the Madhya Bharat High Court in *State v Kalu* AIR 1932 Madh Bha 81 as also by a Full Bench of the Punjab High Court in *The State v Mansha Singh* AIR 1958 Punj 233. However a Division Bench of the Gujarat High Court in *State v Diwanji Gardharji* AIR 1963 Guj 21 dissented from the Full Bench view of the Madhya Bharat and Punjab High Courts and accepted the majority view of the Nagpur Judicial Commissioner's Court mainly by relying on the Supreme Court case of *U J S Chopra v State of Bombay* AIR 1955 SC 633. The Division Bench of the Gujarat High Court thought that the reasoning of the Supreme Court in the said case supported its own conclusions and was con-

trary to the reasoning and the conclusion arrived at by the Full Bench of the Punjab High Court

7. It might have been necessary for us to examine the reasoning and the ratio decidendi of these cases but for the fact that we find that the instant question has been directly decided by their Lordships of the Supreme Court in an appeal arising from this State, namely, *Nirbhay Singh v State of Madhya Pradesh*, Cri Appeal No. 219 of 1966, D/- 30-10-1968 (SC). In that case, *Nirbhay Singh* was tried before the Court of Sessions, Ujjain in connection with the death of his mother, *Bhagwanti*. The Sessions Judge convicted him of the offence of culpable homicide not amounting to murder and sentenced him to rigorous imprisonment for 7 years. An appeal preferred by *Nirbhay Singh* from jail was summarily dismissed by the High Court on 16-3-1965. Thereafter, the State on 21-3-1965 filed an appeal against the acquittal of *Nirbhay Singh* of the charge of murder. The High Court in the said appeal set aside the acquittal and found *Nirbhay Singh* guilty of the offence of murder and, therefore, altered his sentence to one of imprisonment for life. In view of those facts, the question arose for consideration before their Lordships. Their Lordships while considering some of the cases mentioned above by us, made the following observations:—

"There is however no warrant for the argument that when an appeal preferred by a person convicted of an offence is dismissed summarily by the High Court under S. 421 of the Code of Criminal Procedure, the judgment of the trial Court gets merged in the judgment of the High Court and it cannot thereafter be modified even at the instance of any other party affected thereby, and in respect of matters which were not and could not be dealt with by the High Court when summarily dismissing the appeal. When the High Court dismisses an appeal of the person accused summarily and without notice to the State, the High Court declines thereby to entertain the grounds set up for setting aside the conviction of the accused. That judgment undoubtedly binds the accused and he cannot prefer another appeal to the High Court against the same matter in respect of which he had earlier preferred an appeal. But it is a fundamental rule of our jurisprudence that no order to the prejudice of a party may be passed by a Court, unless the party had opportunity of showing cause against the making of that order. When an appeal of a convicted person is summarily dismissed by the High Court the State has no opportunity of being heard. The judgment summarily dismissing the appeal of the accused is a judgment given against the accused and not against the State or the

complainant. If after the appeal of the accused is summarily dismissed, the State or the complainant seeks to prefer an appeal against the order of acquittal, the High Court is not prohibited by any express provision or implication arising from the scheme of the Code from entertaining the appeal. Where, however, the High Court issues notice to the State in an appeal by the accused against the order of conviction, and the appeal is heard and decided on the merits, all questions determined by the High Court either expressly or by necessary implication must be deemed to be finally determined, and there is no scope for reviewing those orders in any other proceeding. The reason of the rule is not so much the principle of merger of the judgment of the trial Court into the judgment of the High Court, but that a decision rendered by the High Court after hearing the parties on a matter in dispute is not liable to be reopened between the same parties in any subsequent enquiry." Therefore, as per the pronouncement of their Lordships of the Supreme Court in the said case, the view as expressed by *Niyogi, A.J.C.* in the Nagpur Full Bench case, 28 Nag LR 233=(AIR 1932 Nag 121) (FB), and as expressed by the Full Benches of the Madhya Bharat, AIR 1952 Madh Bha 81 (FB), and the Punjab High Courts, AIR 1958 Punj 233 (FB), would require re-examination. For the purposes of the present case, it is not necessary for us to examine the majority view of the Nagpur Judicial Commissioner's Full Bench, 28 Nag LR 233=(AIR 1932 Nag 121) (FB), which goes further than the observations of their Lordships of the Supreme Court. We would reserve our opinion on the question. Therefore, we do not think it necessary to discuss the question any further except to answer the reference in the light of the observations of their Lordships of the Supreme Court.

8. Our answers to the three questions posed are as follows—

Question No. (1):— No.

Question No. (2):— No.

Question No. (3):— No, subject to the limitations indicated by their Lordships of the Supreme Court in *Cri Appeal No 219 of 1966, D/- 30-10-1968 (SC)* (supra) where the judgment in an appeal filed by an accused after notice to the State becomes final.

9. In view of the answers given by us, let the matter be put up for decision of the appeal on merits before an appropriate Bench.

Reference answered accordingly.

1970 CRI L J 238 (Vol 76, C N 51) =
AIR 1970 MADHYA PRADESH 29
(V 57 C 8)
FULL BENCH
P K TARE, K. L PANDEY AND
SURAJBHAN JJ

State of Madhya Pradesh, Appellant
v Chhotekhan Nannekhan Respondent
Criminal Appeal No 148 of 1965 and
Criminal Revn. Nos 431 and 591 of 1966
D/- 31-7-1969 from judgment of S J
Guna D/- 7-5-1965

Evidence Act (1872), S 114(e) —
Scope — Prevention of Food Adulteration
Act (1954) S 13(5) — Presumption under
S 114 (e) of Evidence Act applies to
report of Public Analyst — It is rebut-
table — No evidence of requirements of
Rr 7 and 18 of Prevention of Food Adul-
teration Rules (1955) being duly com-
plied with — Report of Public Analyst
is not rendered inadmissible — Cr A
No 180 of 1966 dt 25-8-1966 (MP) &
1967 Cri LJ 1723 (MP) Overruled AIR
1964 Guj 136 & AIR 1966 Mys 244 & AIR
1967 Raj 237 & AIR 1968 Mys 196 Dis-
sented from — (Prevention of Food Adul-
teration Rules (1955) Rr 7 18)

The principle embodied in illustration
(e) under Section 114 of the Evidence Act
is that when any judicial or official act
is shown to have been done in a manner
substantially regular it is presumed that
the formal requisites for its validity have
been complied with If the Statute (Pre-
vention of Food Adulteration Act) itself
had provided that certain regulations and
formalities must be complied with before
the report of the Public Analyst could
be admitted in evidence the position
would have been different for in that
case it would be necessary to specifically
establish that those regulations and for-
malities were duly observed In the ab-
sence of such a provision what purports
to be report signed by a Public Analyst
is without any other proof, admissible in
evidence and the presumption arising
under Section 114 of the Evidence Act
to the regular performance of official
acts also applies to it The accused is not
thereby prejudiced He may rebut the
presumption by cross-examining prosecu-
tion witnesses or leading other evidence
He has also been given under sub sec-
tion (2) of Section 13 of the Act the right
to show if possible that the report is
incorrect (Para 8)

The presumption under Section 114 of
the Evidence Act and illustration (e)
thereunder in relation to regular perform-
ance of official acts applies to the report
of a Public Analyst It is however a
rebuttable presumption. Thus such a
report is not rendered inadmissible only
because it has not been specifically esta-

blished by evidence aliunde that the
requirements of Rules 7 and 18 of the
Prevention of Food Adulteration Rules
1955 were duly complied with Case law
discussed Cr A No 180 of 1966 dt 25-
8-1966 (MP) & 1967 Cri LJ 1723 (MP)
Overruled AIR 1964 Guj 136 & AIR 1966
Mys 244 & AIR 1967 Raj 237 & AIR 1968
Mys 196 Dissented from (Para 9)

The distinction between relevancy or
admissibility of a piece of evidence and
the value to be attached to it is obvious
S 13(5) refers to admissibility of the
report and leaves it to the Court to deter-
mine in the light of the circumstances of
the case what value ought to be attached
to it There is nothing in this provision to
indicate that the report would be admis-
sible only if it is obtained in the manner
prescribed by the rules made under the
Act (Para 5)

Cases Referred	Chronological	Paras
(1969) AIR 1969 Delhi 198 (V 56) =1969 Cri LJ 881 Nawal Kishore v State		7
(1968) Cri Appeal No 29 of 1968 D/- 2-12-1968=1969 Ker LT 50 (SC) K K Pookunju v K K Ramakrishna Pillai		7
(1968) AIR 1968 Bom 247 (V 55) =1968 Cri LJ 729 Krishna Raja- ram v M V Koranne		7
(1968) AIR 1968 J & K 17 (V 55) =1968 Cri LJ 162 Jammu Muni- cipality v Faqur Hussain		7
(1968) AIR 1968 Mys 196 (V 55) =1968 Cri LJ 952, Belgaum Borough Municipality v Shridhar Shanker		7
(1967) AIR 1967 SC 970 (V 54)= 1967 Cri LJ 939 Municipal Corpo- ration of Delhi v Ghosa Ram		5
(1967) 1967 Cri LJ 1723=1967 M P LJ 872 State of Madhya Pradesh v Abbasbhai		1 9
(1967) AIR 1967 Mys 33 (V 54)= 1967 Cri LJ 382 Laxman Sitaram v State of Mysore		7
(1967) AIR 1967 Raj 237 (V 54)= 1967 Cri LJ 1374 State of Raja- sthan v Kapoor Chand		7
(1966) AIR 1966 SC 128 (V 53)= 1966 Cri LJ 105 Mangaldas v State of Maharashtra		5
(1966) AIR 1966 Ker 70 (V 53)= 1966 Cri LJ 416 Food Inspector Cannanore Municipality v P Kannan		7
(1966) Cri Appeal No 180 of 1966 D/- 25-8-1966 (MP) State of Madhya Pradesh v Shanfar Lal		1 2 4 7 9
(1966) Cri. Appeal No 495 of 1964 D/- 3-10-1966 (MP) Municipal Council Multai v Juggan		2
(1966) AIR 1966 Mys 244 (V 53)= 1966 Cri LJ 1036 Mary Lazrado v State of Mysore		7

- (1966) AIR 1966 Ori 81 (V 53)=
1966 Cri LJ 562, State v. Uma-
charan Ram 7
- (1964) AIR 1964 All 199 (V 51)=
1964 (1) Cri LJ 502, Municipal
Board, Faizabad v. Lalchand 7
- (1964) AIR 1964 Guj 136 (V 51)=
1964 (2) Cri LJ 32, State of Guja-
rat v. Shantaben 4, 7
- (1952) AIR 1952 Nag 83 (V 39)=
1952 Cri LJ 448, The State v.
Sonabai 2
- (1951) AIR 1951 Nag 191 (V 38)=
1952 Cri LJ 471, Dattappa v.
Buldana Municipality 2
- M. V. Tamaskar, Dy. Government
Advocate, for the State.

PANDEY, J.:— This case comes before us on a reference made by Golwalkar and Bhawe, JJ., for examining the correctness of the view taken by Newasker and Sen, JJ. in State of Madhya Pradesh v Shankerlal, Cri Appeal No 180 of 1966, D/- 25-8-1966 (MP), which was decided along with State of Madhya Pradesh v Abbasbhai, 1967 MP LJ 872=(1967 Cri LJ 1723) The same question is raised in Ataul Haque v. State of Madhya Pradesh. (Cri. Revn No 431 of 1966 (MP)), and Kundanlal v. State of Madhya Pradesh, (Cri Revn. No 591 of 1966 (MP)), and, therefore, these two cases also are before us for the same purpose.

2. In the first case, the respondent Chhotekhan was convicted under S 7 read with Section 16(1)(a)(ii) of the Prevention of Food Adulteration Act, 1954, for selling adulterated milk and was sentenced to rigorous imprisonment for one year and a fine of Rs 2,000/- or, in default, to like imprisonment for a further term of six months. In appeal, the Sessions Judge acquitted Chhotekhan on the ground that there was no specific evidence to show which preservative had been added to the sample of milk sent to the Public Analyst and what was the quantity so added and, therefore, his report was of no value. In taking that view, the Sessions Judge relied upon Dattappa v. Buldana Municipality, AIR 1951 Nag 191. Against that acquittal, the State filed this appeal, which came up for hearing before Golwalkar and Bhawe JJ. They regarded Dattappa's case, AIR 1951 Nag 191, decided by Mudholker J. (as he then was) as overruled by The State v. Sonabai AIR 1952 Nag 83, and Municipal Council, Multai v Juggan, Cri Appeal No. 495 of 1964. D/- 3-10-1966 (MP).

It was, however, argued that there was no specific evidence to show that a specimen of the seal had been sent separately as required by Rule 18 of the Prevention of Food Adulteration Rules, 1955, or that the Public Analyst had compared the seal on the container with the one separately sent to him as required

by Rule 7 of those Rules and, therefore, the report of the Public Analyst was not admissible in evidence. For this view, reliance was placed upon Shankerlal's case, Cri. Appeal No 180 of 1966, D/- 25-8-1966 (MP), mentioned in the opening paragraph. Golwalkar and Bhawe JJ doubted the correctness of the view taken in that case and made this reference.

3. In the second case, Ataul Haque was convicted under Section 7 read with Section 16(1)(a)(ii) of the Act for selling adulterated milk and sentenced to rigorous imprisonment for one year and a fine of Rs. 2,000/- or, in default, to a further term of like imprisonment for four months. He has challenged his conviction inter alia on the ground that no evidence was led to show that the provisions of Rules 7 and 18 of the Prevention of Food Adulteration Rules, 1955, were complied with. In the third case too, Kundanlal was convicted under Section 7 read with Section 16(1)(a)(i) of the Act for selling adulterated ghee and sentenced to rigorous imprisonment for one year and a fine of Rs 2,000/- or, in default, to like imprisonment for three months. He too has raised the point that Rules 7 and 18 *ibid* were not complied with.

4. In Shankerlal's case, Cri. Appeal No. 180 of 1966, D/- 25-8-1966 (MP), the Division Bench relied upon State of Gujarat v Shantaben, AIR 1964 Guj 136, and observed:

"It cannot be doubted that the report of the Public Analyst is admissible only under certain circumstances. It is admissible under the Prevention of Food Adulteration Act provided certain formalities are observed. If the formalities are not observed, the reports cannot be made admissible. That shows that the rules are mandatory. If the rules are mandatory, there cannot be a presumption that official acts have been properly performed. The fixing of the seal is no doubt an official act, sending the sample of the seal also is an official act, but the admissibility of the document depends on the performance of the official acts which should be proved by evidence. There is not an iota of evidence in this report. Section 13(5) of the Act says that the report signed by the Public Analyst can be used as evidence of the fact stated therein. It is therefore clear that the public analyst must mention in his report that he received the seal intact and he had compared the seal with the specimen seal that was sent to him by the Food Inspector and they tallied. If that is done, no other proof may be necessary."

5. Section 13(5) of the Act, which provides for use of report of the public analyst as evidence, reads—

"Any document purporting to be a report signed by a Public Analyst, unless

it has been superseded under sub-section (3) or any document purporting to be a certificate signed by the Director of the Central Food Laboratory may be used as evidence of the facts stated therein in any proceeding under this Act or under Sections 272 to 276 of the Indian Penal Code (Act XLV of 1860)

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein

The distinction between relevancy or admissibility of a piece of evidence and the value to be attached to it is obvious and need not be elaborated. It is plain enough that sub-section (5) refers to admissibility of the report and leaves it to the Court to determine in the light of the circumstances of the case what value ought to be attached to it. It may be noted that there is nothing in this provision to indicate that the report would be admissible only if it is obtained in the manner prescribed by the rules made under the Act. So in *Mangaldas v State of Maharashtra* AIR 1966 SC 128 their Lordships observed

This provision clearly makes the report admissible in evidence. What value is to be attached to such report must necessarily be for the Court of fact which has to consider it. Sub-section (2) of Section 13 gives an opportunity to the accused vendor or the complainant on payment of the prescribed fee to make an application to the Court for sending a sample of the allegedly adulterated commodity taken under S 11 of the Act to the Director of Central Food Laboratory for a certificate. The certificate issued by the Director would then supersede the report given by the Public Analyst. This certificate is not only made admissible in evidence under sub-section (5) but is given finality to the facts contained therein by the proviso to that sub-section. It is true that the certificate of the Public Analyst is not made conclusive but this only means that the Court of fact is free to act on the certificate or not as it thinks fit" (Page 132)

In a subsequent case *Municipal Corporation of Delhi v Ghisa Ram*, AIR 1967 SC 970 their Lordships laid down that the report of the Public Analyst does not cease to be good evidence even where a certificate from the Director of the Central Food Laboratory cannot be obtained for any cause and the conviction of the accused is unsustainable on the ground that, by reason of deprivation of the valuable right under Section 13(2) of the Act owing to lapse of time he is prejudiced in his defence

6 In this case we are not required to consider what value should be attached

to the report of the Public Analyst where it is established by evidence that a specimen of the seal had not been sent separately to the Public Analyst or he did not also compare the seal on the container with the other seal. In this situation the Court may conclude that it was not established that the sample seized was examined by the Public Analyst. The limited question before us is whether there is in view of illustration (e) under Section 114 of the Evidence Act a rebuttable presumption that official acts like sending a specimen seal separately and the comparison of the seal on the container with that seal so sent were properly performed

7 In *Shankerlal's case* Cri Appeal No 180 of 1966 D/- 25-8-1966 (MP) (supra) it was observed that since the rules were mandatory there could be no presumption that the procedure as therein prescribed being official acts were properly followed. For that view reliance was placed upon the observations of the Gujarat High Court in *Shantabens case* AIR 1964 Guj 136 (supra). There is however nothing in the judgment of *Raju J* delivered in the Gujarat case to indicate that he considered the applicability of Section 114 of the Evidence Act and illustration (e) thereunder to the acts of the Food Inspector and the Public Analyst. That aspect of the question was not considered in *Mary Lazarado v State of Mysore* AIR 1966 Mys 244, *State of Rajasthan v Kapoor Chand* AIR 1967 Raj 237 and *Belgaum Borough Municipality v Shridhar Shanker* AIR 1968 Mys 196 also although the view taken in the Gujarat case was adopted. A contrary view was however taken in *Municipal Board Faizabad v Lal Chand* AIR 1964 All 199, *State v Uma Charan Ram* AIR 1966 Ori 81, *Laxman Sitaram v State of Mysore* AIR 1967 Mys 33 and *Nawal Kishore v State* AIR 1969 Delhi 198 without referring to the presumption under Section 114 of the Evidence Act and also in *Food Inspector Cannanore Municipality v P Kannan* AIR 1966 Ker 70, *Jammu Municipality v Faquir Hussain*, AIR 1968 J & K 17 and *Krishna Rajaram v M V Koranne* AIR 1968 Bom 247 on the basis of the presumption under the section. In many of these cases the Gujarat case was specifically distinguished or dissented from. The contrary view taken in these cases is supported by the following observations of the Supreme Court in *K. K. Poolunju v K K Ramakrishna Pillai*, Cri. Appeal No 29 of 1968 D/- 2-12-1968 (SC)

The only point of any substance which has been pressed before us by the learned counsel for the appellants is that the Rules framed under the Act had not been complied with inasmuch as it has not been proved that the specimen im-

pression of the seal used had been sent to the Public Analyst. Rule 18 of the Prevention of Food Adulteration Rules, 1955, provides that a copy of the memorandum and a specimen impression of the seal used to seal the packet shall be sent to the Public Analyst separately by post. The High Court was not at all impressed with the contention based on Rule 18. It relied on the report of the Public Analyst Exh. P-9 which was in Form III as prescribed by the Rules in which it was stated, inter alia, that the Public Analyst had received from the Food Inspector a sample of compounded risky asafetida marked No C 2/65 for analysis, properly sealed and packed and that he had found the seal intact and unbroken. The contention which was pressed and which has been reiterated before us is that it is nowhere stated in Exh P/9 that the Public Analyst had compared the specimen impression of the seal with the seal on the packet of the sample. The High Court relied on the principle that official acts must be presumed to have been regularly performed. Under Rule 7, the Public Analyst has to compare the seal on the container and the outer cover with the specimen impression received separately on receipt of the packet containing the sample for the analysis. The High Court considered that it must be presumed that the Public Analyst acted in accordance with the Rules and he must have compared the specimen impression received by him with the seal of the container.

We do not find any error in the decision of the High Court on the above point."

8. The principle embodied in illustration (e) under Section 114 of the Evidence Act is that when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that the formal requisites for its validity have been complied with. As we have indicated elsewhere, if the Statute itself had provided that certain regulations and formalities must be complied with before the report of the Public Analyst could be admitted in evidence, the position would have been different, for, in that case, it would be necessary to specifically establish that those regulations and formalities were duly observed. In the absence of such a provision, what purports to be report signed by a Public Analyst is, without any other proof, admissible in evidence and the presumption arising under Section 114 of the Evidence Act to the regular performance of official acts also applies to it. The accused is not thereby prejudiced. He may rebut the presumption by cross-examining prosecution witnesses or leading other evidence. He has also been given under sub-section (2) of Section 13 of the Act the right to show, if possible, that the report is

incorrect. So, in AIR 1967 SC 970 (supra), the Supreme Court observed—

"Obviously the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence." (Page 972)

9. For all these reasons, we are of opinion that the view taken in Cri. Appeal No 180 of 1966, D/- 25-8-1966 (MP) (supra) and 1967 MP LJ 872=(1967 Cri LJ 1723) (supra) is not correct. In our opinion, the presumption under Sec 114 of the Evidence Act and Illustration (e) thereunder in relation to regular performance of official acts applies to the report of a Public Analyst. It is, however, a rebuttable presumption. That being so, such a report is not inadmissible only because it has not been specifically established by evidence aliunde that the requirements of Rules 7 and 18 of the Prevention of Food Adulteration Rules, 1955, were duly complied with.

Order accordingly.

1970 CRI. L. J. 241 (Vol. 76, C. N. 52) =

AIR 1970 MADRAS 63 (V 57 C 19)

M ANANTANARAYANAN C. J. AND
M. NATESAN J.

A. Mohambaram, Appellant v. M. A. Jayavelu and others, Respondents.

W. A. Nos 179 and 190 of 1968, D/- 6-12-1968 from decision of Kailasam, J. in W. P. No 436 of 1968.

(A) Constitution of India, Art. 226 — Quo Warranto — Requisites for the issue of — Office of Public Prosecutor is a public office — Importance of the office stated — (Criminal P. C. (1898), Ss. 4 (1) (t) and 493).

To sustain a quo warranto writ, the applicant has to satisfy the Court that the office in question is a substantive public office and that the incumbent whose position is questioned is holding the post without legal authority, that is, in appointing him the Government has contravened statutory provisions or binding rules. The office of Public Prosecutor is a public office and hence an appointment to that post can form the subject-matter of a petition under Art. 226 seeking a writ of quo warranto. (Paras 5 and 10)

The office of Public Prosecutor involves duties of public nature and of vital interest to the public. Provisions under Sections 417, 493, 422 and 494 of Criminal P. C. bring out the importance of that office. These show that Public Prosecutor is not a just an Advocate engaged

GM/HM/C709/69/TVN/D

by the State to conduct its prosecutions. The importance of the office from the point of view of the State and the community is brought out in Section 494 Criminal P C which vests in the Public Prosecutor a discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent if granted, has to be followed by the discharge of the person or his acquittal as the case may be AIR 1965 SC 491 at p 494 & AIR 1957 SC 389 at p 393 & AIR 1961 Mad 450 at p 460 & AIR 1938 PC 266 Rel on (Paras 5 and 10)

(B) High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders 1958 R 45 — Rule valid and mandatory — Rules framed in exercise of power under Articles 227 and 309 of Constitution — Contravention fatal to appointment — On facts held, Government had appointed a person as public prosecutor not nominated by the Collector — Order of appointment quashed — Mandamus to act upon nomination sent by collector and appoint writ petitioner accordingly refused — Government is not bound to accept nomination sent by Collector — Order in W P No 436 of 1968 (Mad) by Kailasam J reversed on facts — (Constitution of India Arts 227, 309 and 226) — (Criminal P C (1898), Section 492)

Per Anantanarayanan, C J It could not be seriously disputed that the preamble to the Criminal Rules of Practice 1958 is conclusive that Art 227 of the Constitution is the foundation for Rule 45 of the above Rules particularly Art 227 (2) (b) which invests the High Court with power to make and issue rules for regulating the practice and proceedings of such Courts. Relevant part of the Proviso to Art 309 of the Constitution could equally be regarded as the foundation of the Rule (Para 6)

It cannot be urged that the State Government could appoint a public prosecutor whoever they liked irrespective of the procedure laid down by Rule 45 or the nomination of the Collector for the reasons that it was the appointing authority and that the Collector was a subordinate of the Government. The State was bound to conform to the rule of law so that its decision should be predictable and in conformity with the principle Arbitrariness in any such sphere if countenanced or tolerated, would gravely jeopardise the rule of law and may even bring it to an end AIR 1967 SC 1427 at p 1434 & AIR 1968 Fer 244 Rel on. (Para 7)

Per Natesan, J Tracing the rules as to appointment of Public Prosecutor from 1895 to the latest Criminal Rules of Practice and Circular Orders 1958 it would be clear that the procedure relating to the appointment of Public Prosecutor relate to practice and proceedings

of the Court. The Governor of Madras approving the rules forwarded by the High Court purports to exercise the powers conferred by Article 227 of the Constitution and all enabling powers. Vide Article 227 Clause (2) and the related Proviso. The power to frame rules for regulating the practice and proceedings of Criminal Courts can properly include the qualifications of the person who has to function as Public Prosecutor in Criminal Courts. Rule 45 cannot be considered inconsistent with the provision of Section 492 Criminal P C vesting the power of appointment of Public Prosecutor in the State Government. The rule does not in the least detract from the power of Government to appoint Public Prosecutor. It only sets out the procedure which the Government will follow in making the appointment. Notwithstanding the rule the power to appoint Public Prosecutor still vests in the State Government and so the requirement of Art 227 for validity of the rule that it shall not be inconsistent with the provision of any law for the time being in force is fully satisfied (Para 11)

Rule 45 can be sustained also under the Proviso to Art 309 of the Constitution, under which the Executive too could make rules regulating the recruitment and the conditions of service of persons appointed to public posts. The fact that the Rule in question does not purport to have been made under the power conferred by Article 309 is immaterial since it is not decisive. But while approving the rules the Governor had declared that it was done in exercise of the powers conferred by Article 227 of the Constitution and all other powers thereunto enabling. If the High Court under Article 227 may not properly frame a rule with reference to the appointment of Public Prosecutor as matter relating to practice and proceedings of Criminal Courts, the rule should be deemed to have been made under the proviso to Art 309 which enables the Governor or such person as he may direct to make rules regulating the recruitment and the conditions of service to posts in connection with the affairs of the State. (Para 12)

Further though the original rule regarding the appointment of Public Prosecutor which acquired statutory force by virtue of Section 96-B (4) of the Government of India Act 1919 was not continued that factor could be taken into consideration in examining the character of the present rule. The statutory force of the rule could not be devalued after the Constitution when the citizens were assured of the sovereignty of the Rule of Law. (Para 12)

The submission that rule is only for guidance of the Executive and non-adherence to the rule is not justifiable has

to be rejected. Statutory rules cannot be described as or equated with administrative directions. The clear and unambiguous expression in Art. 309 of the Constitution that rules made by the Governor or such person as he may direct regulating the recruitment and the conditions of service of persons appointed, until provision in that behalf is made by or under an Act, shall have effect subject to the provisions of any such Act, must be given its full and unrestricted meaning. Having regard to the history of the rule regarding the appointment of Public Prosecutor, the rule must be held to have been made under constitutional powers and so has statutory force, whether it is Art 227 or the Proviso to Art. 309. (Para 12)

In this case, applications were called for the post of Government Pleader-cum-Public Prosecutor originally in vogue in the district. The District Bar Association sent names of 17 Advocates for consideration to the Collector. Thereafter, there was a proposal to appoint separate individuals for the posts. The Collector forwarded the list to the District and Sessions Judge to propose names for the posts separately on the assumption that there would be separate incumbents for the posts. The District and Sessions Judge furnished two distinct panels containing five names each for appointment to the two posts. The respondent's name whose appointment to the post of Public Prosecutor was impugned, was found only in the panel of names for the appointment of Government Pleader and that of the appellant (Writ-Petitioner) for the appointment of Public Prosecutor, each panel containing five names. The Collector in forwarding his nomination to the Government while agreeing with the panels given by the District and Sessions Judge, specifically recommended that the appellant (Writ Petitioner) who was then Additional Public Prosecutor be appointed Public Prosecutor. No alternative name was given by the Collector for the post. The Collector recommended that the present appointee (respondent) may be appointed as Additional Public Prosecutor which post would fall vacant by the appellant (Writ Petitioner) being appointed as the Public Prosecutor. Thus, while the Collector had not recommended the present appointee for either of the posts then vacant, the District Judge, who was consulted, recommended the present appointee only for the post of Government Pleader. So neither the authority that had to be consulted under the rule, nor the authority that had to nominate, recommended the present appointee for the post of Public Prosecutor.

Held, that the appointment made by the Government violated the mandatory provision under Rule 45 of Criminal Rules of Practice under which the appointment should be on the nomination of the Col-

lector. This was so notwithstanding the fact that the Government was not bound to accept the nomination sent by the Collector. It might require the Collector to make a fresh nomination or call for a panel of names with his recommendation in consultation with the Sessions Judge. For appointment not to contravene the rule, it must be a nominee of the Collector that should be appointed for the post. However, the appointment would be by the Government which had to take the final decision. (Paras 13 & 16)

Though it was an administrative order, no absolute discretion lay with the Government for making the appointment. It had to be made in accordance with a rule and a procedure prescribed had to precede the appointment. An order contravening the rule and procedure prescribed was liable to be set aside. Rules made under statutory powers, unless they were constitutionally invalid, must be adhered to. Statutory rules which were functional in character were not made to be violated at the caprice of the Executive Authority concerned. There was no such thing as absolute or untrammelled discretion, the nursery of despotic power, in a democracy based on the rule of law. (Para 18)

However, the appellant (writ petitioner) was not entitled to the issue of a writ of mandamus directing the Government to appoint him to the post of Public Prosecutor on the ground that his name was the only one recommended by the Collector. The Government was not bound to appoint the person nominated by the Collector. He could only claim that he should be considered for the post. AIR 1961 Mad 450, Dist; (1948) 1 KB 223 & AIR 1967 SC 1427 at p 1434 & AIR 1968 Ker 244 & AIR 1953 Mad 392, 393, Rel on; Order in W. P. No 436 of 1968 (Mad) by Kailasam, J. Reversed (taking a different view of the facts). (Para 24)

(C) Constitution of India, Arts. 14 and 16 — Appointment — Discretionary orders by the Executive — Extraneous or improper matters — Consideration of — Discretion must be held exercised beyond authority.

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of law they have not exercised that discretion. When considerations extraneous to the suitability of a person for appointment are taken into account in making an appointment, there is an abuse of discretionary power, and so the exercise of power exceeds the bounds of authority. The other aspirants for the office would have been left out of consideration on totally irrelevant grounds. In such a case Arts 16 and 14 are violated. (Para 20)

The fact that an aspirant for office happened to be an active member of a political party in power by itself should not and could not disqualify him if otherwise suitable for being appointed to a post

(Para 21)

(D) High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders 1958 R 45 — Standing Orders of the Government relating to appointment of Law Officers in the mofussil — Standing Orders have no statutory force — Government can relax them in suitable cases

Standing Orders of the Government regarding appointment of Law Officers in the mofussil are devoid of statutory force and remain merely as declarations—no doubt public and explicit declarations—but still only declarations by Government of their intention and line of conduct. Such Standing Orders have no legal sanction behind them and the Government may in suitable cases in the exercise of discretion, relax the rules. Hence the rule embodied in the Standing Order requiring 7 years standing at the bar, for the appointment of a Law Officer can be relaxed by the Government in its discretion in a suitable case. AIR 1961 Mad 450 Foll

(Para 22)

(E) High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders, 1958, R 45 — Object of the Rule

Rule 45 of the Madras Criminal Rules of Practice and Circular Orders 1958 provides that the State Government should appoint a Public Prosecutor on the nomination of the Collector who shall consult the Sessions Judge before submitting his nomination to the Government. The object of the provision is self-evident viz. that it intends to secure to the Government the appointing authority real assistance. The Collector the executive head in the district may be properly expected to offer his advice in the matter. He is required under the rule to act in consultation with the Sessions Judge the appropriate authority to give advice for the selection. The consultation which has to precede nomination by the Collector is obviously intended to secure a conference of two minds eminently fitted for the task.

(Para 17)

(F) Words and Phrases — Nomination' — Word synonymous with naming proposing or recommending

(Para 15)

Cases Referred Chronological Paras

(1960) AIR 1968 Ker 244 (V 55) = 1968 Ker LT 268 K. M. Joseph v State of Kerala 7 18
(1967) AIR 1967 SC 1081 (V 54) = 1967-1 SCR 373 = (1967) 2 SCJ 830 Raja Anand v State of U P 20

(1967) AIR 1967 SC 1427 (V 54) = 1967-1 ITJ 903 = 1967-2 SCJ 102 Jaisingham v Union of India 7 18
(1965) AIR 1965 SC 491 (V 52) = (1964) 4 SCR 575 University of Mysore v Govinda Rao 10
(1961) AIR 1961 SC 751 (V 48) = 1961 (1) Cri LJ 773 = 1961-2 SCR 679 State of Uttar Pradesh v Baburam 12
(1961) AIR 1961 Mad 450 (V 48) = ILR (1961) Mad 553 Ramachandran v Alagiriswami 10 12 22
(1957) AIR 1957 SC 389 (V 44) = 1957 SCJ 336 = 1957 SCR 279 = 1957-1 Mad LJ (Cri) 247 State of Bihar v Ram Naresh 10
(1953) AIR 1953 Mad 392 (V 40) = 1953-1 Mad LJ 88 Pushpam v State of Madras 17
(1953) AIR 1953 Nag 81 (V 40) = ILR (1952) Nag 267 Miss Cama v Banwarilal 23
(1951) 342 US 98 = 96 L Ed 113 United States v M Wunderlich 18
(1948) 1948-1 KB 223 = 1947-2 All ER 680 Associated Provincial Picture Houses Ltd v Wednesbury Corporation 18
(1938) AIR 1938 PC 266 (V 25) = (1938) 2 Mad LJ 780 = 65 Ind App 388 Faqir Singh v Emperor 10

V Thyagarajan for Appellant Government Pleader T Govindarajulu and P M Sundaram for Respondent

ANANTANARAYANAN C J — I have had the advantage of perusing the judgment of my learned brother which discusses all relevant aspects of these Writ Appeals in considerable detail. I am in entire agreement with his conclusions and if I am appending a brief separate judgment it is only because of the importance of the vital aspect.

2 The facts on the record themselves are incontrovertibly established and indeed there are no two views permissible on the facts. Briefly stated in making the appointment of the first respondent to the office of the Public Prosecutor North Arcot Sessions Division, the State was not appointing a person who had been nominated by the Collector or was any nominee of the Collector under Rule 45 of the Criminal Rules of Practice. The view to the contrary taken by the learned Judge (Kailasam J) is clearly based on a misconception of the actual facts of the record as my learned brother has so plainly shown.

3 On this aspect which is the factual aspect it is sufficient to be very brief. As the rule makes it mandatory for the Collector to consult the Sessions Judge what actually happened was that the Collector referred the names of 17 Advocates, furnished by the Bar Association, to the District and Sessions Judge to enable him to propose names separately for the of-

office of the Public Prosecutor and the Office of Government Pleader, as the Collector had justification to assume that separate incumbents would have to be appointed for the two offices. The District and Sessions Judge furnished two distinct panels of names, and the appointee-respondent was included in the panel of names for the office of the Government Pleader, which does not now concern us at all. It is not in dispute that the name of the appellant was included by District and Sessions Judge in the panel of names for the office of Public Prosecutor. The Collector forwarded his nomination to Government, in compliance with Rule 45, making the specific recommendation or nomination, whichever it might be termed, that the appellant, who was then Additional Public Prosecutor, be appointed Public Prosecutor, North Arcot Sessions Court. The appointee-respondent was not nominated by the Collector for this office, in any sense. If the nomination of the Collector had been accepted by Government, the appointment of the appellant to that office would necessarily have created a vacancy in the office of Additional Public Prosecutor, a distinct office, the filling up of which was not then imminent. The Collector expressed his opinion that that office could be given to the respondent-appointee, so that he could pick up work, and equip himself for greater responsibilities.

As my learned brother has shown, the actual appointing authority under Section 492 of the Code of Criminal Procedure is the State Government, and Rule 45 of the Criminal Rules of Practice is only the mode by which this power is to be exercised. The Collector is not the appointing authority, and, hence, the Government could well require the Collector not merely to nominate one person, but to submit a panel of nominees. Further, where the Government are unable, for any proper reason, to accept a single nomination of the Collector, if it happened to be a single nomination as in this case, the Government would further correspond with the Collector, with a view to obtaining a nomination, which might seem to be acceptable, in public interest. If the rule were to be taken as implying that the Collector need make only one nomination, even if Government were unable to accept that nomination this would imply that the virtual crux of the power would be with the Collector, and not the State Government, which is not the intendment of Section 492 of the Code of Criminal Procedure.

4. Hence, in the context of these facts, I propose to deal, very briefly, with the following questions—

1. Is the Office of Public Prosecutor, a public office, within the ambit of quo warranto jurisdiction?

2. Is Rule 45 of the Criminal Rules of Practice not merely an administrative rule of directory significance, but a statutory or law-based mandatory rule, which the State Government must conform to, until and unless the content of the rule be changed?

3. Is the State Government bound to conform to the rule and prescribed procedure, in making such an appointment to a public office, as part of the incidents of the rule of law?

5. It appears to me, very clearly, that the answers to all these questions must be in the affirmative. Not merely is the office of Public Prosecutor a public office, but, in my view, it is a public office of considerable significance, for the integrity and efficiency of the administration of criminal justice. Any one appointed to this office must, in the interests of the public, have a high degree of efficiency, and knowledge of the law of Crimes and the Criminal Procedure; he must have character and integrity, that are irreproachable and above suspicion, he must have a sense of his duty to the public and to the Court, as overriding considerations. As can be immediately realised, if these requisites are lacking, the incumbent to such an office can gravely injure the administration of criminal justice.

The ideal Public Prosecutor is not surely concerned with securing convictions, or with satisfying the departments of the State Government, with which he has to be in contact. He must consider himself as an agent of Justice, and, as my learned brother has pointed out, his discretion to apply to the Court for its consent to withdraw from any prosecution, is a vital one. It is in the interests of the State and the Public, that any selection to such an office must be based on the most pertinent considerations, without prejudice or favour, and that only the best person or persons should be appointed.

6. I propose to deal very briefly with the second question, namely, the binding character of Rule 45 of the Criminal Rules of Practice. My learned brother has traced the lineage of this rule, and I need not recapitulate that aspect. But I do not see how it could be seriously disputed, that the preamble to the rules, published in 1958, is conclusive that Article 227 of the Constitution of India is the foundation for this rule, particularly Art 227 (2) (b), which invests the High Court with power to make and issue rules "for regulating the practice and proceedings of such Courts". It must be noticed that the Government promulgated the Rule, after the High Court had framed it and after Government had accorded their prior sanction. As my learned brother

has stressed the relevant part of the Provision to Art 309 of the Constitution could equally be regarded as the foundation of the Rule. No doubt the rule can be changed if in practice there are difficulties experienced in the working of the rule. But unless and until the rule is changed in accordance with due procedure it is a law-based rule which Government must adhere to. It cannot be set at naught or flouted in an individual case merely because of caprice or in an arbitrary manner. If that happens the Courts are bound to interfere though it may be open to Government to modify or alter the rule for future contingencies.

7 This brings me to the last aspect of the matter namely whether it is open to the State Government to claim that since it is the appointing authority with the power to appoint a person to the concerned office and the Collector is a subordinate of Government the Government may appoint whoever they like irrespective of the procedure laid down by Rule 45 or the nomination of the Collector because the power is unfettered. It is here that the observations of their Lordships of the Supreme Court in *Jaisinghani v Union of India* ((1967) 1 ITJ 903 = (1967) 2 SCJ 102 = AIR 1967 SC 1427 at p 1434) which were also relied on by the Kerala High Court in *K. M. Joseph v State of Kerala*, AIR 1968 Ker 244 appear to be not merely pertinent but to bear upon a situation of that kind with the weight and solemnity of basic legal principle. Not merely are the Executive Authorities that is the State in its executive aspect bound to conform to the rule of law but such a requirement is even more obligatory on the State than on any private citizen. Any such decision should be predictable and in conformity with principle it should both appear to conform, and also in the spirit as well as the letter should subserve the rule of law. Arbitrariness in any such sphere if countenanced or tolerated will gravely jeopardise the rule of law and may even bring it to an end.

8 For the reasons set forth by my learned brother I entirely agree that the order appointing the first respondent as the Public Prosecutor of North Arcot District must be set aside and that the State Government should now take up the question for consideration and due action, in the light of principles that we have stated. The appellant may claim that he has every right to be considered for the post but he has certainly no right now to the appointment per se the due appointment must be made afresh by Government in conformity with the procedure established by law.

9 **NATESAN J** — The appellant in these appeals is an Advocate of the Madras High Court practising at Vellore North Arcot District and an aspirant for the

post of Public Prosecutor North Arcot Sessions Division which fell vacant on 31st August 1967. By G O Ms No 231 dated 30th January, 1968 the Government appointed the first respondent herein as the Public Prosecutor and the appellant challenging the legality of the appointment moved this Court under Art 226 of the Constitution by two petitions one for a writ of quo warranto directed against the first respondent requiring him to show cause by what authority he claims to hold the office of Public Prosecutor North Arcot and another for a writ of mandamus requiring the State of Madras the 2nd respondent herein, to appoint the appellant as Public Prosecutor. The substantial ground of challenge to the appointment and the basis of the appellant's claim for the post is that statutorily the appointment by Government can only be on the nomination of the District Collector in consultation with the Sessions Judge of the Division and that the Collector nominated the appellant only for the post. Our learned brother Kailasam, J before whom the petition came up for hearing while holding that the appointment to the post of Public Prosecutor is governed by statutory requirements proceeded in the view that the requirements of the rule have been complied with and dismissed the applications.

10 The function of a writ of quo warranto under the Constitution is summed up by Gajendragadkar J (as he then was) as follows in *University of Mysore v Govinda Rao* ((1964) 4 SCR 575 = AIR 1965 SC 491 at p 494)

'Broadly stated the quo warranto proceeding affords a judicial inquiry in which any person holding an independent substantive public office or franchise or liberty is called upon to show by what right he holds the said office franchise or liberty if the inquiry leads to the finding that the holder of the office has no valid title to it the issue of the writ of quo warranto ousts him from that office. In other words the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. It also protects a citizen from being deprived of public office to which he may have a right.

To sustain a quo warranto writ the applicant has to satisfy the Court that the office in question is a substantive public office and that the incumbent whose position is questioned is holding the post without legal authority that is in appointing him the Government has contravened statutory provisions or binding rules.

That the office of Public Prosecutor is a public office is not questioned before us for the respondents. Section 4 (1) of

the Code of Criminal Procedure (V of 1898) defines "Public Prosecutor" thus:

"'Public Prosecutor' means any person appointed under Section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Government in any High Court in the exercise of its original criminal jurisdiction".

Section 492 of the Criminal P. C. providing for the appointment of Public Prosecutor by the Government is found in Part IX, Supplementary Provisions, Chapter XXVIII, under the heading "of the Public Prosecutor" and runs thus:

"(1) The State Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of Police below such rank as the State Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case".

The procedure as to appointment is Rule 45 of the Criminal Rules of Practice which reads—

"A Public Prosecutor may be appointed for each Sessions Division. The appointment may be made for a period of three years on the nomination of the Collector who shall consult the Sessions Judge before submitting his nomination to Government but the Government is not precluded from reconsidering the appointment, if it thinks fit, before the close of that period."

Indubitably the office of Public Prosecutor involves duties of public nature and of vital interest to the public. Under Section 417, Criminal Procedure Code, the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order, of acquittal passed by any Court other than a High Court, under Section 493, Criminal Procedure Code, the Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution and the pleader so instructed shall act under his directions. The Public Prosecutor may appear to conduct a prosecution only under instructions from the

Collector, and other officers who require his assistance in the conduct of criminal cases, should communicate with the Collector. He is the person to whom notice of appeal shall be given by Court of Session under Section 422 of the Code. The Public Prosecutor is not just an Advocate engaged by the State to conduct its prosecutions. The importance of the office from the point of view of the State and the community, is brought out in Section 494, Criminal P. C., which vests in the Public Prosecutor a discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent, if granted, has to be followed up by the discharge of the person or his acquittal, as the case may be.

It is relevant in this context to cite the following observations of the Supreme Court in *State of Bihar v. Ram Naresh*, (1957) SCJ 336 = (1957) SCR 279 = (1957) Mad LJ (Cri) 247 = AIR 1957 SC 389 at p 393 about the position of Public Prosecutor:—

"In this context it is right to remember that the Public Prosecutor (though an executive officer as stated by the Privy Council in *Faqir Singh v. Emperor* (1938) 2 Mad LJ 780 = 65 Ind App 388 = AIR 1938 PC 266), is, in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizable offences) is on the Executive Authorities".

Manifestly the public would, in a large measure be interested in the manner in which he discharges his duties, and he could properly be considered, to be a person employed in connection with the affairs of the State. The Collector determines the fee payable to him under the relevant rules and he is remunerated by the State.

In *Ramachandran v. Alagiriswami*, ILR (1961) Mad 553 at p 569 = (AIR 1961 Mad 450 at p. 460), this Court observed—

"Nobody seriously doubts that the State Prosecutor in the City and Public Prosecutors in the mofussil are holders of public offices".

11. The next question for consideration is whether the appointment of Public Prosecutor is governed by any statutory provision or rule. Our learned brother, Kailasam, J., has traced the rules as to the appointment of Public Prosecutor from 1895. The Office is of ancient origin. Government Order dated 1st September, 1866, states that in every District Court there is a Government Pleader who is

usually also the Public Prosecutor and that he is nominated by the Collector and appointed by the Government. The rule more or less in the form now we have providing for consultation of the Sessions Judge before the nomination is submitted to the Government is found as Rule 14 in the Criminal Rules of Practice and Executive Orders published in 1910. The authority for the rule is G O No 1232 Judicial dated 12th August 1901. The rule became Rule 30 in the Criminal Rules of Practice and Circular Orders issued in 1931 after approval by the Government in G O Ms No 2420 dated 9th June 1930. It is placed in Part I of the Rules consisting of rules under or in matter relating to the Code of Criminal Procedure.

The latest Criminal Rules of Practice and Circular Orders 1958 received the approval of the Government in G O Ms No 978 dated 10th April 1957 which runs as follows—

'The passing of the Indian Constitution and the Adaptation of Laws Order as amended by the Adaptation of Laws (Amendment) Order 1950 the Cri P C (Amendment) Act 1955 (Central Act 26 of 1955) the Cri P C (Madras Amendment) Act 1955 (Madras Act 34 of 1955) Separation of the Judiciary from the Executive in this State have necessitated the revision of the present edition of the Criminal Rules of Practice and Circular Orders 1931. The High Court Madras has forwarded to Government for approval a revised set of draft rules Judicial Presidency Magistrate Court and Administrative Forms Rules and Orders under the Special enactments and also important circulars and orders issued by the High Court in matters relating to the Judiciary.

In exercise of the powers conferred by Art 227 of the Constitution of India and of all other powers hereunto enabling the Governor of Madras hereby approves the revised rules forms circulars etc forwarded by the High Court, Madras with modifications as set out in the Appendix in these proceedings. The rules forms etc., in the Appendix will be published in the Fort St George Gazette as rules made by High Court with the previous approval of the Government of Madras.

The Preamble to the Rules published in 1958 reads—

"Whereas it is expedient to amend consolidate and bring up to date the Criminal Rules of Practice and Orders 1931 and incorporate therein the Orders Notifications and Administrative instructions issued from time to time by the Government and the High Court, in exercise of the powers conferred by Art 227 of the Constitution of India and of all other powers hereunto enabling and with the previous approval of the Governor of Madras the High Court hereby makes the following Rules and Orders for the guid-

ance of all criminal Courts in the State'

The Governor of Madras who approves, the rules forwarded by the High Court purports to exercise the powers conferred by Art 227 of the Constitution and all enabling powers. It is necessary to set out the material part of Cl (2) and the related Proviso to Art 227 which invests the High Court with power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

Article 227

'(2) Without prejudice to the generality of the foregoing provision, the High Court may

- (a) call for returns from such Courts
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts and
- (c) prescribe forms in which books entries and accounts shall be kept by the officers of any such Courts

Provided that any rules made forms prescribed or tables settled under Cl (2) or Cl (3) shall not be inconsistent with the provision of any law for the time being in force and shall require the previous approval of the Governor"

We are in entire agreement with the learned Judge Kailasam J that the procedure relating to the appointment of Public Prosecutor can be said to relate to practice and proceedings of the Court. We have already referred to some of the important functions of the Public Prosecutor in the Districts with reference to criminal proceedings in Courts. The power to frame rules for regulating the practice and proceedings of criminal Courts can, in our view properly include the qualifications of the person who has to function as Public Prosecutor in Criminal Courts. Rule 45 cannot be considered inconsistent with the provision of Sec 492 Criminal P C vesting the power of appointment of Public Prosecutor in the State Government. The rule does not in the least detract from the power of Government to appoint Public Prosecutor. It only sets out the procedure which the Government will follow in making the appointment. Notwithstanding the rule the power to appoint Public Prosecutor still vests in the State Government and so the requirement of Art 227 for validity of the rule that it shall not be inconsistent with the provision of any law for the time being in force is fully satisfied.

12 It appears to us that this rule could be sustained also under the Proviso to Art 309 of the Constitution. Under that Article the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services. The Proviso to Art. 309 enables the Executive also to make rules regulating the recruitment and the con-

ditions of service, until provision in that behalf is made by an Act of the Legislature. The relevant part of the Proviso to Art. 309 runs thus:

"Provided that it shall be competent for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act".

No doubt the rule in question does not purport to have been made under power conferred by Art 309. Usually when Government issues an order on the basis of a statutory provision, the provision of the Statute in pursuance of which the order is made is specified. But the omission of the authority for the order or rule is not decisive. While approving the rules forwarded to Government by the High Court, it is proclaimed that they have been approved by the Governor of Madras in exercise of the powers conferred by Art 227 of the Constitution and all other powers hereunto enabling. The Criminal Rules of Practice contain provisions regarding various matters—rules relating to criminal procedure, judicial forms, etc and within, we find this rule relating to the appointment of Public Prosecutor with an ancient lineage of Government Orders dating back to 1866. If the High Court under Art 227 may not properly frame a rule with reference to the appointment of Public Prosecutor as a matter relating to practice and proceedings of Criminal Courts the rule should be deemed to have been made under the proviso to Art. 309 which enables the Governor or such person as he may direct to make rules regulating the recruitment and the conditions of service to posts in connection with the affairs of the State.

Sub-section (4) of S 96-B of Government of India Act, 1919 provided that all rules in operation at the time of passing of that Act, whether made by the Secretary of State in Council or any other authority relating to the several services of the Crown in India were duly made in accordance with the powers in that behalf and confirmed the rules. The original rule regarding the appointment of Public Prosecutor had acquired statutory force by virtue of Section 96-B (4) of the Government of India Act, 1919. May be that the original rule is not continued. But in examining the character of the present rule, it is a factor to be taken into consideration. Why should we devalue after the Constitution when citizens are assured of the sovereignty of the Rule of Law, a rule

that had statutory force, to an administrative direction to be followed at the discretion of the authority, when statutory basis could be found for the rule? When the Government approved the revised publication of the Criminal Rules of Practice and Orders, 1931 in G O No. 2420 dated 9th June, 1930, it is stated:—

"Under Section 107 of the Government of India Act, and Section 554 of the Code of Criminal Procedure and all other powers enabling him on this behalf, the Governor-in-Council is pleased to sanction, subject to the alterations mentioned below, the rules in Part I of the Criminal Rules of Practice and Orders and the forms thereunto appended."

Section 107 of the Government of India Act, 1919 subject to certain modifications is similar to Section 224 of the Government of India Act, 1935. Article 227 of the Constitution is a reproduction of Section 224 with certain changes.

The submission that rule is only for guidance of the Executive and non-adherence to the rule is not justiciable, is untenable. In *State of Uttar Pradesh v Baburam*, (1961) 2 SCR 679 = AIR 1961 SC 751 Subba Rao, J. (as he then was,) speaking for the majority, observed that statutory rules cannot be described, as or equated with administrative directions. Of course, the Court was considering the Police Acts and Rules made thereunder for the appointment of Police Officers and prescribing procedure for their removal. The clear and unambiguous expression in Article 309 of the Constitution that rules made by the Governor or such person as he may direct regulating the recruitment and the conditions of service of persons appointed, until provision in that behalf is made by or under an Act, shall have effect subject to the provisions of any such Act, must be given its full and unrestricted meaning. Having regard to the history of the rule regarding the appointment of Public Prosecutor, in our opinion, the rule has been made under constitutional powers and so has statutory force, whether it is Art 227 or the Proviso to Art 309 that is relied upon. The appointment of Public Prosecutor for the district does not rest solely on Standing Orders of the Government as was the case of the Government Pleader for Madras in *ILR (1961) Mad 553* = (AIR 1961 Mad 450).

13. We have next to determine whether the appointment in this case is one that has been made without any regard to the statutory provisions. It is on this we have to differ with respect from our learned brother Kailasam, J. The relevant file has been produced for our perusal and we find the claim of the appellant justified that the appointee has not been nominated by the Collector for the post of Public Prosecutor and that it is the ap-

appellant that was recommended for the post. The counter-affidavit filed in this case in fact do not dispute the position. It is seen from the file that in July 1967 applications were called for the post of Government Pleader-cum-Public Prosecutor which was originally in vogue in the district. The District Bar Association furnished to the Collector names of 17 Advocates for consideration. There was then a proposal for bifurcation and appointment of separate individuals for the posts of Government Pleader and Public Prosecutor. The Collector referred the names of 17 Advocates given to him by the Bar Association to the District and Sessions Judge North Arcot to propose names for the posts of Government Pleader and Public Prosecutor separately on the assumption that there would be separate incumbents for the posts. The District and Sessions Judge furnished two distinct panels of names under the two heads: a panel of names for the appointment of Government Pleader and another for the appointment of Public Prosecutor; each panel containing five names. The present appointee's name is found only in the panel of names for the appointment of Government Pleader and the appellant's name in the panel of names for the appointment of Public Prosecutor. With reference to the present appointee who had a standing of six years and 4 months at the Bar, the learned District Judge recommended the relaxation of the provision in a Standing Order requiring seven years standing at the Bar, there being a precedent for such relaxation. The appellant was appointed as Additional Public Prosecutor Vellore in 1962 relaxing the requirement. The District and Sessions Judge in recommending the present appointee for the post of Government Pleader pointed out that the appointee was Standing Counsel for the Vellore Municipality and competent in his work.

14 The Collector in forwarding his nomination to the Government while expressing his agreement with the panels given by the District and Sessions Judge specifically recommended that the appellant who was then Additional Public Prosecutor be appointed Public Prosecutor. No alternative name was given by the Collector for the post. As regards the present appointee the Collector added that he may be appointed as Additional Public Prosecutor. The post of Additional Public Prosecutor would fall vacant if the present appellant was appointed as Public Prosecutor. The Collector expressed his view that the post of Additional Public Prosecutor should go to a young Advocate so that he might be groomed and trained to become Public Prosecutor in course of time. He remarked that the present appointee could conveniently pick up work under the guidance of the Public Prosecutor and equip himself for further

responsibility in due course. It is clear from the note of the District Collector that for the post of Public Prosecutor he nominated only one individual that is the appellant. Far from sending up the name of present appointee for the post even alternatively he indicated that the present appointee has to abide his time.

Our learned brother Kailasam J proceeded in the view that the letter of the District Judge to the Collector was not clear as to whether he recommended a person out of five names in the list to be appointed as Government Pleader and another person from the second list of five persons to be appointed as Public Prosecutor and that the letter of the District Judge could be construed as recommending any one of the ten persons for appointment for either of the posts. If that were so it is a matter for consideration. But as pointed out above there is no ambiguity either in the panel of names sent by the Sessions Judge or in the nomination made by the Collector. The Collector's recommendation and the letter of the Sessions Judge on the consultation are precise as to what they state. That apart, under the rule it is the Collector that has to make the nomination. It must also be noticed that while the Collector has not recommended the present appointee for either of the posts then vacant the District Judge who was consulted recommended the present appointee only for the post of Government Pleader. So neither the authority that has to be consulted under the rule nor the authority that has to nominate recommended the present appointee for the post of Public Prosecutor.

15 It was faintly argued on behalf of the respondents that the Collector only suggested the appointment of the appellant as Public Prosecutor and not nominated him. To nominate as may be seen from any dictionary means to name or designate by name for office or place. Webster's New 20th Century Dictionary gives the word 'nomination' among other meanings: the naming or appointing a person to an office; the naming of a person as a candidate for election or appointment to an office. A meaning of the word 'nominate' is 'to propose for office'. In the counter affidavit of the Secretary to the Government Home Department it is stated that the word nomination can only mean naming that is recommending. Clearly whether it is naming proposing or recommending the Collector does name propose or recommend only the appellant for the office and he does not name propose or recommend the present appointee for the post.

16 If Rule 45 has statutory force unquestionably there is violation of the rule in that the present appointee has not been appointed on the nomination of the Col-

lector. The rule enjoins that the appointment be made on the nomination of the Collector. As precondition to nomination a duty is cast on the Collector to consult the Sessions Judge before submitting his nomination to the Government. The appointment by Government of a Public Prosecutor for the District is thus conditioned by two requisites. Firstly the Collector should consult the Sessions Judge. Secondly, after such consultation, the Collector should submit his nomination to the Government. This does not mean that the Government is bound to accept the nomination sent up by the Collector. It is not the requirement of the rule that there can be only one nomination, and, once a nomination is sent up, it must be accepted by the Government. To interpret the rule in that manner would be to make the Collector the appointing authority, and that he is not, under Section 492, Criminal P C. And such an interpretation would make the rule ultra vires, whether it is a rule under Art 227 or Art. 309. The Government is the appointing authority and it is the Government that has to take the final decision. It may not approve of a nomination sent by the Collector. It may require the Collector to make a fresh nomination or call for a panel of names with his recommendation in consultation with the Sessions Judge. Only, for appointment not to contravene the rule, it must be a nominee of the Collector that should be appointed for the post.

17. The object of the requirements of the rule is self evident. The subject-matter is such that the requirements of the rule cannot be considered to be empty formalities. They are intended to secure to the Government, the appointing authority, real assistance. The Sessions Judge is expected to know the suitability or otherwise of the members of the Bar in his Sessions Division for the post. He has opportunities to appraise their fitness having regard to their standing in the Bar and the confidence they command. The Collector, the executive head in the district, may be properly expected to offer his advice in the matter. He is required under the rule to act in consultation with the Sessions Judge, the appropriate authority, to give advice for the selection. The consultation which has to precede nomination by the Collector is obviously intended to secure a conference of two minds eminently fitted for the task.

In *Pushpam v. State of Madras*, (1953) 1 Mad LJ 88 at p 90 = (AIR 1953 Mad 392 at p 393), Subba Rao, J., (as he then was) observed:

"Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order

is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions".

It is manifest on the facts that Rule 45 has been violated.

18. It is submitted that the appointment is an executive or administrative act of the Govt and so is not justiciable. True the appointment is an administrative act. But if it contravenes the law, Courts can intervene even with an act of the Executive Authority. Here no absolute discretion is vested in the Govt for making the appointment. The appointment has to be made in accordance with a rule, and a procedure prescribed has to precede the appointment. Having regard to the post to be filled up, the procedure prescribed cannot be considered to be purely directory. While the decision is that of the Government, and it may be an executive decision, the discretion given to the Government in the matter is circumscribed by the rule and it is within the four corners of the rule that the discretion must be exercised.

As pointed out by Lord Greene, M R, in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, (1948) 1 KB 223 the exercise of such discretion must be a real exercise of the discretion. The Master of the Rolls said:

"If in a statute conferring the discretion there are to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters".

Rules made under statutory powers, unless they are constitutionally invalid, must be adhered to. Statutory rules which are functional in character are not made to be violated at the caprice of the Executive Authority concerned. There is no such thing as absolute or untrammelled discretion, the nursery of despotic power, in a democracy based on the rule of law. Douglas, J., in *United States v. M. Wunderlich*, (1951) 342 US 98 expressed in language which must ever be borne in mind by those that would govern and the governed:

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler. Where discretion is absolute man has always suffered".

In (1967) 1 ITJ 903 = (1967) 2 SCJ 102 = AIR 1967 SC 1427 at p. 1434, the Supreme Court spoke for our Constitution in these words:—

"In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our own Constitutional system is based. In a system governed

by rule of law discretion when conferred upon Executive Authorities must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and in general such decisions should be predictable and citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law.

Learned Counsel for the appellant drew our attention also to the decision of the Kerala High Court in AIR 1968 Ker 244, where relying on the observations of the Supreme Court quoted above it was held that the right of a State to make appointments to its service is not arbitrary.

19 A subsidiary point was raised for the appellant that the appointment was made on extraneous considerations and so can be quashed even if the rule has no statutory force. It is alleged in the affidavit in support of the application for quo warranto that the only consideration which weighed with the Government is that the present appointee is an active member of a particular political party. The argument based on this is that considerations wholly not germane have weighed with the appointing authority and, even if there is wide executive discretion in the matter of the appointment the discretion is vitiated.

20 The Court's province in this regard is well settled. In *Raja Anand v State of U P* (1967) 1 SCR 373 = (1967) 2 SCJ 230 = AIR 1967 SC 1081 at p 1085 the Supreme Court observed:

It is true that the opinion of the State Government which is a condition for the exercise of the power under Section 17 (4) of the Act (Land Acquisition Act) is subjective and a Court cannot normally enquire whether there were sufficient grounds for justification of the opinion formed by the State Government under Section 17 (4). But even though the power of the State Government has been formulated under Section 17 (4) of the Act in subjective terms the expression of opinion of the State Government can be challenged as ultra vires in a Court of law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is mala fide.

If people who have to exercise a public duty by exercising their discretion take into account matter which the Courts consider not to be proper for the guidance of their discretion, then in the eye of law they have not exercised that discretion. See Maxwell on the Interpretation of Statutes 11th Edition, page 118. When considerations extraneous to the suitability of a person for appointment are

taken into account in making an appointment there is an abuse of discretionary power and so the exercise of power exceeds the bounds of authority. The other aspirants for the office would have been left out of consideration on totally irrelevant grounds. It could then well be said that Art 16 which provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and Art 14 are violated. While the fitness of a person to an office may be solely within the discretion of the appointing authority the discretion, as has been repeatedly pointed out must be exercised bona fide.

Wade in his *Administrative Law* at page 59 quotes Lord Halsbury's remark.—discretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice not according to private opinion according to law and not humour. It is to be not arbitrary vague and fanciful but legal and regular.

Arbitrary discarding of existing rules be they administrative and improvising ad hoc procedure for particular cases is a dangerously unhealthy trend as it may descend to ad hominem procedure cases and give room for comments of favoured treatment violative of Art 16. While Courts will not interfere with the choice of an individual with reference to an appointment made in the due exercise of its discretion by the Government without shutting out of consideration the claims of others for the post Courts will certainly stand guard and are bound to do so in a democracy against flagrant abuse of powers on the simple and sound principle that the Constitution cannot have intended powers to be abused beyond what might be called the inevitable area where opinions may legitimately differ.

21 While the principles which the appellant seeks to invoke are well settled in our opinion, there is no room in this case for striking down the appointment in question on principle of arbitrary or capricious exercise of discretion and favoured treatment without any regard to established norms in the matter of the appointment. The appellant seeks to clutch at an averment made in the counter affidavit of the Secretary to the Government Home Department, while denying the charge that active association of the appointee with the party in power is the basis of the appointment. Unfortunately and as it strikes us without appreciating the inference which the language employed could lead to the denial is thus expressed.

'It is specifically denied that the only consideration that weighed with the Government in exempting the first respondent

was his association with the D. M. K." But reading this averment in the light of the allegation in the affidavit which is traversed thereby and the setting in which it is found in the counter affidavit, it is clear that the statement in the counter affidavit was not meant to be an acknowledgment that the affiliation with the party in power was one of the considerations for the appointment, though not the only one. The record and the file relating to the appointment which we have perused, do not warrant judicial inference of extraneous consideration like the one alleged by the appellant to have been the basis of the choice. The fact that an aspirant for office happens to be an active member of a political party in power by itself should not and cannot disqualify him if otherwise suitable for being appointed to a post. To make that a point against him when there is no legal bar, would be to exclude him from consideration for the post on wholly irrelevant grounds. The present appointment has to go on the sole ground that the appointee is not a nominee for the post sent up by the Collector. Neither the nomination of the Collector, nor the recommendations of the Sessions Judge which accompanied it has manifestly been relevant material in deciding on the appointment.

22. A point was taken for the appellant questioning the exemption granted to the appointee in respect of the requirement as to seven years standing at the Bar. This requirement is to be found in the Standing Orders relating to the appointment of Law Officers in the mofussil. It is not made out that this Standing Order has any statutory force, and it may be pointed out that the appellant himself got exemption when he was appointed as Additional Public Prosecutor. In ILR (1961) Mad 553 = (AIR 1961 Mad 450), the Division Bench points out that such Standing Orders of the Government regarding appointment to an office are devoid of statutory force and remain merely as declarations no doubt public and explicit declarations—but still only declarations by Government of their intention and line of conduct. Such Standing Orders have no legal sanction behind them and the Government may, in suitable cases in the exercise of discretion, relax the rules.

23. Learned Counsel for the first respondent submitted that the appellant invoking the special extraordinary jurisdiction of this Court has not come with clean hands and is therefore, disentitled to relief. It is urged that in his affidavit the appellant stated that the first respondent has not been enrolled in the Madras High Court and he is an Advocate of the Mysore High Court. This is clearly contrary to facts, and, in his reply affidavit, the appellant contented himself with the

statement that in view of the assertion of the first respondent he withdrew this contention. The appellant, in his reply affidavit, did not categorically admit the true position. The learned Judge, Kailasam, J., points out that, if the appellant had taken some care and looked into the list of the Bar Council, Madras, he would not have made the allegation, and that, in any event, after the specific statement by the first respondent, the appellant could have withdrawn his allegation without any qualification. However, before the learned Judge, Counsel for the appellant submitted that the defect in pleadings in this regard was unintentional. Unqualified regret on behalf of the appellant was expressed and the learned Judge who dealt with the writ petition, did not think it necessary to pursue the matter any further.

Learned Counsel for the first respondent submitted that, before granting a writ of quo warranto, it is necessary to see that the relator is a fit person to be entrusted with the writ and reference was made to the decision in *Miss Cama v. Banwarilal*, AIR 1953 Nag 81, for the proposition that a relator must not be disqualified by having acquiesced or concurred in the act which he comes to complain of. We fail to see the relevance of the decision in the context of this case. True, an averment, has been made in the affidavit in an irresponsible manner while challenging the validity of the first respondent's appointment. A little care and attention and a sense of responsibility in making the averment against a brother member of the Bar would have avoided this. One may say that the allegation has been made recklessly. But it has been atoned for by unqualified regret at the hearing and the learned Judge has accepted the same. Though the appellant himself is personally interested in the proceeding, being an aspirant for the office, still we cannot ignore the fact that the matter is one in which the public can be said to be equally interested and concerns the administration of justice.

24. It follows that the order of the Government G. O. Ms No 231, Home Department, dated 30th January, 1968 appointing the first respondent as Public Prosecutor for the North Arcot Sessions Division has to be quashed. The Government will have to proceed afresh in the matter to fill up in accordance with law the post which thus falls vacant. The appellant has applied for mandamus to act upon the only nomination sent up by the Collector and appoint him as Public Prosecutor for the term. This relief, he cannot have. As observed earlier, the Government is not bound to accept a nomination sent up by the Collector. It cannot be contended by the appellant that the Government is withholding from him

a post to which he is entitled to for the issue of a writ of mandamus. The appellant can claim only that he should be considered for the post. We should here observe that in these proceedings we are not concerned in the least with the merits or qualification of either the appellant or the first respondent. The suitability of an applicant is for the authorities to decide.

25 We accordingly allow W P No 436 of 1968 quashing the order appointing the first respondent as Public Prosecutor. The question of filling up the post of Public Prosecutor North Arcot District will be taken up by the Government for consideration in the light of the observations made herein. W A No 179 of 1968 is therefore allowed and W A No 180 of 1968 dismissed. The parties will bear their respective costs throughout.

Order accordingly

1970 CRI L J 254 (Vol 76, C N 53) =

AIR 1970 MADRAS 85 (V 57 C 23)

KRISHNASWAMY REDDY J

T Subbiah (Accused) Petitioner v S K D Ramaswamy Nadar (Complainant) Respondent

Criminal Revn Case No 1306 of 1968
Criminal Revn Petn No 1289 of 1968
D/-17-2-1969

(A) Criminal P C (1898) S 94 — Word 'thing' refers to physical or material object — Summons for purpose of taking specimen signature or handwriting is not for production of any document or thing.

Section 94 Criminal P C applies only to cases where the Court requires the production of any document or other thing necessary or desirable for the purpose of any investigation inquiry trial or other proceeding under the Criminal P C. The word 'thing' referred to therein is a physical object or material and does not refer to an abstract thing. Therefore it cannot be said that issuing of summons to a person for the purpose of taking his specimen signature or handwriting is for the production of any document or a thing contemplated under S 94.

(Para 6)

(B) Constitution of India Art 20 (3) — Court directing a person to give his specimen signature and handwriting — Does not amount to testimonial compulsion offending Art 20 (3) — (Point conceded in view of AIR 1961 SC 1808).

(Para 7)

(C) Evidence Act (1872) Ss 73 45, 47 — Court cannot direct person to give specimen signature and handwriting pending investigation by Police — Nature and extent of Court's power in such matter, explained — Sine qua non of applying S 73 is enquiry before Court — AIP 1962

Pat 255 (FB) Dissented from — (Identification of Prisoners Act (1920), S 5) — (Criminal P C (1898), Ss 164, 173)

The petitioner was arrested by Police in connection with certain offences of cheating forgery etc and subsequently released on bail. Pending the investigation the Police filed a Memo to Sub-Divisional Magistrate requesting him to direct the petitioner to give specimen signature and handwriting for purposes of further investigation. On issue of notice by the Magistrate.

Held that the Magistrate had no power to direct the accused to give his specimen handwriting or signature in the course of investigation by the police at their instance. (Para 19)

Court can form opinion in respect of handwriting either (a) on the opinion of an expert or (b) on the opinion of a person acquainted with the handwriting or (c) by comparison by the Court itself. Under Section 73 the Court by its own comparison of writing has to form its opinion. This power under Section 73 can be exercised by the Court without being asked for by any party. While exercising such power, the Court for the purpose of comparison, can take the extraneous aid by using magnifying glass by obtaining enlargement of photographs or by even calling an expert. (Para 8)

Under Section 73 an additional power is conferred on the Court to direct any person present in Court to write any words or figures. But to direct a person to write words or figures for the purpose of comparison there must be (i) a cause before the Court (ii) the person so directed must be a party to the cause (iii) he should be present in Court in respect of the said cause and (iv) such comparison must be necessary to determine the issue raised in the said cause. The sine qua non of applying the provisions of the Evidence Act is the enquiry by a Court. (Para 10)

The Magistrates cannot take part in the investigation by the police or aid the police in any manner except in cases where such assistance is specifically provided in the Criminal P C or under any other statute. (Paras 11 12)

Also the contrast between S 5 of the Identification of Prisoners Act and Section 73 Evidence Act shows that the Court under S 73 Evidence Act does not have even power to issue summons to the person to be present in Court unless he is already present in Court as a party concerned in the proceeding before it. The Magistrate can direct a person to give his finger prints in the course of investigation by the police by virtue of Section 5 of the Identification of Prisoners Act but not under Section 73 of the Evidence Act though the finger prints are included therein for the purpose of comparison. AIR 1962 Pat 255 (FB) Dissented from AIR

1961 SC 1808, Disting: 1966 Mad LJ (Cri) 298 (Ker) & AIR 1958 Bom 207 & AIR 1958 Cal 123, Rel. on. (Para 13)

(D) Evidence Act (1872), S. 73 — "Any person" — Interpretation of — Those words refer to persons who are parties to "cause" pending before Court.

Though the words "any person" are so wide as to include all persons, the words "person present in Court" limit only those persons who are before the Court to whom the Court may give a direction, to write any words or figures. Again, those words may not include an onlooker or a spectator but refer to persons who are parties to a 'cause' pending before the Court. It may include even the witnesses of the contesting parties in the said cause.

(Para 10)

(E) Evidence Act (1872), S. 73 — Exercise of powers under — Stage for — Warrant for arrest of accused issued under Ss. 60 to 63, Criminal P. C. — Power is not one exercised in course of enquiry or trial— Power under S. 73, Evidence Act could not be exercised. AIR 1962 Pat 255 (FB), Dissented from. (Para 15)

Cases Referred: Chronological Paras

(1966) 1966 Mad LJ Cri 298 = 1965 Ker LT 950, Aloysious John v. State of Kerala 16

(1962) AIR 1962 Pat 255 (V 49) = 1962 (2) Cri LJ 84 (FB), Gulzar Khan v State 15, 16

(1961) AIR 1961 SC 1808 (V 48) = 1961 (2) Cri LJ 856, State of Bombay v Kathi Kalu Oghad 4, 7, 14

(1960) AIR 1960 Cal 32 (V 47) = 1960 Cri LJ 56, Farid Ahmed v The State 14

(1958) AIR 1958 Bom 207 (V 45) = 1958 Cri LJ 619, State v. Poonamchand 17

(1958) AIR 1958 Cal 123 (V 45) = 1958 Cri LJ 367, Hiralal v. State 18

(1928) AIR 1928 PC 277 (V 15) = 28 Mad LW 737, Kessarbai v. Jethabhai Jivan 9

K. Ramaswami, for Petitioner, Assistant Public Prosecutor, for the State, A Shanmughavel, for the Complainant.

ORDER:— This revision petition has been filed by the accused in Crime No 4 of 1968, District Crime Branch, Ramanathapuram at Madurai, against the order of the Sub-Divisional Magistrate, Srivilliputtur, directing him to appear on 27-11-1968 for taking his specimen signature and handwriting for the purpose of investigation.

2. The relevant facts necessary for the appreciation of the contentions raised by the petitioner are briefly as follows;

3. The petitioner was arrested by the Rajapalayam Police in connection with certain offences of cheating, forgery etc, alleged to have been committed by him

He was subsequently released on bail. While the investigation was pending, the Inspector of Police, District Crime Branch, Ramanathapuram, filed a memo on 21-9-1968 before the Sub-Divisional Magistrate, Srivilliputtur, requesting him to direct the petitioner to give his specimen handwriting and affix his specimen signature both in ink and pencil for the purpose of further investigation in the matter. On that memo, the learned Sub-Divisional Magistrate issued notice to the petitioner asking him to appear on 5-10-1968 and give his specimen handwriting and signature for the purpose of further investigation. On 5-10-1968 the petitioner appeared through his counsel and filed an objection petition alleging that he was not bound in law to furnish specimen handwriting or signature as that would amount to testimonial compulsion to offer evidence against himself, offending Art 20 (3) of the Constitution of India.

4. After hearing both sides, the learned Sub-Divisional Magistrate following the decision of the Supreme Court in State of Bombay v Kathi Kalu Oghad, AIR 1961 SC 1808 overruled the objections raised by the petitioner and directed him to appear on 27-11-1968 for the purpose of giving his specimen signature and handwriting.

5. Against the above order, this revision has been filed. In this revision petition, the petitioner raised the following points, (1) that the Sub-Divisional Magistrate has no jurisdiction to issue any summons to the petitioner under Sec 94, Criminal P. C for the purpose of producing any documents and consequently for complying with the directions issued by the Court; (2) that the direction given by the Court insisting upon the petitioner to give his specimen signature and handwriting would amount to testimonial compulsion offending Art 20 (3) of the Constitution of India. This point has been raised in the lower Court and negatived. (3) that the Sub-Divisional Magistrate had no jurisdiction under Section 73 of the Evidence Act to direct the petitioner to give his specimen handwriting or signature when the charge-sheet had not been filed, in other words, the Sub-Divisional Magistrate had no jurisdiction to exercise this power under Section 73 of the Evidence Act during the pendency of the investigation while he has not taken cognizance of the case.

6. In respect of the first point that the Sub-Divisional Magistrate has no jurisdiction under Section 94, Criminal P C to issue summons to the petitioner for the purpose of taking his specimen signature or handwriting from him. I am of the view that there is nothing to indicate, that the learned Sub-Divisional Magistrate has issued summons to the petitioner under Section 94, Criminal P C. Section 94, Cri-

riminal P C will apply only to cases where the Court requires the production of any document or other thing necessary or desirable for the purpose of any investigation inquiry trial or other proceeding under the Criminal P C. In this case the summons was not issued to the petitioner for the production of any document or any other thing. The word thing referred to in Section 94 Criminal P C is a physical object or material and does not refer to an abstract thing. It cannot be said that issuing of summons to a person for the purpose of taking his specimen signature or handwriting is for the production of any document or a thing contemplated under Section 94 Criminal P C. It is not the case of the prosecution that the learned Magistrate exercised his power under Section 94 Criminal P C in issuing summons to the petitioner. The learned Counsel for the petitioner is unable to substantiate this point and ultimately did not press it.

7 In respect of point No 2 that directing the petitioner to give his specimen signature and handwriting will amount to testimonial compulsion under Art 20 (3) of the Constitution of India the learned counsel was unable to press this point in view of the decision of the Supreme Court in AIR 1961 SC 1808.

8 In respect of point No 3 the main question that arises is as already pointed out whether the Court has got power to direct the accused to give his specimen handwriting signature or to write words or figures in the course of the investigation by the police under Section 73 of the Indian Evidence Act. It therefore becomes necessary to consider the scope of Section 73 of the Evidence Act which runs thus:

In order to ascertain whether a signature writing or seal is that of the person by whom it purports to have been written or made any signature writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved although that signature writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also with any necessary modifications to finger impressions.

This section therefore makes it clear that when the Court considers necessary to ascertain whether the signature writing or seal is that of the person alleged to have been written or made the Court can compare such signature writing or

seal with the admitted or proved signature writing or seal of that person and that while doing so the Court is empowered to direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare such words or figures with those alleged to have been written by that person. This is an enabling provision for the Court making an enquiry in determining an issue to form its opinion by comparison of the words or figures as the case may be in a given case. In respect of the proof of handwriting or signature we have two other modes provided under the Evidence Act. Under Section 45 the opinions of experts specially skilled in such signs will be relevant for forming an opinion by the Court on such points. Under Section 47 the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed will be relevant for the purpose of the Court forming an opinion whether a particular document was written or signed by him. Section 73 of the Evidence Act provides the third method. Thus the Court can form opinion in respect of handwriting either (a) on the opinion of an expert or (b) on the opinion of a person acquainted with the handwriting or (c) by comparison by the Court itself. Under Sections 45 and 47 of the Evidence Act the Court has to form an opinion on the opinion of others whereas under Section 73 of the Evidence Act the Court by its own comparison of writings has to form its opinion. In spite of the opinions of expert or a person acquainted with the handwriting the Court could still if it desires to use its skill in comparing the handwriting or signatures do so under Section 73 to which no party to the cause will have a right to question or object to. This power under Section 73 can be exercised by the Court without being asked for by any party. While exercising such power the Court for the purpose of comparison can take the extraneous aid by using magnifying glass by obtaining enlargement of photographs or by even calling an expert—all these to enable the Court to determine by comparison. There is no basis for the view that the Court cannot seek extraneous aid for its comparison but on the other hand there is indication in Section 73 of the Evidence Act itself that such extraneous aid might be necessary. Section 73 enables the Court to compare the finger impressions also. The finger impressions cannot be normally compared by naked eye without a special skill required for the purpose. In comparing finger impressions the Court may have to take necessarily the help of a skilled person.

9 In *Kesarbai v Jethabhai Jivan*, AIR 1928 PC 277 the Privy Council while dealing with the scope of Section 73 of

the Evidence Act, observed that mere comparison of signatures without the aid in evidence of microscopic enlargements or any expert advice is dangerous

10. For the purpose of comparison under Section 73 by the Court, an additional power is conferred on it to direct any person present in Court to write any words or figures enabling the Court to compare them with any words or figures alleged to have been written by such person. Though the words "any person" are so wide as to include all persons, the words "person present in Court" would limit only those persons who are before the Court to whom the Court may give a direction, to write any words or figures. Again here, in my view, the words "any person present in Court" may not include an onlooker or a spectator who has come to Court for the purpose of sight seeing or for even witnessing the proceedings in Court. The words "any person present in Court" will refer to persons who are parties to a 'cause' pending before the Court. It may include even the witnesses of the contesting parties in the said cause. It is clear to my mind that, to direct a person to write words or figures for the purpose of comparison, there must be a cause before the Court, that the person so directed must be a party to the cause, that he should be present in Court in respect of the said cause and that such comparison is necessary to determine the issue raised in the said cause. If there is no cause pending before the Court for its determination, the question to ascertain the signature or handwriting of a person will not arise at all and, therefore, the provisions of Section 73 of the Evidence Act will apply only when a matter is pending before the Court and not otherwise. The provisions of the Evidence Act will apply only in relation to matters of fact under enquiry before a Court. If there is no enquiry by a Court, there is no scope of applying any of the provisions of the Evidence Act. The sine qua non of applying the provisions of the Evidence Act is the enquiry by a Court.

11. The enquiry or trial in criminal cases commences only after the court takes cognizance of the matter provided under Section 190, Criminal P. C. The cognizance for the Court is taken either on a private complaint or on a report by the police or on any other information received from any person or upon his own knowledge or suspicion that an offence has been committed.

12. The final report under Section 173, Criminal P. C., is submitted by the police as a result of investigation under Chapter XIV of the Criminal P. C. The Magistrates cannot take part in the investigation by the police or aid the police in any manner except in cases where such assistance is specifically provided in the Criminal P. C.

or under any other statute, such as recording of statements from witnesses and recording of confession from the accused under S 164, Criminal P. C., in the course of the investigation by the police.

13. Under Section 5 of the Identification of Prisoners Act, 1920 it is specifically provided that if a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect. It also provides that in that case, the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken as the case may be, by a police officer. The word "measurements" mentioned in the said provision will include finger prints and foot prints but not the handwriting or the signature. It is very significant to note that taking of handwriting or signature from a person by a Magistrate in the course of investigation by the police is specifically excluded. When the Parliament made this enactment, it must have had in its mind not only that Section 73 of the Evidence Act does not give power to the Court to take finger prints, signature and handwriting from a person in the course of investigation by the police but also it must have thought that it might not be necessary to include the taking of handwriting or signature of a person in the course of investigation by the police. Otherwise, there is no tangible reason for the Parliament to exclude, under the Identification of Prisoners Act, the taking of handwriting or signature. The Parliament must have probably thought that though the taking of the handwriting or the signature of a person is one of the modes of identification, it was not an infallible one and that the better mode of proving the handwriting or signature is what is provided under S 47 of the Evidence Act, namely, the evidence of that person who is acquainted with the signature of the person concerned. In this context, it is also worthwhile to note in contrast to Sec 73 of the Evidence Act that this section empowers the Magistrate to direct any person irrespective of the fact whether that person is a party to the cause or not, and the section also empowers the Magistrate to direct a person to be produced before him at the time and place specified by him and does not confine only to those persons present in Court. By this contrast between these two provisions though under different statutes, it appears to my mind that the Court under S. 73 of the Evidence Act does not have even power to issue summons to the person to be present in Court unless he is already present in Court as a party concerned in the proceed-

ing before it. The Magistrate can direct a person to give his finger prints in the course of investigation by the police by virtue of Section 5 of the Identification of Prisoners Act but not under Section 73 of the Evidence Act though the finger prints are included therein for the purpose of comparison.

14 It is contended by Sri Shanmughavel, the learned counsel appearing for the complainant that in the interests of justice it is the duty of the Magistrate to assist the police in the course of investigation and that Section 73 must be read so as to give a liberal meaning to it and he stresses this point further stating that there is no other provision under any other statute enabling a Magistrate to direct a person to give his handwriting or signature in the course of investigation. There is a fallacy in this contention. If in the interests of justice even before the Court takes cognizance of the case it would assist the Police Officer in investigation equally in the interests of Justice it can be contended that a party accused of an offence by the police even before the Magistrate takes cognizance of the case against him, could approach the Magistrate and seek his assistance to take his specimen signature or handwriting for the purpose of comparison in the course of investigation by the police to establish his innocence. Can it be said that the Magistrate could comply with the request of the party before taking cognizance of the case against him? This will lead to an anomaly. The learned counsel is unable to press this point further. But however he relied upon a decision of the Supreme Court in AIR 1961 SC 1808.

On a careful reading of the decision of the Supreme Court I do not find any basis for the contention of the learned counsel that even during the investigation, the Magistrate can direct a person to give the specimen handwriting or signature under Section 73 of the Evidence Act. That decision arose from three appeals from three States namely Bombay, Punjab and West Bengal. In the Bombay case the Police in the course of the investigation, had obtained specimen handwritings of the accused for the purpose of comparison of the handwriting in the disputed document. In the Punjab case the impressions of the palms and fingers of the accused were taken by the police in the course of investigation in the presence of a Magistrate obviously under the provisions of Sections 5 and 6 of the Identification of Prisoners Act. In the West Bengal case the facts of which are similar to the facts of the present case the accused after he was released on bail was directed by the Magistrate under Section 73 of the Evidence Act to give his specimen writing and signature for the purpose of

comparison during the investigation by the police and at their instance. The learned counsel depends upon the following passage in the said decision.

To be a witness" may be equivalent to 'furnishing evidence in the sense of making oral or written statements but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for the purpose of identification'. 'Furnishing evidence in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that — though they may have intended to protect an accused person from the hazards of self-incrimination in the light of the English law on the subject — they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminal to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of crime. It is as much necessary to protect an accused person against being compelled to incriminate himself as to arm the agents of law and the law Courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution-makers were aware of the existing law for example Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (33 of 1920). Sec 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do so. Measurements include finger impressions and foot-print impressions. If any such person who is directed by a Magistrate under S 5 of the Act to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs it has been declared lawful by Section 6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly Section 73 of the Evidence Act authorises the Court to permit the taking of finger impression or a specimen handwriting or signature of a person present in Court if necessary for the purpose of comparison.

Nowhere in this passage we find that Section 73 of the Evidence Act authorises the Court to take the finger impression or specimen handwriting of the person present in Court in the course of investigation by the police. It is true that in the West Bengal case (the point of) the specimen handwriting or signature to be taken in the course of investigation by the police

does not appear to have been raised at all. It is also significant to note that in the decision of the High Court of West Bengal against which the appeal was filed reported in *Farid Ahmed v. The State*, AIR 1960 Cal 32, it was held that the order could not have been made under Section 73 of the Evidence Act as it was made in the course of an investigation. This appears to be the finding given by the West Bengal High Court in that case on that point. In the appeal, against the decision of the High Court to the Supreme Court, this point was not at all raised. The Supreme Court was wholly concerned in all the three cases, irrespective of the details of the facts of those cases, with the question whether the taking of finger prints, handwriting etc., etc., from an accused either under the Identification of Prisoners Act or under S. 73 of the Evidence Act, would offend Art 20 (3) of the Constitution. This is made very clear in the first sentence of para 2 of the majority judgment which is as follows:

"It is not necessary to state in any detail the facts of each of the cases now before us. We shall, therefore, state only so much of the facts as have occasioned calling in aid of the provisions of Cl. (3) of Art. 20 of the Constitution".

This passage makes it abundantly clear that the Supreme Court was not concerned with any other question in relation to the facts of each of these cases. I am, therefore, of the view that there is no basis for the contention of the learned counsel that the Supreme Court has at least indirectly approved the point that the Magistrate can take handwriting or signature of the accused in the course of investigation.

15. The learned counsel relied upon a Full Bench case of the Patna Court in *Gulzar Khan v. State*, AIR 1962 Pat 255 (FB) which is similar to the facts of this case. The facts of that case are these: They were concerned with three cases. In one case, the accused were directed by the Magistrate to appear before the police for giving their finger-prints and foot prints for the purpose of comparison in the course of investigation, when the accused were on bail. In the second case, the accused was directed by the Magistrate to appear before the Sub Inspector of Police and to give specimen of his signature for the purpose of comparison while he was on bail and the investigation was pending. In the third case, the Magistrate directed the accused to appear before him and to give specimen handwritings and thumb-impressions. To an argument by the counsel that Section 73 of the Evidence Act cannot be invoked by the Magistrate before taking cognizance of the case and that the Magistrate was not empowered under S. 73 to direct a person to give specimen handwriting and

thumb impressions for the purpose of investigation by the police, the Court answered it by one sentence that the argument could not be acceded to. The Court has observed (sic) its view in the following terms indicating that even before the Magistrate takes cognizance of the case, he can direct the accused to give specimen handwriting and signature under Sec. 73 of the Evidence Act.

"But even in regard to Section 73 of the Evidence Act, the word 'Court' therein must be equated with the Court of the Magistrate in a case triable by him or before it is committed to sessions in a case triable by the Court of Session. As 'a matter of fact, in every case where the accused is arrested and he is required to give his specimen handwriting of signature or thumb impression etc., he is arrested under a warrant which must be issued by a Magistrate or when the police arrest without a warrant in a cognizable offence under Section 60 of the Code of Criminal Procedure, he must be produced before a Magistrate without unreasonable delay and follow the procedure under Sections 60 to 63 of the Code as also under Art 22 of the Constitution of India and that attracts the provisions of Section 73 of the Evidence Act. In none of the numerous cases, has this point been specifically raised on this account and this contention also fails accordingly."

With great respect, I am unable to agree with these observations for the reasons given by me in the earlier portion of my judgment. The Magistrate issuing a warrant for the arrest of an accused or exercising his powers under Sections 60 to 63 of the Criminal P. C. are not the powers exercised by him in the course of an enquiry or trial by him which, as already pointed out by me is the only stage when he could exercise his powers under Section 73 of the Evidence Act.

16. In a decision of a Division Bench of Kerala High Court in *Aloysious John v. State of Kerala*, 1966 Mad LJ CrI 298 (Ker), Govinda Menon, J., on behalf of the Division Bench, dissented from his own earlier judgment, decided by him as single Judge, and held that under S. 73 of the Evidence Act, the Magistrate has no powers at the investigation stage by the police to issue a direction to the accused to appear in Court for the purpose of giving specimen handwriting and signature at the request of the police. The Division Bench expressed inability to subscribe to the view mentioned in AIR 1962 Pat 255. I respectfully agree with this decision.

17. In *State v. Poonamchand Gupta*, AIR 1958 Bom 207 it was held that Cl (2) of Section 73 of the Evidence Act limits the power of the Court to directing a person present in Court to write any words or figure only where the Court itself is

of the view that it is necessary for its own purposes to take such writing in order to compare the words or figures so written with any words or figures alleged to have been written by such person and that the power does not extend permitting one or the other party, before the Court to ask the Court to take such writing for the purpose of its evidence or its own case

18 In *Hiralal v State* AIR 1958 Cal 123 it was held that Section 73 cannot be construed as an instrument or a device to be used for the advancement of any party, either the prosecution or the accused that it is one of those sections where large powers are given to the Court to find out the truth and to do complete justice between party and party and that any other use of it would be wholly unjustified I respectfully agree with these two decisions

19 In the result I find that the Magistrate had no power to direct the accused to give his specimen handwriting or signature in the course of investigation by the police at their instance

20 The petition is allowed

Petition allowed

1970 CRI L J 260 (Vol 76, C N 54) ==

AIR 1970 MYSORE 34 (V 57 C 7)

B M KALAGATE J

Deepchand Accused Petitioner v Sampathraj Complainant, Respondent

Criminal Revn Petn No 306 of 1969 D/ 24-3 1969 against order of Second Additional S J Bangalore D/ 2-4 1969

(A) Evidence Act (1872), Ss 126 146 and 149 — Scope — Privilege under S 126 is not absolute — Defamatory questions put by lawyer to a witness in cross-examination on client's instructions — No reasonable basis available for putting them — Such communication is not professional — Its disclosure is not protected under S 126 — Witness, on instructions of client, asked in cross-examination whether he was doing opium smuggling business, whether he was involved in opium smuggling case in a particular year whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him — Imputation conveyed by those questions is per se defamatory — Hence client is liable under S 500 Penal Code 1935 MWN 460 Dissented from—(Penal Code (1860) S 499 Exception 9 — Judicial proceedings — Privilege of witnesses)

The privilege under S 126 Evidence Act is not absolute. When defamatory questions are put by a lawyer to a witness in cross-examination on client's instructions without any reasonable basis for putting them such a communication is not professional and its

disclosure is not protected under S 126. Where a witness on the instructions of the client, is asked in cross-examination whether he was doing opium smuggling business, whether he was involved in an opium smuggling case in a particular year whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him, the imputation conveyed by those questions is per se defamatory. Hence that client is liable under S 500 Penal Code

(Paras 6 9 and 14)

It is true that the law gives power to the Court to protect witnesses. But it can be seen from S 146 that it is perfectly open to a lawyer to put questions to a witness in cross-examination to shake his credit by injuring his character and the mere fact that the answer to such questions may directly or indirectly tend to criminate the witness is no justification to refuse to answer them. The effect of Ss 146 to 149 is that though it is permissible for a lawyer to put such questions nonetheless the lawyer must be satisfied that there are reasonable grounds for thinking that the imputation which those questions convey is well founded, since if such questions are put the damage is done

(Paras 8 and 10)

The privilege under Section 126 is not absolute but is only a qualified one. This is seen from the illustrations to the Section also which make it clear that all professional communications are not privileged and protected from disclosure. If it is an absolute privilege then no witness whether male or female will be safe in a Court of law when he or she is under cross-examination.

(Paras 9 and 11)

Further under S 126 the communication which is made to a lawyer must be in course of and for the purpose of employment as such. It cannot be said that when a lawyer puts a question on the instructions of his client to a witness in cross-examination which is defamatory without there being any reasonable ground for putting it, it is a communication made for the purpose of the employment as lawyer. Though S 146(3) permits a question injuring the character of the witness such a communication of the client to his lawyer cannot be said to be a professional one and that it is absolutely privileged and its disclosure is protected under S 126 without the express consent of the client. Thus when a witness on the instructions of the client is asked in cross-examination whether he was doing opium smuggling business whether he was involved in an opium smuggling case in a particular year whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him the imputation conveyed by them is per se defamatory. Therefore that client is liable under S 500 Penal Code 1935 Mad WN 460 Expl and Diss from AIR 1954 Mad 741 Dissenting from 1935 Mad WN 460 Ref (Paras 6 7 13 and 14)

(B) Penal Code (1860), S. 499 Exception 9 — Burden of proof — Accused relying upon exception 9 — Therefore it is for him to prove that his case falls under that exception. AIR 1966 SC 97, Foll.—(Evidence Act (1872), S. 105). (Para 16)

(C) Penal Code (1860), Ss. 499 and 500— Conviction and sentence — Questions per se defamatory put by lawyer to witness in cross-examination on instructions of his client — No reasonable basis available for putting them — It cannot be said that the client can be convicted only as abettor and not as principal offender. AIR 1954 Mad 741, Foll. (Para 18)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 97 (V 53) = 1966	
Cri LJ 82, H. Singh v. State of	
Punjab	16
(1954) AIR 1954 Mad 741 (V 41) =	
1954 Cri LJ 1239, Ayesha Bi v.	
Peer Khan Sahib	12, 18
(1935) 1935 Mad WN 460, Palaniappa	
Chettiar v. Emperor	11, 12

M. V. Devaraju and A. Shamanna, for Petitioner, P. S. Devadas, for Respondent.

ORDER: The petitioner was the accused in C. C. 3227 of 1966 in the Court of the Additional First Class Magistrate, Bangalore. The respondent herein filed a complaint against the petitioner accused for an offence under S. 500 of the Indian Penal Code.

2. The facts leading to the complaint may be briefly stated as follows.—The complainant and the accused are both businessmen. The accused was involved in what is known as Gold Control Order case wherein the complainant was examined as a witness in support of the prosecution. During the course of cross-examination of the complainant, learned Counsel Sri Chandra Kumar who appeared for the accused in that case put the five questions mentioned in the complaint. According to the complainant, those questions were put at the instance of the accused with a view to harm the complainant's reputation and standing in the business community of Bangalore and also with intent to lower his character. He further alleged that the imputations made by the accused against him are all absolutely false and were made deliberately to damage and harm the complainant's moral, social and business reputation and the imputations conveyed by those questions are per se defamatory. Therefore the accused is liable for punishment under Section 500 of the Indian Penal Code.

3. The learned Magistrate, on the evidence adduced before him, found the accused guilty of the offence and convicted him of the offence punishable under S. 500 of the Indian Penal Code and sentenced him to undergo simple imprisonment till the rising of the court and to pay a fine of Rs. 500 or in default of payment of fine, to undergo simple imprisonment for a further period of two months.

4. Against the said order, the accused preferred an appeal in the Court of the II Additional District and Sessions Judge, Bangalore, challenging his conviction and sentence. The learned Sessions Judge agreeing with the conclusion reached by the learned Magistrate, confirmed the conviction and sentence imposed on the accused and dismissed the appeal. It is the correctness and legality of this order that is challenged in this petition under Ss. 435 and 439 of the Code of Criminal Procedure.

5. Mr. Devaraju, the learned counsel for the petitioner submitted that the imputation made fell within the Ninth Exception to Section 499 of the Indian Penal Code and if so, there is no defamation. He also contended that the information conveyed to the Advocate by the accused were professional communications and their disclosure is not permissible under S. 126 of the Indian Evidence Act. The five questions that were put to the complainant were as follows:

"1. In 1949-50 have you done the business of opium smuggling?"

Ans No.

2. Is it a fact that you were involved in a opium smuggling case in 1949-50 and you were under remand for 15 days?"

Ans. It is absolutely incorrect.

3. In 1949-50 you were not doing the business of smuggling the cloth from the running train at Marwad?"

Ans. No.

4. Was there not a case at that time regarding the smuggling in which you were involved?"

Ans: I was a mere witness.

5. I put it to you that because there was a warrant against you, you came away to Bangalore from Rajasthan?"

Ans It is not correct "

From the above questions it is clear that the imputation made against the complainant was that he was doing the business of opium smuggling and that he was involved in a opium smuggling case in 1949-50. It is also clear that the imputation conveyed by the third question was that the complainant was doing the business of smuggling of cloth from running train and from the fifth question, that he has come to Bangalore from Rajasthan because there was a warrant against him.

6. Not much discussion is necessary to find that the imputation conveyed by these questions is per se defamatory.

7. These questions were put in open Court and made public. The Courts below were in my opinion, right in coming to the conclusion that the imputation conveyed by the questions was per se defamatory. Therefore, the two questions that arise for consideration are, whether the imputation conveyed by the above questions fall within the Ninth Exception to Section 499 of the Indian Penal Code and whether they are privileged communications which cannot be disclosed

without the express permission of the client under Section 126 of the Indian Evidence Act.

8 Now the Ninth Exception to Section 499 Indian Penal Code reads as follows

"Ninth Exception—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it or any other person or for the public good." At this stage it would be appropriate to refer to S 146 of the Indian Evidence Act which permits lawful questions to be put in cross examination. It is provided that when a witness is cross examined he may in addition to the questions referred to in that Section be asked any question which tends to shake his credit, by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. Thus it would be seen that it is perfectly open to a lawyer to put questions to a witness in cross examination in order to shake his credit by injuring his character and the mere fact that the answer to such questions may directly or indirectly tend to criminate the witness is no justification to refuse to answer such questions.

It is also pertinent to note the provisions of Section 149 of the Indian Evidence Act which provides that no question referred to in Section 148 ought to be asked unless the lawyer asking it has reasonable grounds for thinking that the imputation which it conveys is well founded. Thus the effect of the provisions of Sections 148 and 149 is that though it is permissible for a lawyer to put a question in cross examination of a witness to shake his credit by injuring his character nonetheless the lawyer must be satisfied that there are reasonable grounds for thinking that the imputation which it conveys is well founded.

9 But what is contended before this Court by the learned counsel for the petitioner Mr Devaraju is that the communications made by a client to his lawyer are professional communications and are protected from disclosure unless their disclosure is permitted either by the client expressly or under the provisions of Section 126 of the Evidence Act.

To me it appears that the privilege stated in Section 126 of the Evidence Act is not an absolute privilege as claimed but is only a qualified one. This proposition receives support from the illustrations to Section 126 itself. If it was an absolute privilege as claimed, then no witness whether male or female would be safe in a Court of law when he or she is under cross-examination.

10 It is true that law gives power to the court to protect witnesses but then if the question is put the damage is done. It is therefore reasonable to state that though under Section 146 (3) of the Evidence Act the lawyer is entitled to put questions to

shake the credit of a witness by injuring his or her character there must be some reasonable ground for thinking that the imputation conveyed by the question is well founded.

11 Mr Devaraju, in support of his contention that the privilege under Section 126 is an absolute one relied upon the decision in Palaniappa Chettiar v Emperor, 1935 Mad WN 460. The Order of the Court is so brief that it is difficult to find out the reasons for stating that the privilege under Section 126 is an absolute one and a lawyer is not at liberty to disclose the communications made to him during the course of his employment. According to the learned Judge all communications are privileged and are protected from disclosure. With respect, this statement is clearly unsupportable in view of the illustrations to Section 126 which make it clear that it is not all professional communications that are privileged and are protected from disclosure.

12 In a subsequent decision of the same High Court in Ayesha Bi v Peer Khan Sahib, 1954 Cri LJ 1239 = (AIR 1954 Mad 741) the decision in Palaniappa Chettiar 1935 Mad WN 460 came to be considered where the learned Judge was not inclined to accept the proposition stated therein as correct.

13 Section 126 of the Indian Evidence Act provides that no lawyer shall be permitted to disclose any communication made to him in the course and for the purpose of the employment as such lawyer by or on behalf of his client unless with the express consent of his client. The communication which is made to a lawyer must be in course and for the purpose, of employment as such.

In my view, it cannot be said that when a lawyer puts a question on the instructions of his client to a witness in cross examination which is defamatory in character without there being any reasonable ground it is a communication made for the purpose of the employment as lawyer. A question put to a witness in cross examination which might injure his character though permissible under Section 146 (3) of the Indian Evidence Act with a view to shake his credibility nonetheless there must be a reasonable ground for putting a question which is defamatory in character and if there is no basis for putting such questions then it is difficult to state that such a communication which is defamatory in character is a professional communication and its disclosure is protected under Sec 126 of the Indian Evidence Act without the express consent of his client.

14 The trial Court has observed that the lawyer did not claim any privilege under Section 126 of the Indian Evidence Act. Mr. Devadass appearing for the respondent has pointed out that the evidence of P W 1 the Advocate clearly shows that he had not satisfied himself that there were reasonable grounds for thinking that the imputation conveyed by the questions is well founded. Thus he states it obvious from his admission that he did not show that the imputation con-

veyed by those five questions was well founded. He states that if the lawyer was in possession of any such document, he would have confronted the witness with such document.

He, therefore, contends that the questions put by the learned Advocate were without any reasonable grounds. In my opinion, the communication by the client to his lawyer to put questions which are defamatory in character to the witness in cross-examination without there being any basis cannot be said to be absolutely privileged and are protected from disclosure without the express consent of the client under S 126 of the Indian Evidence Act. Since the imputation conveyed by the questions is per se defamatory the accused is liable for conviction.

15. But the accused has, as already stated also relied on the Ninth Exception to Section 499 of the Indian Penal Code. The Court below has held that the accused cannot justifiably claim protection under the Ninth Exception to Section 499 of the Indian Penal Code.

16. Mr. Devaraju for the petitioner has drawn my attention to a decision of the Supreme Court in *H. Singh v. State of Punjab*, AIR 1966 SC 97 wherein the scope of the Ninth Exception to Section 499 of the Indian Penal Code came to be considered. Since the accused has relied upon the exception it is for him to prove that his case falls under that exception. The Supreme Court has, in that decision, stated that the burden of proof by the accused who relies on an exception is not the same which ordinarily lies on the prosecution to prove its case, but it has clearly stated that the accused must show that he has acted in good faith and by the test of probabilities his evidence establishes his case.

17. From the evidence on record, I am of the opinion that both the Courts below were right in coming to the conclusion for the reasons stated, that the accused was not entitled to the benefit of the Ninth Exception to Section 499 of the Indian Penal Code.

18. It was next contended by Mr. Devaraju that the accused can be convicted only as abettor and not as a principal offender. That is a proposition which cannot be accepted. Such a submission was made in *Ayesha Bi's case*, 1954 Cri LJ 1239 = (AIR 1954 Mad 741) referred to above where his Lordship rejected that contention by observing that there is no meaning in stating that defamation cannot be committed by a proxy through the mouth of his Vakil.

19. In the result, for the reasons stated above, I confirm the conviction and sentence passed by the Court below and dismiss this revision petition.

Petition dismissed.

1970 CRI. L. J. 263 (Vol. 76, C. N. 55) =

AIR 1970 ORISSA 27 (V 57 C 11)

A MISRA, J.

Prasanna Kumar Samal and others,
Petitioners v Balbhadra Rout, Opposite
Party.

Criminal Revn No 215 of 1966, D/-
July 1969 against order of Sub-Divisional
Magistrate, Kamakshyanagar, D/- 28-3-
1966

(A) Cattle Trespass Act (1871), Ss. 10
and 24 — Requisite for conviction under
S. 24.

Though for a conviction under S 24
of the Cattle Trespass Act there should
be a specific finding that the cattle rescued
were liable to be seized under S 10
of the Act which necessarily includes
proof of damage having been caused, the
mere absence of a specific finding could
not entitle the accused to an acquittal
where there is acceptable evidence on
record in support of the prosecution case
and the cattle having damaged the crop
or the person who effected the seizure
being entitled or authorised to seize.
AIR 1963 Pat 199, Foll. (Para 6)

(B) Cattle Trespass Act (1871), S. 10—
Person authorised by cultivator or oc-
cupier to watch or seize cattle is him-
self cultivator or occupier — He is also
entitled to seize cattle under S. 10. AIR
1922 Pat. 317, Foll. (Para 7)

Cases Referred: Chronological Paras

(1963) AIR 1963 Pat 199 (V 50) =

1963 (1) Cri LJ 607, Bhado Mon-
dal v State 6

(1922) AIR 1922 Pat 317 (V 9),

K Dusadh v. Sarati Dusadh 7

A K Padhi, for Petitioners; S C,
Mohapatra and S Mohanty, for Opposite
Party

ORDER: The petitioners have been
convicted u/s 24 of the Cattle Trespass
Act and each of them sentenced to pay
a fine of Rs 50/- and in default, to
undergo simple imprisonment for 15 days.

2. The complainant's case, in brief, is
that on 16-10-64, while P. W. 3, the watcher
appointed by the villagers of Baligorada,
with the help of P. W. 4 was taking some
cattle of the petitioners to the cattle
pound for having damaged paddy crop on
complainant's land, petitioners forcibly
rescued and took away the cattle. Peti-
tioners in defence deny the allegations
and allege that while some heads of
cattle belonging to some of them were
grazing on a waste land on the Baligo-
rada side of the rivulet, P. W. 3 and
some of his co-villagers seized them. On
receiving information, petitioner no 1
went there and protested against such
action. On his protest, P. W. 8 attempt-

ed to assault him with an axe but petitioner no 1 managed to snatch it away and apprehending assault left the place. Ultimately he recovered the cattle from the jungle at night. The other petitioners deny their presence at the place of occurrence.

3 In all 8 witnesses were examined on the side of complainant and the defence examined two witnesses. The learned Magistrate on a consideration of the evidence accepted the complainant's version to be substantially true, convicted and sentenced the petitioners as stated above.

4 The main contention of learned counsel for petitioners is that a conviction u/s 24 of the Cattle Trespass Act can be sustained only if the prosecution proves that the seizure was strictly in accordance with section 10 of the Act. In the present case it is further contended that there is no specific finding that the cattle alleged to have been rescued were liable to be seized. In other words there is no specific finding that (1) P W 3 was a person entitled to seize u/s 10 and (2) that actual damage to the crop had been caused by the cattle.

5 Reference is made to para 9 of the judgment where it is observed that the consistent story given by the P Ws also makes it believable that the occurrence actually took place not on the bank of the Joro but at the deity's abode near the Bhuvan road and it is contended that the said finding refers only to the alleged place of occurrence and has nothing to do with the competency of P W 3 to effect the seizure or regarding the damage if any alleged to have been caused to the paddy crop.

6 It is true that to justify a conviction u/s 24 of the Cattle Trespass Act there should be a specific finding that the cattle rescued were liable to be seized u/s 10 which necessarily includes proof of damage having been caused. The mere absence of a specific finding would not entitle the petitioners to an acquittal where there is acceptable evidence on record in support of the prosecution case and the cattle having damaged the crop or the person who effected the seizure being entitled or authorised to seize—vide AIR 1963 Pat 199 Bhado Mondal State.

7 Section 10 enumerates five categories of persons who are entitled to seize cattle and they include the cultivator as well as the occupier of any land. In this case it has been contended that P W 3 not being the cultivator or occupier was not entitled to seize the cattle and a seizure by him will not be in accordance with law. In my opinion such a contention has no merit. When section 10 provides that the cultivator or

occupier may seize or cause to be seized any cattle trespassing I do not think it is open to contend that he is not entitled to give general instructions to his watchman or other servant so instructed to seize cattle. It will not amount to the cultivator or occupier seizing or causing them to be seized within the meaning of that section. Such a contention as the present one was raised and negatived in the decision reported in AIR 1922 Pat 317 K Dusat v Sarati Dusat.

8 Coming to the question of damage it is the prosecution case that the cattle damaged the paddy crop on the land of complainant in Badagaham Chhak. There is a specific finding by the learned Magistrate regarding the damage caused by the cattle. At the end of para 8 of the judgment it is observed:

Therefore the evidence of the P Ws that the paddy crops of P W 1 in Badagaham Chhak was damaged by the cattle of the accused persons appears to be true. There is absolutely no material in support of the defence that the accused Prasanna recovered his alleged buffaloes by a thorough search in the jungle at an expense of Rs 25/-.

Thus there is a finding that the cattle caused damage and P W 3 was entitled to seize them. This being so the seizure was legal as it is in accordance with the provisions contained in section 10 and the contention that rescue of the cattle will not amount to an offence u/s 24 has no merit.

9 Coming to the sentence each of the petitioners has been sentenced to pay a fine of Rs 50/- which in the circumstances appears to be excessive. Therefore while dismissing the revision and maintaining the conviction of petitioners the sentence of fine of Rs 50/- awarded against each of the petitioners is reduced to Rs 25/- and in default to undergo simple imprisonment for 10 days.

Petition dismissed

1970 ORI L J 264 (Vol 76, C N 56)

(ORISSA HIGH COURT)

S K RAY, J

Sriram Chandra Das Appellant v Krishna Chandra Roy Respondent

Criminal Appeal No 86 of 1966, D/ 216-1969 from order of Judicial Magistrate 2nd Class Cuttack, D/ 211 1966

(A) Penal Code (1860), S 504—Offence under — Mere abuse does not constitute offence under S 504

Mere abuse does not come within the purview of S 504. The section comprises of the

GM/GM/CT60/68 S.V/D

following ingredients, viz., (a) intentional insult, (b) the insult must be such as to give provocation to the person insulted, and (c) the accused must intend or know that such provocation would cause him to break the public peace or to commit any other offence. The offence under this section can be made out only on proof of the aforesaid three elements including intention or knowledge of the offender that provocation given by him will cause the complainant to break the public peace, beyond all reasonable doubt either by positive evidence or by such evidence from which those facts can be conclusively inferred. (Para 11)

(B) Penal Code (1860), S. 351—Assault—Ingredients of.

Before an act can amount to assault under S. 351, it is necessary that a gesture or preparation should be made by the person who would cause another to apprehend that the person is about to use criminal force to him then and there and the preparation taken with the words, must cause him to apprehend that criminal force would be used to him if he persists in the particular course of conduct, and there would be no assault if he desists from that conduct. (1903) ILR 30 Cal 97. Foll.

(Para 13)

Cases Referred: Chronological Paras
(1903) I L R 30 Cal 97 : 6 Cal WN

342. Birbal Khalipa v. Emperor 13

Ranjit Mohanty and R. K. Kar, for Appellant; H. Kanungo and R. N. Mohanty, for Respondent.

JUDGMENT — This is an appeal preferred by the complainant against the order of acquittal passed by Sri P. C. Patro Judicial Magistrate, second class, Cuttack on 21.1.66 in complaint case No. 259 O-1/64

2. The prosecution case is that the complainant was called to the shop of the accused through the latter's son on 27.3.64 at 11 a. m. When he reached the shop the accused suddenly flared up and abused him in filthy language. The words of abuse used by the accused have been quoted both in the complaint petition and also in the judgment of the trial Court. After abuse, the accused rushed towards the complainant and threatened him with assault. A gentleman of the locality intervened and the matter subsided. On these allegations charges under Ss. 504 and 352 were framed against the accused.

3. The trial Court has found as a fact, which is no longer in dispute, that the accused has got a shop and the complainant was abused. The motive as stated in the complaint petition has been sought to be made out in the following fact:

The complainant purchases goods from the

shop of the accused on credit. There is an account maintained in the shop in his name in which the goods purchased on credit are entered. The complainant, however, had advanced a sum of money to the accused some five years ago for getting the lands of one Rangelata Dai conveyed to him. The accused was to act as intermediary in that transaction of sale. Nothing came out of it, and no sale took place. Despite repeated reminders the accused had not repaid that money. On the day previous to the date of occurrence when the accused was absent and the shop was being attended to by his son, the complainant purchased goods equivalent to the amount advanced by him for purchase of land and got the same amount entered in his credit account. The accused on coming to know of it later on, felt that he had been tricked by the complainant. This angered him which led to the incident on the date of occurrence.

4. The defence is one of a denial. The accused not only denied the occurrence, but also the allegations that he had received a sum of money from the complainant for seeing through the sale transaction.

5. The trial Court has found that the complainant is a regular customer of the accused who owns a grocery shop in the village. He also finds that there is no satisfactory evidence regarding the advance of any money by the complainant to the accused for getting some lands conveyed by Rangelata to him.

6. The first finding is not disputed and the second finding appears, on a perusal of the evidence on record to be correct. P. W. 1's evidence on this point is uncorroborated. He admits that there were witnesses for this advance of money, but such corroborative evidence has not been put in.

7. As regards the motive, P. W. 1, the complainant says that five years ago he had advanced a sum of Rs. 56.11 to the accused who was to act as intermediary in the matter of getting some land of Rangelata's sold to him. The sale never took place and the complainant as a matter of fact had advanced the money. The accused had verbally told the complainant that the money would be paid back by way of adjusting price of articles which the complainant takes on credit from his shop. Relying on such assurance, the complainant had in fact taken articles equivalent to the value of the amount advanced to the accused from the latter's shop just the previous day. If this evidence is true, there is apparently no cause for the accused to be angry and to behave in the manner he did, on the date of occurrence. If the accused had agreed to such a thing, there is no conceivable reason why he would

alter his attitude. Thus the motive for the occurrence is a very weak one.

8 There was a delay of six days in filing the complaint petition. Some explanation for the delay has been stated in the complaint petition. It is said that some gentlemen desired to settle the matter and detained him in the village for that purpose and this caused the delay in filing the complaint P. W. 1, however does not breathe a word about this in his examination in chief. Thus the trial Court was justified in saying that there is some amount of suspicion due to the non explanation of the delay in filing the complaint petition.

9 The prosecution seeks to prove its case through P. Ws. 2, 3 and 4. It is argued on behalf of the defence that none of the prosecution witnesses cited in the complaint petition has been examined. Though that is not the finding of the trial Court nevertheless I feel there is some force in that argument. P. W. 2 is one Batakrushna Pati of mouza Champeswar. One of the witnesses mentioned in the complaint petition is one Batakrushna Pati of mouza Dantaul Samil Champeswar. Dantaul is the main village of the accused. Therefore it cannot be definitely said that P. W. 2 is the same person mentioned in the complaint petition as Batakrushna Pati. P. W. 3 Sriharan Das is of village Routpada. The complaint petition mentions one Sriharan Das of Khairabata Samil Routpada. This indicates that his main village is Khairabata, which adjoins Routpada.

10 It is argued on behalf of the complainant that normally people name the major mouza as their own instead of the minor mouza to which they actually belong and while P. W. 3 stating in Court that his own mouza is Routpada has given the name of his village in the popular sense. This may be so but it cannot be said definitely that it is so. Thus P. W. 3 however says that his house is at a distance of one mile from Routpada and he has two grocery shops in his own village. The defence therefore characterises this witness as a chance witness. The purpose of his coming to the shop of the accused was to purchase some molasses. It is argued that he could have purchased molasses in his own village and there is no reason why he would come to the village of occurrence near about midday. P. W. 4 is not mentioned in the complaint petition at all. He is also not named by any other witnesses examined on behalf of the complainant as one who was present at the time of occurrence. The complaint petition discloses names of two persons belonging completely to two different villages as having witnessed the occurrence. They have not been

examined. In this state of evidence the trial Court has drawn some adverse inference against the truth of the prosecution story on account of non examination of witnesses mentioned in the complaint petition. I am also not in a position to discard the defence argument that P. Ws. 2 and 3 are not the same Batakrushna Pati and Sriharan Das respectively mentioned in the complaint petition. It must therefore be held that none of the prosecution witnesses mentioned in the complaint petition has been examined and in place of named witnesses the complainant has examined chance witnesses like P. W. 4. In these circumstances, the trial Court has correctly held that the prosecution has failed to prove its case beyond all reasonable doubt.

11 Section 501, Penal Code comprises of the following ingredients viz., (a) intentional insult, (b) the insult must be such as to give provocation to the person insulted and (c) the accused must intend or know that such provocation would cause him to break the public peace or to commit any other offence. Therefore mere abuse will not come within the purview of the section. The offence under this section can be made out only on proof of the aforesaid three elements including intention or knowledge of the offender that provocation given by him will cause the complainant to break public peace beyond all reasonable doubt either by positive evidence or by such evidence from which those facts can be conclusively inferred. I have gone through the evidence carefully and I am satisfied that the evidence does not establish all the three aforesaid ingredients of the offence under S. 501. Therefore even accepting the evidence on record, it must be held that the offence under S. 501 has not been made out and as such there cannot be any conviction thereunder.

12 The other section under which the charge is made is S. 352, Penal Code. The question therefore is whether the facts mentioned in the complaint have been made out. According to the prosecution the accused after abusing him in filthy language rushed towards him with a view to assault him. Assault is defined in S. 351 in the following terms:

'Whoever makes any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person is said to commit assault.'

In my opinion if the evidence as laid by the prosecution is accepted a conviction under S. 352 will naturally follow.

13 The defence relied upon a case in (1908) I L R 30 Cal 37 Birbal Khaliya v. Emperor

that this is not assault. But that case is distinguishable on facts. In that case the accused threatened the Sub-Inspector of police that if he attempted to take his thumb impression he would assault him.

Therefore, their Lordships said that before an act could amount to assault under S. 351, it is necessary that a gesture or preparation should be made by the person who would cause another to apprehend that the person was about to use criminal force to him then and there and the preparation taken with the words, must cause him to apprehend that criminal force would be used to him if he persisted in the particular course of conduct, and there would be no assault if he desisted from that conduct. In the instant case the words coupled with the gesture would normally raise an apprehension that the assault was impending. Therefore this decision has no application to the facts of the present case.

14. In view of the conclusion reached by me, in concurrence with the trial Court that the prosecution witnesses cannot be safely relied upon, the prosecution must be held to have failed to strictly prove its case beyond all reasonable doubt. The accused must, therefore, get the benefit of doubt so far as the offence under S. 352 is concerned. In the circumstances, I find there is no sufficient ground to reverse the decision of the trial Court and to substitute it by an order of conviction. The prosecution case may be true, but it cannot be said that it must be true on the aforesaid facts and circumstances.

In the result the appeal fails and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 267 (Vol. 76, C. N. 57) =
AIR 1970 PUNJAB & HARYANA 32
(V 57 C 7)

SHAMSHER BAHADUR AND
S S. SANDHAWALIA, JJ.

Lal Singh and others, Petitioners v.
State and others, Respondents

Criminal Misc. No 959 of 1968, in Criminal Revn No 37/R of 1967, D/- 9-10-1968, against order of Jindra Lal J., D/- 10-9-1968

Criminal P. C. (1898), Ss. 561-A, 369, 439, 430 and 424 — Inherent powers of High Court under S. 561-A — Can be exercised for revoking, reviewing or recalling its own decision in criminal revision and rehearing the same. AIR 1962 Andh Pra 479 (FB) & (1964) 1 Mad LJ 362 & AIR 1966 Mad 163 & AIR 1965 Orissa 7, Dissented from.

EM/FM/C365/69/BNP/B

High Court in its inherent powers is fully empowered to revoke, review, or recall and alter its own earlier decision in a criminal revision and to rehear the same. The circumstances in which these powers can be exercised necessarily would be exceptional ones which would lead the court to review that the exercise of the same is necessary to conform to the three conditions mentioned in Section 561-A of the Code (Para 16)

There is no bar whatsoever express or implied in the statutory provisions of the Code which would rule out the applicability of the inherent powers of the High Courts under Section 561A qua an order purporting to be passed under Section 439, Criminal Procedure Code. The rule of finality embodied in Ss 369 and 430 of Criminal P. C. does not, in terms, apply to revisional jurisdiction of the High Court. There is indication in the Code itself that the purpose of Section 369 is not to prescribe a general rule of finality of all judgments of all Criminal Courts but is only to prescribe finality for the judgment of the trial Court so far as the trial Court is concerned. This is also clear from Section 424 which clearly indicates that S 369, which is placed in chapter 26 of the Code had reference only to judgment of a Criminal Court of original jurisdiction. Section 439 Criminal Procedure Code, is not in term controlled by Section 369 and in fact the revisional jurisdiction under Section 439 must be read as controlling Section 369 of the Code. It cannot, therefore, be said that the inherent power which High Court possesses to review a judgment made in the exercise of its revisional jurisdiction relates either to a matter covered by a specific provision of the Code or that its exercise would in any way be inconsistent with any express provisions of the same (Paras 7, 8, 9)

The High Court subject to the extraordinary jurisdiction under Article 134(1) vested in the Supreme Court in criminal matters, practically remains the last court of appeal and revision. The principle that there remains an inherent power in the last court of appeal and revision to rectify an error which may creep in finds express recognition in S 561A of the Code under which the High Court whenever it is satisfied that for the purposes mentioned in S 561A it should exercise its inherent powers not only can it do so but it is its duty to exercise it and secure the completion of those purposes. The power to grant a rehearing in an appropriate case, therefore, would obviously fall within the ambit of the inherent powers of the High Court. AIR 1962 Andh Pra 479 (FB) & (1964) 1 Mad LJ 362 & AIR 1966 Mad 163 & AIR 1965 Orissa 7, Dissented from AIR 1959 All

315 (FB) & AIR 1963 Mys 326 & AIR 1962 Pat 417 & AIR 1955 SC 633 Rel on Case law discussed (Paras 10 & 12)

Cases Referred Chronological Paras

(1966) AIR 1966 Mad 163 (V 53) = 1966 Cri LJ 548 S Rangaswami v R Narayanan 5 15

(1965) AIR 1965 Orissa 7 (V 52) = 1965(1) Cri LJ 56 Nafu Sahu v State 5 13

(1964) 1964-1 Mad LJ 362 = 1964 Mad LJ (Cri) 278 C Lakshmana Iyer v Pubbi Setti Sethamma 15

(1963) 1963 (2) Cri LJ 224 = 1963 Mad WN (Cri) 67 In re Anthony Doss 5 15

(1963) AIR 1963 Mys 326 (V 50) = 1963(2) Cri LJ 656 In re Biyamma 4 14 16

(1962) AIR 1962 Andh Pra 479 (V 49) = 1961 (2) Cri LJ 727 (FB) Public Prosecutor v Devi reddi Nagi Reddi 5 15 16

(1962) AIR 1962 Pat 417 (V 49) = 1962 (2) Cri LJ 625 Ramballabh Jha v State of Bihar 4 14 16

(1959) AIR 1959 All 315 (V 46) = 1959 Cri LJ 543 (FB) Raj Narain v State 4 13 14 15 16

(1958) AIR 1958 SC 376 (V 45) = 1958 Cri LJ 701 Talab Haji Hussain v Madhukar Purshottam Mondkar 12

(1955) AIR 1955 SC 633 (V 42) = 1955 Cri LJ 1410 U J S Chopra v State of Bombay 7 15

(1952) AIR 1952 All 926 (V 39) = 1952 Cri LJ 1625 Ram Dass v State 4 13

(1951) AIR 1951 All 441 (V 38) = 1951 All Cri R 11 Mohammad Wasi v State 4 13

(1949) AIR 1949 All 176 (V 36) = 50 Cri LJ 228 Chandrika v Rex 4 13

(1948) AIR 1948 All 106 (V 35) = 49 Cri LJ 56 Sri Ram v Emperor 4 13

(1871) 3 PC 465 = 17 ER 120 Rodger v Comptrolr D Escampta De Paris 12

(1866) 1 PC 378 Owners of the Vessel Singapore and Owners of the Vessel Hebe 11

(1836) 1836-1 Moo PC 117 = 12 ER 757 Rajundermarain Rae v Bijay Govind Singh 10

D N Aggarwal for Petitioners M S Dhillon for Advocate General S P Goyal for Lal Singh for Respondent

SANDHAWALIA J — The point of law which has necessitated the reference of this Criminal Miscellaneous Application to a Division Bench may be formulated in the following terms —

Is this High Court empowered to revoke review recall or alter its own earlier decision in a Criminal Revision and rehear the same?

The facts which deserve notice for the limited purpose of this application may now be surveyed By his order dated the

22nd October 1967 the Executive Magistrate 1st Class Sangrur in proceedings under Section 145 Criminal Procedure Code held that Karnail Singh and others were in possession of the land in dispute on the 6th of May 1967 and directed the delivery of the same to them Against this order Lal Singh and others (respondents in the present Criminal Miscellaneous Application) went up in revision to the learned Sessions Judge Sangrur who by his order dated 1st April 1968 made a recommendation to the High Court for the acceptance of the revision on the basis of the reasons given therein. It was recommended that the order of the learned Magistrate dated the 22nd October 1967 be set aside and the possession of the land be ordered to be delivered to Lal Singh and others

2 The learned Sessions Judge had directed that the parties if they so desire may appear in the High Court on the 3rd May 1968 However it appears that the matter came up before the Registrar on the 13th of May 1968 and that none of the parties was then present Notices on that date were directed to be issued for the 27th May 1968 and all the parties were served Some of the respondents therein amongst them the present petitioners in this application namely Sher Singh Kartar Singh etc did not put in any appearance and consequently on the 24th July 1968 actual date notices were issued to them by registered post acknowledgement due intimating thereby that the revision would be heard by this Court on the 31st July 1968 On the said date the revision came up for hearing before Jindra Lal J and it was found that actual date notices had not come back duly served The State was represented through counsel and the recommendation was not opposed on its behalf The learned Single Judge notices that some remark was made that the respondents other than the State were no longer interested in the matter on account of the Civil litigation having been compromised in the High Court and consequently on the 1st August 1968 when the matter came up before Jindra Lal J he was pleased to pass the following order —

This revision is reported for acceptance and is not opposed

For the reasons given by the learned Sessions Judge Sangrur the revision is accepted the order of the learned Magistrate dated the 22nd October 1967 is set aside and it is ordered that possession of the land which is the subject matter of the present proceedings be delivered to the petitioners-tenants

3 The present Criminal Miscellaneous Application was then moved on behalf of Sher Singh Kartar Singh Charag Singh Suraj Singh and Kapur Singh under

Section 561-A, Criminal Procedure Code, on the 6th August, 1968. It was averred therein that the actual date notices issued by this Court for appearance to them on the 31st July, 1968, were actually delivered to them on the 4th of August, 1968, and the reports on the registered covers dated the 31st July, 1968, clearly show that none of the present applicants was present in the village on that day. It was further averred that the order dated the 1st August, 1968, which was passed without affording any opportunity of hearing to them is gravely prejudicial to their interests and the same be vacated. Notice of the present application was issued to the respondents and accepted on their behalf by the counsel and meanwhile the operation of the order dated 1st August, 1968, was stayed. At the hearing of the application, it was contended on behalf of Lal Singh etc respondents that there is no power in this High Court for a review of its earlier order dated the 1st August, 1968, and the same having become final could not now be interfered with. In view of the importance of the question involved, Jindra Lal J. for the reasons given in the relevant order, referred this case for decision by a larger Bench and this is how the matter is before us.

4. Mr D. N. Aggarwal, learned counsel for the applicants in this Criminal Miscellaneous Application, has relied mainly upon the ratio and the reasoning of the majority judgment in the Full Bench case reported as AIR 1959 All 315 (FB), and particularly therein on the judgment of Raghubar Dayal J. In that case, the identical point arising in this application was in issue and Raghubar Dayal and M. L. Chaturvedi, JJ (O. H. Mootham, C. J. dissenting) held that the High Court had the power to recall its earlier decision and rehear a Criminal Revision and the learned Judges also further sought to classify the conditions and the circumstances which would justify the exercise of such an exceptional power. Mr Aggarwal has also placed reliance on four decisions of the same High Court in support of the proposition canvassed by him. These are, the Division Bench judgment in AIR 1948 All 106 and three Single Bench judgments reported as AIR 1949 All 176, AIR 1952 All 926 and AIR 1951 All 441. Two Division Benches of the Mysore and Patna High Courts have also been relied upon by the learned counsel namely AIR 1963 Mys 326 and AIR 1962 Pat 417.

5. In reply to the contentions raised and the authorities cited on behalf of the applicants, Mr S. P. Goyal, learned counsel for the private respondents Lal Singh and others, has relied primarily on the observations in the Full Bench judgment

of the Andhra Pradesh High Court reported as AIR 1962 Andh Pra 479 (FB). Reliance was also placed on three Single Bench judgments of the Madras High Court reported in (1964) 1 Mad LJ 362, 1963 (2) Cri LJ 224 and AIR 1966 Mad 163, and another Single Bench judgment of the Orissa High Court reported as AIR 1965 Orissa 7.

6. To appreciate the rival contentions raised it is necessary to go back to the language of the statute as laid down in the relevant provisions of the Criminal Procedure Code. Reliance has been placed on the language of Section 369, Criminal Procedure Code, which is in the following terms —

"369. Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court by the Letters Patent or other instrument constituting such High Court no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

It has been contended by Mr S. P. Goyal that Section 369, Criminal Procedure Code, applies in terms to the revisional jurisdiction of the High Court and in the alternative it has been argued that if that be not so then in any case the principle and the doctrine of the finality of criminal judgments enshrined in this section is applicable by analogy to the revisional powers also. However, the true meaning and the exact scope of S. 369, Cr. P. C., is evident when this provision is viewed in the context of the general scheme of the Criminal Procedure Code and the place of this provision therein. Chapters 20 to 23 of the Code deal with different kinds of trials, i. e. trial of summons cases, warrant cases, summary trials and trials before High Courts and Courts of Session whilst Chapter 24 contains general provisions regarding such enquiries and trials. Chapter 25 prescribes the mode of taking and recording evidence and it is thereafter that Chapter 26, in which Section 369 finds its place, falls and is headed as 'of the judgment'. Chapter 27 provides for the submission and confirmation of the death sentences to the High Court whilst the rules relating to execution, suspension, remission and commutation of the sentences are to be found in Chapters 28 and 29. From this overall view of the scheme noticed above, there is hardly any doubt that the provisions of the sections contained in Chapter 26 pertain only to the judgments pronounced by the trial Court. This conclusion finds certain assurance from the language of some of these sections. Thus Section 366, Criminal Procedure Code, which is the very first section in this Chapter refers to "the judgments in every trial in any

criminal Court of original jurisdiction" Similarly Section 367 Criminal Procedure Code provides what must be contained in every such judgment that is to say a judgment in any original trial

7 As to what is the true meaning to be attributed to Section 369 Criminal Procedure Code particularly in reference to the appellate jurisdiction under Section 430 Criminal Procedure Code came up for consideration before the Supreme Court in the case of *U J S Chopra v State of Bombay* AIR 1955 SC 633 Their Lordships of the Supreme Court were particularly considering the rule of the finality of criminal judgments in the particular context of the provisions of Section 439 sub-section (2) and sub-section (6) of the Code The whole gamut of case law had been considered and discussed in this authoritative pronouncement and the following observations appear in the judgment of S R Das J (as he then was) —

There is indication in the Code itself that the purpose of Section 369 is not to prescribe a general rule of finality of all judgments of all Criminal Courts but is only to prescribe finality for the judgment of the trial Court so far as the trial Court is concerned

It was further laid down —

Again the rule of finality embodied in Section 369 cannot, in terms apply to the orders made by the High Court in exercise of its revisional jurisdiction, for Section 442 of the Code which requires the result of the revision proceedings to be certified to the Court by which the finding sentence or order revised was recorded or passed refers to it as its 'decision or order and not judgment'

Mr Goyal has however drawn our attention to certain observations made in the judgment of Bhagwati J in the above said case which torn from their context and read in isolation tend to support the contention advanced by him However on a closer analysis of the whole case we are of the view that some of the observations made with respect to the competence of the High Court to revise or recall the orders passed are to be taken in their particular context of the point for determination and consideration urged before the Supreme Court It is noticeable and we do not consider that these observations relate at all to the inherent power of the High Courts to pass appropriate orders to secure the ends of justice even if those orders amount to the reviewing or recalling of an earlier order

8 In any case Section 369 Criminal Procedure Code is subject to the other provisions of the Code and we see no reason why section 439 of the Code and Section 561-A embodying the inherent powers of the High Court should not be

regarded as such provisions In our view Section 439 Criminal Procedure Code is not in term controlled by Section 369 and in fact the revisional jurisdiction under Section 439 must be read as controlling Section 369 of the Code Further support for this view arises from the language of Section 424 of the Code of Criminal Procedure which refers to the appellate judgments of the Subordinate Courts This is in the following terms —

'The rules contained in Chapter 26 as to the judgment of a Criminal Court of original jurisdiction shall apply so far as may be practicable to the judgment of any Appellate Court other than a High Court'

Provided that unless the Appellate Court otherwise directs the accused shall not be brought up or required to attend to hear judgment delivered'

This provision clearly indicates that Section 369 Criminal Procedure Code which is placed in Chapter 26 of the Code had reference only to the judgment of a Criminal Court of original jurisdiction Again the appellate judgments of the High Court are expressly excluded from the ambit of the provisions of Chapter 25 of the Criminal Procedure Code Reference may also be made to the provisions of Section 430 which are as follows —

Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter 32"

The provisions of this section therefore leave one in no manner of doubt that the revisional jurisdiction embodied in Chapter 32 of the Code is in no way fettered by the rule in Section 430 It logically follows therefore that Section 430 does not in terms give finality to the judgments of a High Court passed in the exercise of its revisional jurisdiction

9 On an overall consideration of the relevant statutory provisions we are unable to find any bar whatsoever express or implied which would rule out the applicability of the inherent powers of the High Courts under S 561-A qua an order purporting to be passed under Section 439, Criminal Procedure Code It cannot therefore be said that the inherent power which this Court possesses to review a judgment made in the exercise of its revisional jurisdiction relates either to a matter covered by a specific provision of the Code or that its exercise would in any way be inconsistent with any express provisions of the same

10 It is also necessary to consider the matter on principle in its historical background as well Prior to the coming into force of the Government of India Act 1935 the High Courts in India were the last and the final Courts of appeal and

revision in its criminal jurisdiction subject to the extraordinary powers of the Judicial Committee of the Privy Council to interfere in cases occasioning a grave miscarriage of justice. After the Constitution of the Federal Court under the provisions of the Government of India Act, 1935, a very limited jurisdiction indeed in criminal matters was also vested in it under Sections 205 and 207 of the said Act. Subsequent to the promulgation of the Constitution of India the jurisdiction exercised by the Judicial Committee of the Privy Council and the Federal Court have ceased to exist. Article 134 of the Constitution of India enshrines the special criminal jurisdiction of the Supreme Court in regard to criminal matters. On a consideration of this provision it is patent that subject to the extraordinary jurisdiction under Article 134(1) vested in the Supreme Court in criminal matters, the High Court practically remains the last Court of appeal and revision. That there remains an inherent power in the last Court of appeal and revision to rectify an error which may creep in seems to be well-recognised, and in the Code of Criminal Procedure express recognition of the same principle is also embodied in the provisions of Section 561-A of the Code.

This aspect of the power of a Court of last resort to rehear an issue came up for consideration before the Privy Council in *Rajundernarain Rae v. Bijai Govind Singh*, (1836) Moo PC 117. In the said case an order had been made *ex parte* upon the appearance of the respondents alone, for the dismissal of an appeal and it appeared that the appellants who were infants, under the protection of the Court of Wards in India had absconded and abandoned the cause. Their Lordships rescinded the order of dismissal and restored the appeal for rehearing upon the terms of the appellant's paying the costs therefor. Their Lordships considered the powers of the Judicial Committee and also of the House of Lords to direct the rehearing of a case and Lord Brougham while delivering judgment observed as follows:—

"Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. The Courts of Equity may correct the decrees made while they are in minutes; when they are complete they can only vary them by re-hearing;

and when they are signed and enrolled they can no longer be re-heard, but they must be altered, if at all, by appeal. The Courts of Law, after the term in which the judgments are given, can only alter them so as to correct misprisions, a power given by the Statutes of Amendment. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

It was further observed:—

"It is impossible to doubt that the indulgence extended in such cases, is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort whereby some accident without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard."

11. In this connection reference may also be made to the case of the Owners of the Vessel *Singapore* and Owners of the Vessel, *Hebe*, (1866) 1 PC 378, wherein Sir William Erle delivering the judgment of the Judicial Committee observed at page 388 —

"We do not affirm that there is no competency in this Court to grant a rehearing in any case."

He further said later:—

"This, however, is a Supreme Court of final appeal, and it is inconsistent with the purposes for which such a Tribunal was instituted, that in any case, at the option of the parties who are dissatisfied with the conclusion which the Court has arrived at they should be at liberty to apply for a reconsideration of the judgment upon the point decided thereby. Although it is within the competency of the Court to grant a rehearing, according to the authorities cited above, still it must be a very strong case indeed, and coming within the class of cases there collected, that would induce this Court so to interfere."

12. This power to grant a rehearing in an appropriate case, therefore, would obviously fall within the ambit of the inherent powers of the Court. Inherent power implies by its very nature a power which cannot be expressed in terms but which must reside in a court for achieving the higher and the main purpose of doing justice in a cause before it and for seeing that the act of the Court does no injury to any of the suitors. This was enunciated in the words of Lord Cairns in

Rodger v Comptoir D'Escompte De Paris (1871) 3 PC 465 at p 475 —

Now their Lordships are of opinion that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression the act of the Court is used it does not mean merely the act of the Primary Court or of any intermediate Court of appeal but the act of the Court as a whole from the lower Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals if I may use the expression to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors of the Court.

It is not necessary to multiply authorities and the proposition seems to be undisputed that the Court of records and the ultimate Courts of appeal and revision have inherent powers to act for the securing of the ends of justice. This very principle as regards criminal matters before the High Court in India is embodied in the provisions of Section 561 A of the Code in the following terms —

Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

The true scope of this provision has been authoritatively pronounced upon by the Supreme Court in Talab Haji Hussain v Madhukar Purshottam Mondkar AIR 1958 SC 376. In the said case their Lordships of the Supreme Court were considering the inherent powers of the High Court to cancel the bail granted to a person accused of a bailable offence. It was observed in the course of the judgment as follows —

In prescribing rules of procedure legislature undoubtedly attempts to provide for all cases that are likely to arise but it is not possible that any legislative enactment dealing with procedure however carefully it may be drafted would succeed in providing for all cases that may possibly arise in future. Lacunae are sometimes discovered in procedural law and it is to cover such lacunae and to deal with cases where such lacunae are discovered that procedural law invariably recognizes the existence of inherent power in Courts.

There can thus be no dispute about the scope and nature of the inherent power of the High Courts and the extent of its exercise.

From the above enunciation of the law

it seems to be very clear that whenever the High Court is satisfied that for the aforesaid purposes it should exercise its inherent powers not only can it do so but it is its duty to exercise it and secure the completion of those purposes.

13 It remains to consider the authorities cited at the bar. A number of decisions of the Allahabad High Court have been relied upon by Mr D N Aggarwal and the first in point of time is a Division Bench judgment of the said Court reported as AIR 1948 All 106. The Bench in the above said case was constituted by Malik and Raghubar Dayal JJ. One Moti Lal appellant in that case had been convicted by a Magistrate for a breach of the Hoarding and Profiteering Prevention Ordinance 1948 and sentenced to 11 months rigorous imprisonment and to pay a fine. An application for revision to the High Court by the said Moti Lal was dismissed. It was however subsequently discovered that a mandatory provision of the law had been overlooked in the trial. It was held by the learned Judges that the High Court had power to correct such an error and to review and alter the earlier judgment even though the revision had already been decided. The provisions of Section 369 were held to be no bar to the exercise of such a power. Another Single Bench judgment of the Allahabad High Court cited was AIR 1949 All 176 where an application was made for the rehearing of an appeal which had already been dismissed by the High Court. From the facts it appeared that the Court had directed that the appeal be heard on 5th June 1948 but by mistake it was placed on the list on the 25th of June 1948 and the learned counsel being unaware of this fact did not appear and the appellant was not also heard. The High Court directed that the order passed on the 25th of June 1948 be set aside and the appeal be reheard and it was held that the Court had power to make such an order under the provisions of S 561-A of the Code. In AIR 1951 All 441 Aggarwal J held that under the provisions of Section 561-A the High Court had the power to review and modify an earlier order passed on an erroneous assumption. In AIR 1952 All 926 the revision petition was dismissed for default the Court being under the misapprehension that no medical certificate of the applicant or illness slip of counsel was filed while in fact both were on the record. It was held that under Section 561 A of the Code of Criminal Procedure the High Court had the power to review the earlier order and restore the case for hearing. It was observed as follows —

No distinction has been made in Section 561-A or in the decided case between the points of fact and the points of law.

where ex facie order passed by a Court is factually wrong and it has been passed under a misapprehension of facts I am of opinion that the provisions of Section 561-A, Criminal Procedure Code can be applied and the order can be revised."

The authoritative pronouncement however, on the identical point which is before us is the majority judgment prepared by Raghubar Dayal and M. L. Chaturvedi JJ. (Mootham C. J. dissenting) in AIR 1959 All 315 (FB). In this authority the learned Judges who have delivered separate judgments have exhaustively considered the whole case law on the point and have then come to the conclusion that the High Court has an inherent power to revoke, review, recall or alter its earlier decision in a criminal revision and to rehear the same.

14. The Mysore High Court has also affirmed the view of the law enunciated by the Allahabad High Court AIR 1963 Mys 326, a Division Bench of the said High Court consisting of K. S. Hegde and Ahmad Ali Khan JJ. considered the inherent powers of the High Court to alter or review its appellate judgment. On a consideration of the authorities, the view expressed by the majority in AIR 1959 All 315 (FB) was affirmed and it was observed as follows by K. S. Hegde J.:-

"If the Criminal Courts had no inherent jurisdiction to alter or review their judgments there was no need to prohibit the exercise of that power by enacting section 369 as well as Section 424. The Legislature would not have prohibited the exercise of a non-existing power. The Legislature while wisely, if I may say so with respect, prohibited the subordinate Courts from altering or reviewing their judgments left the field clear to the High Court because any error or mistake committed by the Subordinate Courts can be corrected by the High Court either by exercising its revisional powers or by exercising its power of superintendence under Article 227 of the Constitution but such remedies are not available as against any errors or mistakes that may be committed by the High Court. Therefore, I am of the opinion that the High Court has inherent power to alter or review its appellate judgments".

AIR 1962 Pat 417 is also a Division Bench authority which affirmed the view that the High Court under Section 561-A has power to set aside an appellate judgment and order the rehearing of the same. In the said case the name of the counsel appearing in the criminal appeal was omitted from the daily list through inadvertence of the office of the High Court with the result that the counsel could not know about the appeal having been posted for hearing and the appeal was dis-

missed without being heard. It was held that the order dismissing the appeal was a judgment rendered without any opportunity being given to the appellant or his advocate within the meaning of Section 421 and was liable to be set aside and the appeal could be ordered to be reheard in exercise of inherent powers under Section 561-A.

15. A contrary view, however, has been taken in AIR 1962 Andh Pra 479 (FB) which is a Full Bench judgment of the said Court and has been relied upon by Mr. S. P. Goyal. This is a case pertaining to the appellate jurisdiction of the High Court. It is noticeable that the learned Judges were directly considering the distinction between lack of inherent jurisdiction and illegal or irregular exercise of the same. Nevertheless there are clear observations supporting the contrary view and the learned Judges dissented from the majority view of Raj Narain's case, AIR 1959 All 315 (FB). It is noticeable however, that even in this authority an exception was made in regard to cases where there has been default of appearance. It was held that the High Court has no inherent power to alter or review its own judgment except in cases where it was passed without jurisdiction or in default of appearance, that is, without affording an opportunity to the accused to appear. Reliance was also placed on three Single Bench judgments of the Madras High Court. The first is C. Lakshmana Iyer v. Pubbi Setti Sethamma, (1964) 1 Mad LJ 362 where P. Kunhamed Kutti J. held that there is no inherent power in the High Court to alter or review its own judgments in a criminal case. In this case a criminal revision had been disposed of by the High Court on merits in the absence of the petitioner and his Advocate. From the short judgment in the case it appears that an opportunity had been fully given to the party and his counsel and the case remained on the list for some days, and when it came up for hearing none of them was present. In the circumstances of the case it was held that there was no justification to set aside the order passed earlier on merits. This case appears to be based primarily on its own facts and the point of law does not seem to have been seriously canvassed. In AIR 1966 Mad 163 Kailasam J. held that there was no inherent power to alter or review a judgment signed by it in view of the provisions of Section 369 of the Code of Criminal Procedure and that the said section was also applicable to Section 439 of the Code. This view seems patently to be in conflict with the dictum of their Lordships of the Supreme Court in AIR 1955 SC 633, which does not seem to have been brought to the notice of the Court. We would respectfully differ from

this enunciation of the law. Reliance was also placed on a Single Bench judgment of the Orissa High Court in AIR 1965 Orissa 7. This is a Single Bench decision by R L Narasimhan C J wherein reliance primarily has been placed on U J S Chopra's case AIR 1955 SC 633. We have already referred to this authority of the Supreme Court and have expressed a view that the pronouncement therein does not in any way debar the exercise of inherent powers under Section 561-A for the purposes of reviewing an order passed in its revisional jurisdiction by the High Court. In 1963 (2) Cri LJ 224 (Mad) Sadasivam J held that the High Court has in exercise of its inherent powers no right to set aside its own judgment on the ground that it is erroneous in law and facts. It is noticeable, however, that even in this authority a notable exception is recognised namely in cases where earlier decision has been passed without jurisdiction or in default of appearance without an adjudication on merits.

16 On a close and considered analysis of the authorities cited at the bar we fully accept and adopt the principle and the enunciation of the law by the majority judgment in Raj Narain's case AIR 1959 All 315 (FB) and endorsed in AIR 1963 Mys 326. It is noticeable that in the Mysore case the Full Bench of Andhra Pradesh High Court in Devireddi Nagi Reddi's case AIR 1962 Andh Pra 479 (FB) has been fully considered and dissented from. We are also in agreement with the law as laid down in Ramballabh Jha's case AIR 1962 Pat 417 and with respect we are unable to agree with the reasoning or the enunciation of the law as laid in Devireddi Nagi Reddi's case AIR 1962 Andh Pra 479 (FB) and the Single Bench authorities of the Madras and the Orissa High Courts cited before us. We are therefore of the view that the High Court in its inherent powers is fully empowered to revoke review or recall and alter its own earlier decision in a criminal revision and to rehear the same. It is to be reiterated that the circumstances in which these powers can be exercised necessarily would be exceptional ones which would lead the Court to review that the exercise of the same is necessary to conform to the three conditions mentioned in Section 561-A of the Code.

17 Lastly an argument advanced by Mr Goyal must also be noticed in passing. It has been strenuously contended that under the provisions of Section 440 of the Criminal Procedure Code in the exercise of the revisional jurisdiction no party has any right to be heard either personally or by pleader and the High Court is empowered if it so desires to decide without

giving such a hearing. It is however, noticeable in the present case that it was not at all a matter in which the High Court had chosen to proceed under the provisions of Section 440. At the time of admission, notice had been issued to both the parties on the 13th of May 1968. Again actual date notices were issued on the 24th of July 1968 directing that the case would be listed on the 31st of July 1968. It is the admitted case of the parties that the respondents in the original criminal revision were not in fact served prior to that and that the said notices were actually delivered to them on the 4th of August 1968 that is after the hearing of the petition and the decision thereon. In view of this factual position this argument based on Section 440 obviously is not well conceived.

18 Mr N S Chhachhi, the learned counsel appearing for the respondent State of Punjab has reiterated the submissions advanced on behalf of the applicant by Mr D N Aggarwal. He has submitted that particularly on the facts of the present case the earlier order which has been passed without affording the applicant an opportunity to be heard should be set aside and the matter should be reheard on merits.

19 This criminal miscellaneous application therefore succeeds and is allowed. The case should now go back to the learned Single Judge for decision on merits.

20 **SAMSHER BAHADUR J** — The ultima ratio of judicial process undoubtedly resides in the highest tribunal of the land and if the finality in a criminal judgment envisaged in Section 369 Code of Criminal Procedure is to be attached to the High Court as well its supremacy cannot be preserved. In the authorities as also the relevant statutory provisions both of which have been fully and elaborately discussed by Sandhawalia J., the power of the High Court to rectify any amend accidental and inadvertent error is maintained. While the order of judgment of an original Court or even a Court of appeal can be set right if so needed by a superior tribunal the inherent power alone can enable a High Court to do likewise. Only the clearest language of a statute can deprive the High Court of this useful and necessary adjunct of judicial power.

21 I agree entirely with the reasoning and conclusion of my learned brother.

Application allowed

1970 Cri. L. J. 275 (Vol. 76, C. N. 58)

(ANDHRA PRADESH HIGH COURT)

NARASIMHAM, J.

Public Prosecutor, Petitioner v. Malla Rama Rao, Respondent.

Criminal Appeal No. 756 of 1966, D/- 16-4-1968

Prevention of Food Adulteration Act (1954), S. 13 (5) — Prosecution for sale of adulterated food — Report of the Public Analyst on record — Prosecution cannot fail solely because Public Analyst was not examined — (Evidence Act (1872), S. 45 — Food adulteration case — Public Analyst, report of—Special rule of evidence) — AIR 1966 SC 128, Foll. (Para 6)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 128 (V, 53)=

1966 Cri LJ 106, Mangal Das

Raghavji v. State of Maharashtra 5

M A. Gangadharrao Addl. Public Prosecutor, for Appellant; S V Kondapi, for Respondent

JUDGMENT: This is an appeal against the acquittal of the accused in CC 209 of 1965 on the file of the Munsif-Magistrate, Visakhapatnam, of an offence of the sale of adulterated curd to the Food Inspector, punishable under section 16 (1) of the Prevention of Food Adulteration Act, 1954 (Central Act 37 of 1954), hereinafter to be referred to as the Act

2. The facts of the case were that the accused was a regular curd vendor and known as such to the Food Inspector, Visakhapatnam Municipality, P. W. 1 On 23-6-1965 at 10-15 a.m. he (P. W. 1) saw the accused at Door No 13-9-18 in Dandu Bazaar Road, carrying buffalo curd in two aluminium vessels. He stopped him and tested the said curd and suspected it to be adulterated. He called the residents of the house, P. W. 2 and another, to be mediators and purchased 3/4 seer of the said curd paying the accused 19 paise and obtained Ex P. 4 receipt. He then served on the accused Form 6 notice, duplicate copy of which is Ex. P. 5. Then he put the curd purchased in three clean dry bottles, sealed and labelled them after adding 16 drops of Formalin to each of the bottles. He gave one such bottle to the accused. He then seized the Aluminium vessels with the remaining curd under the mediators' report, Ex. P. 6. He forwarded one of the sample bottles to the Public Analyst. He received the report, Ex. P. 8, that the sample contained 80% of extraneous water and was therefore adulterated. He then initiated proceedings against the accused.

3. At the trial, P. Ws 1 and 2 deposed to the facts of the case and the documents, Exs P4, P5, P6 and P7. The

accused, when questioned under Section 342, Cri. P. C. denied the sale of curd. He denied that he received the sample bottle. He said that he did not know anything about the Public Analyst's report. He pleaded not guilty to the offence of selling adulterated curd.

4. The Magistrate, who tried the accused, believed the prosecution case and disbelieved the accused's plea in defence. But he rejected the report of the Public Analyst in the view that the Public Analyst was not examined. He held that the prosecution did not prove the guilt of the accused beyond doubt.

5. The learned Public Prosecutor has contended that the Magistrate has disregarded the special rule of evidence enacted under section 13 (5) of the Act, and that the view of the Magistrate is also contrary to what was expressed in *Mangaldas Raghavji v. State of Maharashtra*, AIR 1966 SC 128, that the prosecution would not fail solely on the ground that the Public Analyst had not been called in the case.

6. There can be no doubt that having accepted the prosecution case, the Magistrate disregarded the specific rule of evidence enacted under section 13 (5) of the Act and deemed it necessary that the Public Analyst be examined in this case. These views are clearly unsupportable. On going through the evidence, I have no doubt that the prosecution has established that the accused sold adulterated curd.

7. Ex. P. 8 is the report of the Analyst which also states that the sample was preserved with Formalin and that no change had taken place in the article since purchase that would interfere with the analysis. It is wrong therefore to presume that the article of food was not fit for analysis when the Public Analyst conducted the analysis and sent the report.

8. The accused's denial of sale of curd cannot be accepted as true as against the credible evidence to the contrary.

9. The acquittal of the accused is therefore set aside and the accused is convicted under section 16 (1) and section 7 read with section 2 (1) (a) of the Prevention of Food Adulteration Act, 1954 and sentenced to a fine of Rs. 500/- or in default to rigorous imprisonment for three months. Time for payment of fine one month.

Appeal allowed.

1970 Cr L J 276 (Vol 76 C N 59)
 (ANDHRA PRADESH HIGH COURT)
 KONDAIAH J

Public Prosecutor Appellant v Jandh-
 yala Pullamma and others Respondents
 Criminal Appeal No 538 of 1966 D/
 9 10-1968

(A) Stamp Duty — Stamp Act (1899),
 S 62 (1) (b) — Onus in proceeding
 under S 62 (1) (b) — Question of
 nature of document — Criminal court
 has jurisdiction to go into that ques-
 tion in such proceeding on a considera-
 tion of recitals and other material on
 record — (Evidence Act (1872) Ss 101
 to 104)

In a proceeding under Section 62 (1)
 (b) of the Stamp Act the onus is on the
 prosecution to prove all the requisites of
 the offence under that section. The cri-
 minal court has in such a proceeding the
 jurisdiction to go into the question of the
 nature of the document in issue on a
 consideration of the recitals and other
 material on record. (Paras 8 and 17)

Section 62 (1) (b) clearly indicates that
 it is the duty of the prosecution to prove
 beyond reasonable doubt that the accus-
 ed had executed or signed the document
 in question chargeable to stamp duty but
 the same was not duly stamped. Unless
 and until all the ingredients of the sec-
 tion have been established by the pro-
 secution, its penal provisions are not at-
 tracted. (Para 8)

When the accused in a proceeding under
 Section 62 (1) (b) has not preferred any
 revision to the Board of Revenue against
 the order of the authority under the Act
 on the question of the nature of
 the document it cannot be said that
 that question cannot be gone into
 once again by the criminal court
 in that proceeding as the decision
 of that authority had been allowed to
 become final. The finding and adjudica-
 tion of that authority are final only in
 so far as the applicability of the provi-
 sions of the Act is concerned but it can-
 not be said in view of the expressions
 instrument chargeable with duty with-
 out the same being duly stamped in that
 section that that question cannot be gone
 into by the criminal court in such a pro-
 ceeding. (Para 9)

Further the object of the enquiry
 relating to the nature of a document
 sought to be registered by the authority
 under the Act is to fix the requisite quan-
 tum of stamp duty payable thereon
 whereas the intentment of launching cri-
 minal prosecution is to punish the accus-
 ed for the contravention of S 62. Hence
 the findings as to the nature of the docu-
 ment and the requisite stamp duty pay-
 able thereon, given by the authority can

by no stretch of reasoning be said to
 be conclusive and binding on the crimi-
 nal court in a proceeding under S 62,
 although they are allowed to become
 final. Where the stamp duty decided up-
 on the authority is not in the eye of law
 duly chargeable that decision is not a
 valid decision in the eye of law and can
 be ignored by the criminal court for
 criminal prosecutions. The accused is
 always entitled to show that the ingre-
 dients of Section 62 (1) have not been
 made out beyond reasonable doubt. The
 criminal court thus in a proceeding under
 Section 62 has ample jurisdiction and
 power to go into and decide on a con-
 sideration of the recitals of the document
 as well as the other material on record
 the questions as to the nature of the docu-
 ment the stamp duty chargeable and
 whether the deficit duty claimed is
 chargeable. AIR 1934 All 201 and AIR
 1937 All 190 Rel on AIR 1937 Mad 291
 and AIR 1963 SC 274 and AIR 1969 Andh
 Pra 207 (FB) and (1967) 2 An WR 157 and
 AIR 1966 SC 1089 Ref. (Para 17)

(B) Stamp Duty — Stamp Act (1899)
 Sections 5 and 62 and Sch 1 Arti-
 cle 58 — Nature of document — Deter-
 mination — Evidence — Document in
 respect of lands styled as dakhali —
 Document executed partly due to love
 and affection towards vendees and partly
 for expenses incurred by vendees in
 respect of their archakatwam service and
 paditharamulu — Document is only partly
 sale deed and partly settlement deed
 — Vendees made co accused with vendor
 in proceeding under S 62 — Petition filed
 by vendees in enquiry before authori-
 ty under Act for fixing stamp duty pay-
 able on that document — Such petition
 is not inadmissible in such proceeding by
 virtue of S 92 Evidence Act — (Evidence
 Act (1872) S 92)

Where a document in respect of lands
 styled dakhali has been executed partly
 due to love and affection towards the
 vendees and partly for expenses incurred
 by the vendees in respect of their
 archakatwam service and for padithara-
 mulu such a document is only partly a
 sale deed and partly settlement deed.
 Where the vendees are made co accused
 with the vendor in a proceeding under
 S 62 of the Stamp Act a petition filed
 by the vendees in an enquiry before the
 authority under the Act for determining
 the nature of the document and for fix-
 ing the stamp duty payable thereon is
 not inadmissible in such proceeding by
 virtue of S 92 of the Evidence Act.
 (Para 18)

To determine whether the document in
 question is a deed of settlement only or
 partly a deed of sale and partly a deed
 of settlement the court in a proceeding

under S. 62 against the vendor and vendees, can look into the very recitals of the document as primary evidence and the other materials available on record. It cannot be said that the evidence other than the recitals of the document is inadmissible, as the same is hit by S. 92 Evidence Act. Though the document is styled 'dakhal', when it has been executed partly due to love and affection towards the vendees and partly in consideration of the expenses incurred by the vendees in respect of their archakatwam service and for 'paditharamulu', on reading the entire document it is clear that it is not a simple deed of settlement executed without any consideration except love and affection. It is only partly a sale deed and partly a settlement deed. (Para 18)

In such a proceeding against the vendor and vendees, the vendees are not accomplices but are co-accused along with the vendor. As such, a petition filed by the vendees in an enquiry before the authority under the Act for determining the nature of the document and for fixing the stamp duty payable thereon, is not inadmissible in such proceeding by virtue of S. 92, Evidence Act (Para 18)

(C) Stamp Duty — Stamp Act (1899), Sections 62 (1) (b) and 5 — Offence — Document in respect of lands styled 'dakhal' — Document registered as settlement deed — Document however shown to be only partly sale deed and partly settlement deed — Deficit stamp duty and penalty not paid — Vendor and vendees proceeded under Section 62 (1) (b) — Prosecution in such a case has established beyond reasonable doubt the requisite ingredients of S. 62 (1) (b) — Document executed by vendor only — He is hence liable under that section — Document neither executed by vendees nor signed by them in any capacity other than that of a witness — They cannot be convicted under S. 62 (1) (b). (Para 19)

(D) Stamp Duty — Stamp Act (1899), S. 62 (1) (b) — Sentence — Sufficiency — Document registered as settlement deed — Document however partly a sale deed and partly settlement deed — Document executed by vendor — Offence taking place about nine years prior to proceeding under S. 62 (1) (b) against vendor — Accused-vendor old lady — Hence fine of Rs. 50 will meet ends of justice. (Para 20)

Cases Referred: Chronological Paras
(1967) 1967-2 Andh WR 157=1967
Mad LJ (Cri) 681, Public Prosecutor v. Mukh Singh 14
(1966) AIR 1966 SC 1089 (V 53) =
1966-2 SCR 229, Venkataraman & Co v State of Madras 15
(1959) AIR 1959 Andh Pra 207 (V 46)=

1959-1 Andh WR 119, (FB) Public Prosecutor v. Bhavigadda Thim-miah 13
(1953) AIR 1953 SC 274 (V 40)=
1953-1 Mad LJ 739=1953 Cri LJ 1105, Poppatlal Shah v State of Madras 12
(1937) AIR 1937 All 190 (V 24)=
37 Cri LJ 597, Imam Baksh v. Emperor 16
(1937) AIR 1937 Mad 291 (V 24)=
1937-1 Mad LJ 274=38 Cri LJ 464, Ramaswami Aiyangar v. Sivakasi Municipality 11
(1934) AIR 1934 All 201 (V 21) =
35 Cri LJ 1132, Raghubar Dayal v. Emperor 16
Addl Public Prosecutor, for Appellant, E Subrahmanyam, for Respondents

JUDGMENT: This appeal by the Public Prosecutor on behalf of the State of Andhra Pradesh is from the judgment of the Judicial Second Class Magistrate, Kovvur in C C No 2074/65, acquitting the accused of the charge under S. 62 (1) (b) of the Indian Stamp Act, holding that the document Ex P-1 appears to be a settlement deed but not a sale

2. The brief and material facts that gave rise to this appeal lie in a short compass. A-1 and her son-in-law had executed Ex P-1 on 12-12-1959 purported to be a 'dakhal' or settlement deed in respect of schedule lands relating to the hereditary archakatwam service, in favour of accused 2 & 3 for a sum of Rupees 7,000/- and got the document registered at Kovvur before P W 3, the then Sub-Registrar, on payment of stamp duty of Rs 105/- P W 3, considering that the document in question was a plural transaction, partly a sale and partly a settlement, within the meaning of Section 5 of the Indian Stamp Act, had referred the matter for clarification to the then District Registrar, who passed an order of adjudication on May 7, 1960, holding that the document was partly a deed of sale and partly a deed of settlement and the requisite stamp duty payable thereon was Rs. 465/- and levied a penalty of Rs 50/-. Thereafter, the accused 1 to 3 were directed to pay the balance of Rs 360/- towards deficit stamp duty and Rs. 50/- towards penalty. As the amount has not been paid by the accused, P. W. 4, the present District Registrar and Collector within the meaning of the Indian Stamp Act, sanctioned prosecution under Section 70 (1) of the Indian Stamp Act, in Ex P-9 dated 31-7-1965. The present complaint has been filed before the trial Magistrate pursuant to the order of P. W 4 under Ex P. 9

3. The prosecution examined P Ws 1 to 4 in support of its case. P W 1, an L. D. C in the office of the District Registrar, filed and proved Exs P-1 to P-7.

P W 2 a document writer is the scribe of Ex. P 1 P W 3 is the then Sub-Registrar of Kovvur who registered Ex P-1 and P W 4 is the District Registrar West Godavari who sanctioned prosecution of the accused 1 to 3

4 The plea of the accused is one of not guilty

5 The trial Magistrate on a consideration of the recitals in Ex P-1 and the other material on record came to the conclusion that the document appears to be of a settlement rather than a sale and the stamp duty of Rupees 105/- paid thereon was correct, and acquitted the accused. Hence this appeal.

6 The learned Public Prosecutor contended that the order of the Court below is erroneous illegal and untenable and in any event the trial Magistrate is not competent to go into the question whether the document Ex P-1 was a deed of settlement or sale as the competent authority under the statute had already adjudicated upon that question. Shri Subrahmanyam appearing for the accused contended contra.

7 On the facts and in the circumstances the points that arise for determination are

1) Whether a Criminal Court is competent and has jurisdiction in a proceeding under Section 62 (1) (b) of the Indian Stamp Act to go into the question of the nature of a document on a consideration of the recitals and other material on record?

2) Whether the order of acquittal in the present case is liable to be set aside on merits?

8 For a proper appreciation of the point No 1 it is necessary and relevant at this stage to consider the scope and application of the provisions of S 62 (1) (b) of the Indian Stamp Act (hereinafter referred to as the Act) which read thus

Any person executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped shall for every such offence be punishable with fine which may extend to five hundred rupees.

A reading of the section clearly indicates that the prosecution has a duty to prove beyond reasonable doubt that the accused person or persons have executed or signed the document in question chargeable to stamp duty but the same was not duly stamped. Unless and until the ingredients of section 62 (1) (b) of the Act have been established by the prosecution, the penal provisions of that section are not attracted. It is the cardinal and established principle of criminal jurisprudence that the burden is admittedly on the prosecution to prove all the requisite ingredients of the offence punishable under section 62 (1) (b) in a prosecution launch

ed against the accused persons. It has to be examined how far the prosecution has discharged the onus in the present case.

9 It is sought to be argued by the learned Public Prosecutor that the then District Registrar the competent authority on the matter being referred to him by P W 3 the Sub-Registrar had already adjudicated upon the nature of the document in question as one of sale as well as settlement requiring an additional stamp duty of Rs 360/- after due enquiry and hence the question relating to the nature of the document and the stamp duty payable cannot be gone into once again by the criminal court in this proceeding as the decision of the District Registrar was allowed to become final. No doubt the accused did not prefer any revision petition to the Board of Revenue against the orders of the District Registrar who acted in the capacity of Collector within the meaning of the Act but I am unable to agree with the contention of the learned Public Prosecutor that the criminal Court has no jurisdiction in this proceeding to go into the nature of the document and the due and proper stamp duty payable by the parties on a consideration of the material on record. I am of opinion that the finding of the District Registrar and his adjudication on the reference made by the Sub Registrar are final only in so far as applicability of the provisions of the Act is concerned but it cannot be said in view of the expression 'instrument chargeable with duty without the same being duly stamped' in Section 62 (1) of the Act that the same cannot be gone into by the criminal Court in this proceeding.

10 No direct authority on this point arising under the Act has been cited before me. I shall presently consider some decisions arising under similar circumstances under District Municipalities Act and Sales Tax Act.

11 In *Ramaswami Aiyangar v Sivakasi Municipality* (1937) 1 Mad LJ 274 (AIR 1937 Mad 291) while considering the question whether it is open to the accused in a prosecution under R 30 cl 2 of Sch 4 of the District Municipalities Act to plead that the tax is not leviable. Venkataramana Rao J speaking for the Bench at page 278 ruled

We are therefore clearly of the opinion that it is incumbent upon the prosecution to establish affirmatively that the profession tax was legally leviable from the accused and it is also open to the accused to plead and prove that he is not liable to pay the tax and therefore he is not liable to be prosecuted under Rule 30 Clause 2 of Sch. 4 of the District Municipalities Act.

Ultimately, the conviction and the sentence were quashed and the accused was acquitted.

12. In *Poppattal Shah v. State of Madras* (1953) 1 Mad LJ 739=(AIR 1953 SC 274) the Supreme Court, holding that the transaction in question was a sale outside the province of Madras which did not require any payment of sales tax thereon, acquitted the accused allowing the appeal, finding that the conviction of an assessee for an offence under section 15 of the Madras General Sales Tax Act in respect of such illegal assessment was unsustainable. In that case, the assessment was completed before December 1947, i.e. prior to the amendment of the Act where the words "tax due" in section 15 were in existence instead of the words "any tax assessed" as a result of the amendment.

13. The Full Bench decision of this Court in *Public Prosecutor v. Bhavigadda Thimmaiah*, (1959) 1 Andh WR 119=(AIR 1959 Andh Pra 207 (FB)) sought to be relied upon by the Public Prosecutor was a case, where their Lordships had to consider the expression "any tax assessed on him under this Act" in Section 15 (b) of the Madras General Sales Tax Act subsequent to amendment. The following passage in that Full Bench decision at page 132 lends support to the plea of Sri Subrahmanyam in the present case:

"Cases which enunciate the principle that before an accused could be convicted for non-payment of taxes, one of the essential ingredients of the offence, namely, the liability to pay should be made out, turn on the language of the enactments, namely "taxes due". That expression lends itself to the interpretation taxes lawfully due and payable. The import of the words "tax assessed under the Act" is different. They only connote that an assessment in fact has been made. There is no warrant for importing the words "lawfully or legally assessed" into the section. We are of opinion that the clause "any tax assessed on him under this Act" in Section 15 (b) cannot have that implication."

14. In a recent Bench decision of this Court in *Public Prosecutor v. Mukh Singh* (1967) 2 Andh WR 157, it was held that the non-service of a notice under sub-section (4) of Section 14 of the Andhra Pradesh General Sales Tax Act to show cause why the original order of assessment should not be re-opened on any of the accused before the order of reassessment, invalidated the very reassessment which was found to be null and void, when the accused were prosecuted under Section 30 (1) (a) of Andhra Pradesh General Sales Tax Act. No doubt, the assessment was allowed to become final under the Act, but their Lordships

have held that in the eye of law, the assessment made without serving the statutory notice was no assessment at all, the validity of which can be questioned in a prosecution sought to be launched under section 30 (1) (a) of the said Act.

15. In *Venkataraman & Co v. State of Madras*, AIR 1966 SC 1089, their Lordships of the Supreme Court have held that a civil Court has jurisdiction to question the assessment which was made outside the provisions of the Madras General Sales Tax Act

16. In *Raghubar Dayal v Emperor*, AIR 1934 All 201, while considering the validity of the conviction under S 62 of the Stamp Act read with Section 109, I P C, it was held, on a consideration of the documents and the recitals therein, that they were merely memoranda of the sale of goods entitled for exemption from stamp duty under Art 5, Exemption (a) and not conveyance within the meaning of Art 23, and the conviction was set aside as unsustainable. The same view has been reiterated by the Allahabad High Court in *Imam Baksh v Emperor*, AIR 1937 All 190. In the aforesaid two cases, the documents were considered and finally adjudicated upon by the criminal Court as to the nature of the same and the requisite stamp duty due and payable by the parties for the execution of the same. I am unable to agree with the contention of the Public Prosecutor that these decisions of the Allahabad High Court can have no application to the facts of the present case, as no adjudication by the competent authority under the statute was made in those cases

17. The object and purpose of the enquiry relating to the nature of the document sought to be registered by the competent authority under the provisions of the Act is to fix the requisite quantum of stamp duty due and payable thereon, whereas the object and intentment of launching criminal prosecution after obtaining the requisite sanction, against any persons is to punish such persons for the offences committed by them in contravention of the provisions of S 62 of the Act. Hence, in the circumstances, the findings given in respect of the nature of the document as well as the requisite stamp duty duly payable thereon, by the concerned authority under the Act, can, by no stretch of reasoning, be said to be conclusive and binding on the criminal Court in a proceeding under Section 62 of the Act, although they are allowed to become final in so far as the applicability of the provisions of the Act and decision of the competent authority are concerned. Where the notice required under the statute was not at all issued or no enquiry was made, or the enquiry made was illegal and opposed to the principles of natural justice,

or where the stamp duty decided upon by the competent authority was not in the eye of law duly chargeable I have no hesitation to hold that the decision or adjudication by the concerned authority under the Act was not a valid decision in the eye of law and can be ignored by the criminal Court for the purpose of the criminal prosecution. The accused person is always entitled to prove that the ingredients of Section 62 (1) have not been made out beyond reasonable doubt there by entitling him for an acquittal. Hence the accused in the present case are entitled to raise the plea that the document in question was not a sale but only a settlement and the stamp duty duly chargeable thereon has in fact been paid properly and the alleged deficit stamp duty of Rs 360/- was duly not chargeable within the provisions of Section 62 (1) of the Act and the criminal Court in this enquiry has ample jurisdiction and power to go into those questions and decide the same on a consideration of the recitals of the document as well as the other material on record.

18 There remains the question as to whether Ex P-1 is a deed of settlement on which the duty payable is only Rs 105/- as urged by Sri Subrahmanyam, or a deed of sale or partly sale and partly settlement as contended by the Public Prosecutor. To arrive at a correct conclusion on this point the Court can look into the very recitals of the document as primary evidence and the other material available on record. I am unable to agree with the contention of Sri Subrahmanyam that the evidence other than the recitals of the document is inadmissible as the same is hit by Section 92 of the Evidence Act. Though the document is styled as a deed of 'dakhil' for Rs 7000/- the recitals relating to consideration disclose that it was executed partly due to love and affection towards the vendees and partly in consideration of the expenses incurred by and due and payable to the vendees in respect of the archakatwam service performed by them for a period of 9 years and for paditharamulu.

On a close reading of the recitals of the entire document I must hold that Ex P-1 is not a simple deed of settlement executed without any consideration except love and affection. Admittedly A-1 by virtue of the compromise decree has to pay an amount of Rs 6912/- towards 'paditharamulu' and services expenses to A-2 and A-3 as revealed from Ex. P-1. Ex P-7 the petition filed by A-2 and A-3 discloses that Ex. P-1 was executed by A-1 in their favour for the consideration of the amount due and payable to them by her pursuant to the compromise decree. The contention of Sri Subrahmanyam that Ex P-7 is inadmissible in evidence as according to him it was fil-

ed by A-2 and A-3 who are accomplices is devoid of any merit. I must say that A-2 and A-3 are not accomplices but they are co-accused along with A-1 and they are represented by Sri Subrahmanyam in this very same case. That apart Ex. P-7 was filed before the District Registrar in the course of the enquiry contemplated under the Act and hence it is not inadmissible by virtue of the provisions of section 92 of the Evidence Act.

On a close reading of the recitals in Exs P-1, P-10 and P-7 I have no hesitation to agree with the decision of the District Registrar that it was partly sale deed and partly settlement deed setting aside the finding of the lower Court and disagreeing with the contention of the accused that it was an out and out settlement deed. But I am constrained to observe that the order of adjudication or the material on record does not disclose the basis for allocating the amount of Rs 5400/- towards sale and Rs 1600/- towards settlement. However it is unnecessary for me to go into that question as the same has not been agitated upon by any of the parties. In the circumstances and for the reasons indicated I hold that the prosecution has established beyond reasonable doubt the requisite ingredients of Section 62 (1) (b) of the Act and I do not find any merit in any of the objections raised by the accused in this regard.

19 A-1 who is the vendor and who had executed the document Ex. P-1 is liable for the offence under Section 62 (1) (b) of the Act. But in my considered opinion A-2 and A-3 have neither executed the document nor signed the document in any capacity other than that of a witness to bring home their guilt within the provisions of Section 62 (1) (b) of the Act. Hence they cannot be convicted for the offence charged against them.

20 In the result the acquittal of A-2 and A-3 is confirmed and that of A-1 is set aside. I convict A-1 under Section 62 (1) (b) of the Indian Stamp Act. In view of the fact that the offence has taken place about 9 years ago and A-1 is an old lady I consider that the ends of justice will be met if a fine of Rs 50/- is imposed. In the circumstance I impose a fine of Rs 50/- on A-1 payable within two weeks from the date of receipt of the judgment in the lower Court. The appeal by the State is therefore allowed in respect of A-1 and dismissed in respect of A-2 and A-3.

Appeal partly allowed.

1970 Cri. L. J. 281 (Vol. 76, C. N. 60)

(ANDHRA PRADESH HIGH COURT)

CHINNAPPA REDDY, J.

In re, Dr. A. Appaiah Panthulu
Petitioner.Criminal Misc Petn. No 647 of 1968,
D/- 14-6-1968.Criminal P. C. (1898), S. 561-A —
Expunging objectionable remarks from
judgments of subordinate Courts—Powers
of High Court — Exercise of.

The High Court has jurisdiction under S 561-A of Criminal Procedure Code to expunge objectionable remarks from the judgments of subordinate Courts, but this power should be exercised with great circumspection as undue interference may affect the free and fearless performance of their duties by Judges and Magistrates and the freedom and candour of their expression of opinion regarding the veracity of witnesses giving evidence before them AIR 1964 SC 1 and AIR 1954 Bom 65 (FB), Rel. on. (Para 2)

Where in a sessions case the Sessions Judge made remarks adversely criticising the evidence of doctor and any of the remarks could not be said to be irrelevant or not pertinent to the enquiry before him, though the Court of appeal might not agree with the criticism or appreciation by the Judge, that would not justify an order expunging the remarks (Para 3)

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 1 (V 51) = 2
1964 (1) Cri LJ 1, Raghubir Saran
v State of Bihar
(1954) AIR 1954 Bom 65 (V 41) = 2
1954 Cri LJ 58 (FB) State v Nil-
kanth

Balaparameswari Rao, for Petitioner

ORDER:— Sri Appayya Panthulu, Civil Assistant Surgeon, Government Hospital Yellamanchili has filed this application for expunction of certain remarks made by the learned Sessions Judge of Visakhapatnam adversely criticising the evidence of the petitioner given in Sessions Case No. 26/1966. The offending passages are contained in paragraphs 38 and 43 to 47 of the Judgment of the learned Sessions Judge. It is submitted by the petitioner that on account of certain earlier incidents the learned Sessions Judge was prejudiced against the petitioner and that the remarks are the outcome of the learned Sessions Judge's prejudice. It is said that on a previous occasion when the petitioner gave evidence before the learned Judge the learned Judge found fault with his dress. On another occasion when the learned Judge visited the Sub Jail at Yellamanchili he noted that the

Medical Officer did not visit the Sub Jail that day though there were sick prisoners. On a third occasion the learned Judge forfeited a bond executed by the petitioner for failure to attend Court.

The petitioner alleges that on that occasion he could not attend Court as he had to perform an urgent post mortem examination and that he duly informed the Sessions Judge of the same. The order of forfeiture was later set aside by the High Court. The petitioner suggests that the remarks made by the learned Sessions Judge are the outcome of prejudice born out of these several incidents. To say the least, I consider that the suggestion is very unfair. There is nothing to indicate that the learned Sessions Judge bore any illwill towards the petitioner or had any sort of animus against the petitioner. I am satisfied that the remarks are not the outcome of any prejudice and I also hasten to add that I would not in any case be justified in taking note of allegations not borne out by the record of the case.

2. It is now well established that the High Court has jurisdiction under Section 561-A of Criminal Procedure Code to expunge objectionable remarks from the judgments of subordinate Courts, but that this power should be exercised with great circumspection as undue interference may affect the free and fearless performance of their duties by Judges and Magistrates and the freedom and candour of their expression of opinion regarding the veracity of witnesses giving evidence before them. Mudholkar, J has pointed out in Raghubir Saran v State of Bihar, AIR 1964 SC 1, as follows

"When the question arises before the High Court in any specific case whether to resort to such undefined power it is essential for it to exercise great caution and circumspection. Thus when it is moved by an aggrieved party to expunge any passage from the order or judgment of a subordinate Court it must be fully satisfied that the passage complained of is wholly irrelevant and unjustifiable, that its retention on the records will cause serious harm to the person to whom it refers and that its expunction will not affect the reasons for the judgment or order."

In the same case Subba Rao, J. (as he then was) observed

"I reiterate that every judicial officer must be free to express his mind in the matter of the appreciation of evidence before him. The phraseology used by a particular Judge depends upon his inherent reaction to falsehood his comparative command of the English language and his felicity of expression. There is nothing more deleterious to the discharge of judicial functions than to create in the

mind of a Judge that he should conform to a particular pattern which may or may not be to the liking of the appellate Court. Sometimes he may overstep the mark. When public interests conflict the lesser should yield to the larger one. An unmerited and undeserved insult to a witness may have to be tolerated in the general interests of preserving the independence of the judiciary. Even so a duty is cast upon the Judicial Officer not to deflect himself from the even course of justice by making disparaging and undeserving remarks on persons that appear before him as witnesses or otherwise. Moderation in expression lends dignity to his office and imparts greater respect for judiciary.

Both Mudholkar J and Subba Rao J approved the following observations of Chagla C J in *State v Nilkanth*, AIR 1954 Bom 65 (FB).

'It is very necessary in order to maintain the independence of the judiciary that every Magistrate however junior should feel that he can fearlessly give expression to his own opinion in the judgment which he delivers. If our Magistrates feel that they cannot frankly and fearlessly deal with matters that come before them and that the High Court is likely to interfere with their opinions the independence of the judiciary might be seriously undermined.'

3. Bearing these principles in mind I have carefully examined the remarks made by the learned Sessions Judge. I cannot say that any of the remarks made by the learned Sessions Judge are irrelevant or not pertinent to the enquiry before him. All the remarks deal with the evidence given before him by the petitioner and are germane to the case which he was trying. It may be that a Court of appeal may not agree with all the criticism of the learned Sessions Judge; it may be that a Court of appeal may not agree with the appreciation of evidence by the learned Sessions Judge but that will not justify an order expunging the remarks. In the result the petition is dismissed.

Petition dismissed

1970 Cri L J 282 (Vol 76 C N 61)
(CALCUTTA HIGH COURT)

D N SINHA, C J

AND A. K. MUKHERJEA, J

Jayantilal O Shah Petitioner v Chief Presidency Magistrate Calcutta and others, Opposite Parties

Criminal Misc. Case No 593 of 1967
D/ 23-4 1968

(A) Defence of India Act (1962) Preamble and S 3 (2) (33) — Defence of

AM/CM/A291/69/VGW/D

India Rules (1962) Part XIII (Gold Control) — Constitutional Validity — The Act and Rules contemplate delegation of power — Neither Act nor Rules exceed limits of delegation of power — Constitution of India, Art 245 — AIR 1951 SC 332 & AIR 1951 SC 569 & AIR 1954 SC 465 & AIR 1960 SC 554 (567)

(Para 2)

(B) Civil P C (1908) Preamble — Interpretation of Statutes — Report of Law Commission cannot be taken into consideration

It is impossible for the court in interpreting a statute to take into consideration the report of the Law Commission. The comments of the Law Commission on the question of legal reform are matters for consideration by Government and the legislature and not for the court.

(Para 2)

(C) Defence of India Act (1962) S 3 (2) (33) — Defence of India Rules (1962) Part XIII (Gold Control) R 126A (d) — Validity of Rules — Question whether Rules relating not only to bullion but also to other kinds of gold including manufactured ornaments are ultra vires S 3 (2) (33) of Act — Question does not relate to interpretation of Constitution and, therefore cannot come within provisions of Art. 228 of Constitution.

(Para 2)

(D) Constitution of India Arts 352, 353 — Grave emergency — Meaning of — Meaning is sufficiently explained in Art 352 — Emergency should be such that thereby security of India or any part thereof is threatened by war or external aggression or internal disturbance.

(Para 2)

(E) Constitution of India Art 228 — Question of fact — It cannot be considered under Art 228.

(Para 2)

Cases Referred Chronological Paras

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| (1950) AIR 1950 SC 554 (V 47) = | |
| 1960 Cri LJ 735 Hamdard Dawa | |
| Khana v Union of India | 1 |
| (1954) AIR 1954 SC 465 (V 41) = | |
| 1954 Cri LJ 1322 Hari Shankar | |
| Bagla v State of M P | 2 |
| (1954) AIR 1954 SC 569 (V 41) = | |
| 1955 SCR 290 Rajnarain Singh v | |
| Chairman Patna Administration | |
| Committee | 2 |
| (1951) AIR 1951 SC 332 (V 38) = | |
| 1951 SCR 747 Delhi Laws Act | |
| Case In re | 2 |
| (1938) 1938 AC 708 = 107 LJ PC | |
| 115 Shanon v Lower Mainland | |
| Dairy Products Board | 2 |
| (1864) 9 AC 117 = 53 LJ PC 1 Hodge | |
| v Reg | 2 |
| (1882) 7 AC 829 Russell v Reg | 2 |
| A. K. Dutt & Nandalal Pal for the Petitioner | |
| D. P. Chaudhury for the Opposite Parties. | |

SINHA, C. J.: This is an application under Article 228 of the Constitution praying for the transfer of a criminal proceeding pending in the court of 8th Presidency Magistrate, Calcutta, to this Court. The facts are briefly as follows: The petitioner in this application is Jayantilal O'Shah, a resident of 13, Armenian Street in the city of Calcutta. According to the petitioner, he was carrying on business as an order supplier by remaking gold ornaments and polishing gold and silver ornaments. In 1963 he took out a licence under the Gold Control Rules from the Superintendent, Gold Control, Calcutta who was the licencing authority under the said rules. This was an annual licence and the petitioner did not take out any licence in 1964 onwards, although according to the respondent, he still carries on business in the manufacture of ornaments of gold at premises no 13, Armenian Street. Before I proceed further, it will be necessary to state something more about the said Rules. The Defence of India Act, 1962 (hereinafter referred to as the "said Act") came to be promulgated in 1962 and the preamble of the said Act recites that the President having declared by Proclamation under clause (1) of Article 352 of the Constitution that a grave emergency exists whereby the security of India was threatened by external aggression, the said Act was enacted as it was necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith. Chapter II of the said Act (Sections 3 to 6) deals with emergency powers. Section 3 (1) gives power to the Central Government, by notification in the Official Gazette, to make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community. Sub-section (2) sets out certain specific headings which have been held to be illustrative of the general powers granted under sub-section (1) of section 3. The relevant heading for our purpose is clause (33) of sub-section (2) which runs as follows

"Controlling the possession, use or disposal of, or dealing in, coin, bullion, bank notes, currency notes, securities or foreign exchange;"

The Gold Control Rules, 1963 forms a part of the Defence of India Rules, 1962 and it is not disputed that the origin of the power to promulgate it is derived from S. 3 (2) (33) of the said Act. Under Rule 126-B of the Gold Control

Rules, 1963 (hereinafter referred to as the "said Rules") on and from the date of the publication of the Defence of India (Amendment) Rules, 1963 in the Official Gazette, no dealer is permitted to make or manufacture any article of gold unless authorised to do so and no dealer may make new ornaments out of any gold of which the purity exceeds 14 carats. Briefly speaking, dealers in and manufacturers of gold ornaments would have to possess a licence under the said Rules and are not permitted to deal with gold whose purity exceeds 14 carats. If a person does so, then he commits an offence. I now come to the facts of the present case. I have already mentioned that in 1964 the petitioner did not possess a licence under the said Rules. On the 23rd of October, 1964 there was a search of the business premises belonging to the petitioner at 13 Armenian Street, and primary gold of above 14 carats purity, weighing 69 tolas 4 annas and 7 1/2 pies was seized at the said business premises. On the 29th of December, 1964 the Superintendent of Central Excise, Gold Control, served a show-cause notice on the petitioner. It is stated in the said notice that, gold amounting to 69 tolas 4 annas 7 1/2 pies were seized from 13, Armenian Street, Calcutta and the said quantity of gold was found to be above 14 carats purity and it was in the illicit possession of the petitioner who had the intention to sell and manufacture gold ornaments by melting the same, thereby violating the provisions of Rules 126-H (2) (d), 126-I (10) and 126-I (a) (i) (sic) of Defence of India (Amendment) Rules, 1963. The petitioner was required to show cause as to why the goods seized should not be confiscated and why penalty should not be imposed on him under Rules 126-M and 126-I (16) of the Defence of India (Amendment) Rules, 1963. On the 15th of January, 1965 the petitioner showed cause. On the 3rd of May 1965 the Deputy Collector, Central Excise, Calcutta and Orissa, ordered the confiscation of 64 tolas 4 annas 3 pies of the seized gold under Rule 126-M (2) (aa) of the Defence of India (Amendment) Rules, 1963 for contravention of Rule 126-H (2) (d) thereof. The petitioner preferred an appeal against the said order of the Deputy Collector, Central Excise, Calcutta and Orissa. On November 29, 1965 the appeal was rejected as time barred. The petitioner thereupon applied in revision to the Secretary to the Government of West Bengal, Ministry of Finance (Department of Revenue and Insurance). On the 13th July 1966 the Revision was rejected. On the 3rd of January, 1967 the Deputy Collector, Central Excise, Calcutta and Orissa filed a complaint against the petitioner for con-

travention of the provisions of Rules 126-P (2) (iv) 126-P (1) (i) and 126 I (10) of the Gold Control Rules. On the 21st of June 1967 the 8th Presidency Magistrate Calcutta framed charges against the petitioner particulars whereof are set out in paragraph 14 of the petition. The said criminal proceeding is pending before the 8th Presidency Magistrate and it is this proceeding that has been challenged in this application. On the 26th July 1967 the petitioner made an application under section 432 of the Code of Criminal Procedure before the said Presidency Magistrate requesting him to state a case for the decision of the High Court. The section lays down that if in the opinion of the trying Magistrate any provision of law appears to be unconstitutional and void but which has not been so declared by any High Court to be so the trying Magistrate can refer the matter to the High Court. By his order dated 8th August 1967 the learned Magistrate came to the conclusion that he was not of the opinion that the Rules for the contravention of which the criminal proceeding had been instituted were invalid and so he refused to refer the matter to the High Court. Thereupon the petitioner made an application to this Court under Article 228 of the Constitution and a Rule was issued on the 30th August 1967 calling upon the respondent to show cause why the proceeding should not be transferred to this Court under the provision of that Article. Article 228 provides that if the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of the Constitution, the determination of which is necessary for the disposal of the case, it shall withdraw the case and may either dispose of the case itself or determine the said question of law and then return the matter to the court from where it has been withdrawn for further proceeding. It is clear that we must be satisfied that this case involves a substantial question of law as to the interpretation of the Constitution. In the petition the grounds for making this application are set out in paragraph 20. The grounds as formulated are so clumsily framed that they are not understandable. We therefore requested Mr Dutt who appears for the petitioner to formulate the real point that he wishes to put forward for our consideration in this case. Upon consideration he formulated the following grounds:

The Gold Control Rules purported to be framed in exercise of section 3 (2) (33) of the Defence of India Act 1962 being silent on the limits of delegation relating to legislative power and no limits being laid down by the Constitution relating to exercise of such power. The Gold

Control Rules is a piece of delegated legislation and hence bad."

I might mention here that although Mr Dutt promised to confine himself to this point he travelled far beyond it and advanced arguments which either have nothing to do with the interpretation of the Constitution or are points which have been fully and finally decided by the Supreme Court so that no further interpretation is necessary.

2 I shall first of all deal with the ground as formulated by Mr Dutt. The delegation of powers has not been specifically provided for in the Constitution but it is a power the existence of which is widely accepted. The Supreme Court has in a number of decisions laid down the principles that are to be followed and these are by now so well-established that it is too late in the day to advance the argument that the Constitution or the Defence of India Act or the Gold Control Rules are unconstitutional and void because they themselves do not contain any specific provision as to delegation of powers. As was explained by Fazl Ali, J in *Delhi Laws Act Case* AIR 1951 SC 332 delegated legislation has become a present day necessity—it is both inevitable and indispensable. The legislature has now to make so many laws that it has no time to devote to all the legislative details and sometime the subject on which it has to legislate is of such a technical nature that all it can do is to state the broad principles and leave the details to be worked out by those who are more familiar with the subject. It is not always possible to bring out a self-contained and complete Act straightway since it is not possible to foresee all the contingencies and envisage all the legal requirements for which provision is to be made. The legislature must normally discharge its primary function itself and not through others. It cannot abdicate its legislative function and therefore while entrusting power to an outside agency it must see that such an agency acts as a subordinate agency and does not become a parallel legislature. The policy and principle must be laid down but provided this is done and control is retained the delegation is a valid one. These principles were reiterated in *Rajnaram Singh v Chairman, Patna Administration Committee* AIR 1954 SC 569. The principles therefore to be applied having been very clearly laid down by the Supreme Court, it merely remains for us to apply them to the facts of each case. That the Defence of India Act and the Rules contemplate delegation of power cannot be disputed. The question is whether this application of the power is well within the constitutional limits. In our opinion there is no doubt on the point that the

constitutional limits have not been exceeded. Similar question arose in the case of *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465 with regard to the Cotton Textile (Control of Movement) Order, 1948 promulgated under the Essential Supplies (Temporary Powers) Act, 1946. Mahajan, C. J. said as follows:

"The next contention of Mr. Umrigar that Section 3 of the Essential Supply (Temporary Powers) Act 1946 amounts to delegation of legislative power outside the permissible limits is again without any merit. It was settled by the majority judgment in the "Constitution of India and Delhi Laws Act 1912 etc AIR 1951 SC 332 that essential powers of legislation cannot be delegated. In other words, the Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists of the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct.

In the present case the Legislature has laid down such a principle and that principle is the maintainance or increase in supply of essential commodities and of securing equitable distribution and availability at fair prices. The principle is clear and offers sufficient guidance to the Central Government in exercising its powers under section 3. Delegation of the kind mentioned in section 3 was upheld before the Constitution in a number of decisions of the Privy Council vide *Russell v Reg.*, (1882) 7 A C 829, *Hodge v Reg.*, (1884) 9 A. C. 117 and *Shannon v Lower Mainland Dairy Products Board* 1938 AC 708 and since the coming into force of the Constitution delegation of this character has been upheld in a number of decisions of this court on principles enunciated by the majority in AIR 1951 SC 332. As already pointed out the preamble and the body of the Sections sufficiently formulate the legislative policy and the ambit of the policy and the character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the frame work of that policy. . . ."

The provisions of the said Act and the Rules are similar. The said Act in its preamble lays down clearly the objects for which it was intended. Section 3 of the said Act lays down the policy to be followed by the delegate, namely Parliament. In *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 it was pointed

out at p. 567 that when the delegate is given the power of making the rules and regulations in order to fill in the details to carry out and subserve the purpose of the legislation, the manner in which the requirements of the statute are to be made and the rights therein created to be enjoyed, it is an exercise of delegated legislative powers. In our opinion, neither the Act nor the Rules in the present case can be said to exceed the rule of delegation of powers. Mr. Dutt made out an elaborate argument based on the 14th Report of the Law Commission to the effect that the said Act and the Rules do not subserve their purpose. It is impossible for us, in interpreting either the constitution or the said Act or Rules, to take into consideration the report of the Law Commission. The comments of the Law Commission on the question of legal reform are matters for consideration by Government and the legislature and not for us. Mr. Dutt also referred to the Rules and procedures of the Lok Sabha under the provision of which the Lok Sabha appoints a committee to see that the powers of delegation are not exceeded. That is a matter of internal management with which we have nothing to do. Perhaps the only point argued which might have some substance in it is that, under section 3 (2) (33) the word used is "bullion" but that the provisions in the said Rules do not relate to bullion only, but to other kinds of gold, including manufactured ornaments. Assuming that this is so, it can only mean that the provisions of the said Rules are ultra vires the said Act. That has nothing to do with the interpretation of the Constitution and therefore, cannot come within the provisions of Article 228 of the Constitution. Lastly, Mr. Dutt argued that the provisions of Article 352 for the proclamation of emergency and Article 353 relating to the effects thereof, are vague and do not lay down any limits as to the powers of the president or the Parliament and there was no guide-line to be found therein. To say that, what is a "grave emergency" should have been defined in the Constitution, is an argument of desperation. In my opinion it is sufficiently explained in Article 352 itself. The emergency should be such that thereby the security of India or any part of the territory thereof is threatened by war or external aggression or internal disturbance. More than this, could not possibly have been enunciated in the Constitution. I must mention that during argument Mr. Dutt went into fields which have nothing to do with the interpretation of the Constitution; for example he argued that his client was a pledge of ornaments and had not acquired the same nor was he a dealer. These

are questions of fact and have nothing to do with Article 228 of the Constitution.

3 The result is that we are not satisfied that any ground has been established to our satisfaction to bring the matter within Article 228 of the Constitution and consequently this application is dismissed and the Rule discharged. All interim orders are vacated.

4 The operation of this order will remain in abeyance for three weeks from this date as prayed for.

5 A K. MUKHERJEA, J I agree
Order accordingly

1970 Cri L J 286 (Vol 76 C N 62)
(MADHYA PRADESH HIGH COURT)
SHIV DAYAL J

Mst Ramdhara and another Appellants
v Mst Phulwatibai Respondent

Second Appeal No 71 of 1963 D/ 23-2-1967 from decree of Addl Dist J Chhindwara D/- 6-11 1962

(A) Civil P C (1908) S 100 — Question or finding of fact — Defamation — Lower court finding plaintiff's case proved on evidence — Finding is one of fact — Finding not assailable in second appeal (Para 2)

(B) Tort — Defamation — Requisites — Plaintiff a widow of 45 years — Her husband dead several years before — Plaintiff imputed by defendant a woman to be keep of maternal uncle of plaintiff's daughter-in-law — Incident taking place in village — Statement is not mere vulgar abuse but undoubtedly defamatory

Where the plaintiff a widow of 45 years her husband having died several years before is imputed by the defendant a woman, to be the keep of the maternal uncle of the plaintiff's daughter-in-law and the incident takes place in a village the statement is not a mere vulgar abuse but undoubtedly defamatory

(Para 5)

Though mere vulgar abuse and vituperative epithets may hurt a man's pride yet they do not disparage his reputation if intended as mere abuse and so understood by those who hear those words. It is of the essence of defamation that the words tend to be injurious to a person's character or reputation. The standard to be applied in determining whether a statement is defamatory or not is that of a right minded citizen, a man of fair average intelligence and not that of a special class of persons whose values are not shared or approved by fair minded members of the society generally. An imputation is defamatory if it exposes

one to disgrace and humiliation, ridicule or contempt. The allegation of illegitimacy is undoubtedly defamatory

(Paras 3 and 4)

Where the defendant a woman, during an incident in a village utters the word "chhunal" with other words against the plaintiff a widow of 45 years if merely this word is uttered it can be held to have not conveyed its literal meaning but to be only a vulgar abuse which is not uncommon in villages when women quarrel among themselves. But when the imputation is that the plaintiff is the keep of the maternal uncle of the plaintiff's daughter-in-law there is a definite imputation upon her chastity and the words used by the defendant do not constitute a mere vulgar abuse. They are undoubtedly defamatory. A language is defamatory on the face of it when defamatory meaning is the only possible or the only natural and obvious meaning (1937) 1 K B 818 Foll

(Paras 4 and 5)

(C) Tort — Defamation — Proof of special damage — Necessity — Distinction between libel and slander on the point whether latter is actionable without proof of special damage is not recognised in India — Both libel and slander are criminal offences under S 499 Penal Code — Both are actionable in civil court without proof of special damage "Torts" by Clerk and Lindsell 18th Edn Pp 785 and 787 paras 1491 and 1494 AIR 1927 Bom 22 and AIR 1932 Mad 445 and ILR 1946 (1) Cal 157, Foll (Penal Code (1860) S 499) (Para 6)

(D) Tort — Defamation damages — Quantum — Wordy quarrel between two rustic women — Plaintiff a widow of 45 years — Imputation upon plaintiff's chastity made — Rs 150 awarded as general damages — Where illiterate women in a village indulge in a wordy quarrel and utter defamatory words court should not be strict on the question of quantum of damages — Ends of justice will be met if plaintiff is awarded Rs 50 as general damages (Tort — Damages — Defamation — Quantum) (Para 7)

Cases Referred Chronological Paras
(1946) ILR (1946) 1 Cal 157 D Silva v Potenger 6
(1937) 1937-1 K B 818 = 1937 2 All ER 204 Byrne v Deane 3
(1932) AIR 1932 Mad 445 (V 19) = ILR 55 Mad 727 Narayana Sah v Kannamma Bai 6
(1927) AIR 1927 Bom 22 (V 14) = ILP 51 Bom 167 Hirabai Jehangir v Dinshaw Edulji 6

S C Upadhaya, for Appellants P C Khare for Respondent

JUDGMENT This second appeal arises from a suit for damages for defamation.

The plaintiff's case was that relations between the parties were strained and a few days before the incident there was a quarrel between Ayodhya Prasad, her son, on the one hand, and Shivgovind, husband of Mst. Ramdhara (defendant 1), and Moortlal, husband of Mst Sushila (defendant 2), on the other hand. Ayodhya Prasad, accompanied by Jagatram, went to Police Station to lodge a report about that quarrel. Jagatram is Ayodhya Prasad's Mamiya Susar, (wife's maternal uncle). Four or five days thereafter, when on the evening of the incident, the plaintiff had been to bring her cattle and buffalo, she happened to come across the first defendant on her way. On seeing her the first defendant abused her filthily saying "Rand Tune Chhokara Ko Jagatram Ke Sath Report Ko Kahe Ko Bhej Di. Tu To Dari Chhinal Tu To Jagatram Ki Lugai Hai. Usane Tere Ko Rakha Hai" Defendant 2 also happened to be there and she associated herself with the first defendant in those abuses and defamatory imputations. The plaintiff's contention was that the imputation against her chastity was made with a view to ridicule her and lower her reputation. She claimed Rs 150/- as general damages. The suit was resisted. The trial Court dismissed the suit holding that it was not proved that the defendant uttered those words.

2. The first appellate Court reversed the decree of the trial Court. It has found that the plaintiff's case was proved by the evidence of the plaintiff herself and her witnesses, Manrakhan (P. W. 2) and Rameshwar Prasad (P W 3). The learned Judge has elaborately discussed their evidence and also the evidence produced by the defendants. He also pointed out where the trial Court, in his opinion, erred. He has also discussed the arguments advanced before him on the question of fact. The finding reached by the first appellate Court is one of fact and it is not assailable in second appeal.

3. It is alternatively argued by Shri Upadhyaya that if it is found that those words were uttered by the defendants, they amounted to mere abuses without intending or conveying their natural meaning. The objectionable words cannot be read as to convey an imputation that the plaintiff had become Jagatram's mistress or that she had illicit relations with him. It is true that although mere vulgar abuse and vituperative epithets may hurt a man's pride, yet they do not disparage his reputation, if intended as mere abuse and so understood by those who heard those words.

It is of the essence of defamation that the words tend to be injurious to a person's character or reputation. The stan-

dard to be applied in determining whether a statement is defamatory or not is that of a right minded citizen, a man of fair average intelligence. The standard to be applied is not that of a special class of persons whose values are not shared or approved by fair-minded members of the society generally. See *Byrne v. Deane*, 1937-1 KB 818 (833). An imputation is defamatory, if it exposes one to disgrace and humiliation, ridicule or contempt. The allegation of illegitimacy is undoubtedly defamatory.

4. In the present case, if the defendants had merely uttered the word 'chhinal', I would have held that the word did not convey its literal meaning, that is, a woman of easy virtue, but was only a vulgar abuse, which is not uncommon in villages when women quarrel among themselves. Mere vulgar abuse, which does not tend to lower a person addressed in the estimation of others or to bring him into obloquy, contempt or ridicule, does not amount to defamation. In such a case, the abuse is uttered merely to put an affront upon the feeling of the person abused, or as an insult to his dignity or self-respect without other persons knowing of it or without producing such an impression in their mind as its natural meaning would convey. But where words are uttered in circumstances tending to lower the person addressed in the estimation of the people present and to bring him into ridicule or contempt, they will constitute defamation and will be actionable.

5. Here, the words uttered by the defendants did not constitute a mere vulgar abuse. There was a definite imputation upon the plaintiff's chastity. The attending circumstances cannot be lost sight of. She is a widow of 45, her husband having died several years before. Jagatram is a close relation of hers, being maternal uncle of her daughter-in-law. If, in these circumstances, there is an imputation that the plaintiff is the keep of Jagatram, or that she had developed illicit relations with him, the statement is undoubtedly defamatory. A language is defamatory on the face of it when defamatory meaning is the only possible or the only natural and obvious meaning.

6. It is then contended by Shri Upadhyaya that slander is not actionable without proof of special damage. Learned counsel relies on Clerk and Lindsell on Torts, 18th Edition, Paragraph 1491, page 785:

"Whereas libel is always actionable without proof of any special damage, slander must, in order to be actionable without proof of special damage, impute—
(1) a criminal offence punishable cor—

porally i.e. by punishment with at least imprisonment in the first instance or (2) some disease tending to exclude the party defamed from society or (3) in the case of a woman unchastity or (4) be calculated to disparage the party defamed in any office profession calling trade or business held or carried on by him at the time of publication.

By the common law an imputation by words upon the chastity of a woman was not actionable in itself. But by the Slander of Woman Act 1891 words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable. (See paragraph 1494 page 787 of the same treatise) But that is the law in England. The distinction between libel and slander on the point whether it is actionable without proof of special damage has not been recognised in this country. Both libel and slander are criminal offences under the Penal Code (See Section 499) and both of them are actionable in the civil Court without proof of special damage. See *Hirabai Jehangir v Dinshaw Edulji* ILR 51 Bom 167 = (AIR 1927 Bom 22) *Narayana Sah v Kannamma Bai*, ILR 55 Mad 727 (AIR 1932 Mad 445) and *D Silva v Potenger* ILR (1946) 1 Cal 157. Therefore this contention must also be rejected.

7 At the end, it is argued for the appellants that the amount of damages awarded is excessive. There was only a wordy quarrel between two rustic women so that nominal damages should have been awarded. Learned Counsel suggests that a nominal damage of one rupee should satisfy the plaintiff as she thought her prestige was injured. It is true that where illiterate women in a village indulge in a wordy quarrel and utter defamatory words the Court should not be strict on the question of quantum of damages. In my opinion ends of justice would meet if the plaintiff is awarded Rs 50/ as general damages.

8 The appeal is partly allowed. The judgments and decrees passed by the Courts below are modified only in respect of the quantum of damages. The plaintiff shall get a decree for Rs 50/ as general damages against the defendants and also the entire costs throughout.

Appeal partly allowed.

1970 Cr L J 288 (Vol 76 C N 63)

(MADRAS HIGH COURT)

RAMAKRISHNAN
AND KAILASAM JJ

In re Mahali and others Accused Appellants

Referred Trial No. 63 of 1968 and Criminal Appeal No. 676 of 1968 D/- 14-1969 from order of Addl. S.J. of the Court of Session Coimbatore Division at Coimbatore D/- 5-9-1968

Evidence Act (1872) Ss 114 Illustration (b) and 133 — Evidence of person who is not *particeps criminis* — Reliability of — Depends on facts and circumstances of each case — Principle of corroboration on material particulars should be applied to such evidence if circumstantial evidence calls for it.

So far as the statutory provisions are concerned there is nothing in law to justify the proposition that evidence of a witness who happens to be cognisant of a crime or who made no attempt to prevent it or who did not disclose its commission should only be relied upon to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness and that depends on all the facts and circumstances of the particular case and the principle of caution and the requirement of corroboration on material particulars should also be applied if the circumstantial evidence calls for it. AIR 1956 SC 379 and AIR 1934 Cal 678 (SB) Rel. on. (Paras 9 & 11)

A person gave evidence of the occurrence only two days after the occurrence and did not incriminate himself in the occurrence from the very beginning. He was treated as an approver by granting pardon and was kept under arrest throughout and even at the time of giving evidence. There were discrepancies between his evidence in the Court and his earlier statement before the police and his evidence contained serious improbabilities.

Held that in the absence of circumstantial evidence connecting the accused with the crime the accused could not be convicted on the basis of testimony of such witness without corroboration thereon or material particulars.

(Para 13)

Cases Referred Chronological Paras

(1956) AIR 1956 SC 379 (V 43) =	
1956 Cr L J 777 Vemuri Reddy	
Satyanarayan v Hyderabad State	11
(1934) AIR 1934 Cal 678 (V 21) =	
38 Cal WN 777 = 35 Cr L J 1357	
(SB) Hafizuddin v The Emperor	12

M/s. C. K. Logadass and Ramaswami, for Appellants (Accused Nos. 1 to 3); Public Prosecutor, for State.

RAMAKRISHNAN, J.: Three persons, Mahali, Maran and Palani, Harijans, residents of Hanniyada of Nilgiris were sentenced to death by the learned Sessions Judge of Coimbatore for the offence of murder under Section 302 read with Section 34, I. P. C. subject to confirmation by the High Court. The referred Trial is now before us. The condemned prisoners have also appealed and their appeals are also before us.

2. On the night of 18-2-1968 it was found by P. W. 2 a watchman that a tank near Nilgiri's near Koonur, which used to receive supply from a dam higher up was not receiving its usual supply of water. The concerned authorities of the Water Works Department ultimately traced the block in the flow of water to a dead body wedged into the outlets hole of a "break" pressure tank" which is shown in the rough sketch, Ex P. 18 prepared by the police during the investigation. This break pressure tank is a rectangular structure, $7\frac{1}{2}' \times 3\frac{1}{2}'$ with a depth of 7'3". The in-let pipes and out-let pipes are so placed that a depth of 6' of water is maintained. The tank is covered with R.C.C. Slabs 7' in number laid one by the side of the other. P. W. 1, Ebben Samuel, Commissioner of Coonoor Municipality, was present at the time when the block by means of the dead body which was partially hanging from the over-flow pipe was removed. When the covering slabs were removed another dead body with its hands and legs tied was found in the same chamber. Subsequent post mortem examination showed that these two persons had met with their death by asphyxia due to drowning. The wellknown tests for such asphyxiation like the section of the lungs exuding watery frothy mucus and similar other symptoms were clearly present. There is little doubt that these two unfortunate persons met with a watery grave in the small confined space of the break pressure tank above mentioned. The post mortem doctor fixed the time of the occurrence as 24 to 48 hours prior to the post mortem examination which was held on the 20th morning by the Civil Assistant Surgeon of the Lawley Hospital, P. W. 16. The prosecution case was that the death took place on the night of 18-2-1968.

3. The villagers gathered near the scene where the dead bodies were found, one Palaniyal identified the bodies as those of two Harijans, Subban and Bethan, who were brothers. They will be referred to for the sake of reference as D. 1 and D. 2 in this judgment.

4. The prosecution has given an account of the motive for the occurrence.

D. 1 and D. 2 and one Velan are the sons of P. W. 4. Velan is married to one Palanai, P. W. 8 a girl aged 15 years. About ten days before the occurrence when P. W. 8 was near the water tap accused 1 wanted to drag her into conversation. She protested, for this action her father in law P. W. 4, scolded accused as well as accused 2 whereupon accused 1 replied that he would do something to the family of P. W. 4 within eight days. The point to note is that accused 2 was not present when accused 1 tried to drag P. W. 8 into conversation. Secondly accused 3 is not at all associated with this motive. Accused 1 and 3 and the approver, P. W. 5, Raju are all young Harijans and also residents of Hanniyada.

5. Regarding the actual incident, the approver, P. W. 5 Raju, alone has given evidence. P. W. 5 accepted the invitation of accused 1 on the evening of 18-2-1968 to attend a cinema. On the way they were joined by accused 2 and 3. They were proceeding along the Coonoor road evidently to go to Coonoor for the cinema. Apparently Subban, D. 1 also used to join these young people on similar occasions in the past. When P. W. 5 asked whether D. 1 was going to join them that evening accused 1 is said to have told P. W. 5 that a week previously D. 1 had abused him and threatened to beat him with chappal and that he (accused 1) was going to question D. 1 about it. At about this time D. 1 and D. 2 left their house to go to Bandhumi Village. It was the practice of D. 1 and D. 2 to graze the cattle of Bandhumi villagers and collect food from the villagers every night by way of remuneration. It was for that purpose that D. 1 and D. 2 left their house for on the night of 18-2-1968 with a tiffin carrier M. O. 2. One of them was wearing chappals and was having a bed sheet covering their head. Their route lay along the Coonoor road. Near a culvert which is marked on the sketch mentioned above, D. 1 and D. 2 met the party comprising of P. W. 5 and accused 1 to 3. A quarrel ensued between them and accused 1 proposed that to resolve the quarrel D. 1 should go to a Mahakali temple which is also shown in the sketch away from the Coonoor road for the purpose of taking an oath. That temple is about 2 miles from the place where according to the approver the conversation took place. P. W. 9, Natesan who was returning to his house in Bandhumi village, saw the party of the deceased as well as the accused and P. W. 5 near the culvert at about 8 p. m. They were simply talking. P. W. 9 did not notice any evidence of quarrel. At first, according to the approver D. 1 refused to go to the temple indicated by the accused and wanted to go to another temple instead.

and finally on the pressure of accused 1 D 1 accepted accused's suggestion. They proceeded from the culvert for a distance of about 1 1/2 mile and the break pressure tank was near the place which they reached by that time. Then suddenly accused 2 snatched the tiffin carrier from D 2 accused 3 caught hold of D 2 and accused 1 and 2 pushed D 1 down. Accused 1 pressed him, accused 2 tied his hands and legs with the mufflers of accused 2 and 3. Then accused 1 and 2 pulled the muffler round the neck of D 1 with a view to strangle him, D 1 fainted. Then accused 1 and 2 tied the hands of D 2 behind the back with his muffler. Then all the accused removed the covering slabs of the tank and threw both D 1 and D 2 into the tank and closed it with the slabs. They threatened P W 5 not to divulge what he had seen to anybody. They took him to the temple and made him to swear on oath to keep the matter secret. The lid of the tiffin carrier was thrown there and the chappals also were thrown nearby.

6 As to what the accused and P W 5 did thereafter there is evidence. The three accused came to the house of P W 12 at about midnight told him that they had been to the cinema and wanted to sleep at his place. They did so. P W 11 Doraiswami deposes that the usual practice followed, was for P W 5 and accused 1 to 3 to sleep in the house of the uncle of P W 11 every night. But they did not do so on the night of 18-2-1968. The above are the broad details as to the circumstantial evidence as well as the evidence of the approver for connecting the accused with a very heinous crime. The accused pleaded not guilty to the occurrence and did not examine any defence witnesses.

7 Leaving apart for a minute the evidence of the approver P W 5 which we shall presently refer to in some more detail, the rest of the evidence which is circumstantial is not sufficient to bring home the guilt of the accused beyond reasonable doubt. To begin with, the motive which arose out of a quarrel near the water tap between accused 1 and the deceased's sister-in-law appeared to be a hardly sufficient for a scheme of murder. Even in this quarrel near the water tap accused 2 is not a participant. It is accused 1 who is said to have given a threat to do something to the family of P W 4. Accused 2 is not associated with the threat. Accused 3's name is not at all mentioned as one concerned in the motive.

8. Taking the association of the deceased and the accused prior to the occurrence and at places proximate to the scene of occurrence leaving apart for a minute the evidence of the approver

P W 5 P W 9 says that at 8 p.m. he saw the accused in the company of the deceased and P W 5 at a culvert at the Coonoor road. But this culvert is 1 1/2 miles from the scene of occurrence. A reference to the sketch shows that a foot path leads for a considerable distance from the culvert to the break pressure tank. It is significant P W 9 did not notice any angry words exchanged between the two groups of people. According to him they were merely standing and talking. Regarding the incidents after the occurrence there is only inadequate evidence. According to P W 11 there is only inadequate evidence. According to P W 11 it was the usual practice of the accused and P W 5 to sleep in the house of one Thadi Karuppan the uncle of P W 11. P W 11 is a small boy aged 10 years. He states that on the particular night 18-2-1968 accused and P W 5 did not come to Thadi Karuppan's house for sleep. The evidence of P W 12 is that the accused slept in his house giving the reason that they had gone to a cinema. It is a perfectly plausible reason. It does not point to an inevitable inference that these three persons participated in a murder in the meanwhile.

8-A Now we will take up the evidence of the approver P W 5. He is related to accused 1 and 3 being a first cousin. According to his evidence he was a passive spectator of the incidents near the break pressure tank when accused 1, 2 and 3 murdered the deceased. He was arrested along with the other accused on the 20th of February two days after the occurrence. He was kept in the lock up. Thereafter to the police he gave for the first time the present version of the occurrence. Then he was taken to the Sub-Magistrate Ootacamund and before the Sub-Magistrate also he gave the statement which was recorded under Section 164 Cr P C on 13-3-1968. There also he has been given the broad details of the occurrence in the manner he had given in Court. No doubt there are certain contradictions between the earlier statements and the version of P W 5 in Court, to which we shall briefly refer to. But the point to remember is that in all these statements he had completely exonerated himself from any blame and claimed to have been only a passive spectator.

9 The question which arises therefore is whether in such circumstances P W 5 could be properly considered as an accomplice for the purpose of S 133 of the Evidence Act. The Section lays down that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. While Section 133 of the Evidence Act lays

down the above position of law, it has been long recognised that as a rule of prudence and caution, the testimony of an accomplice should be corroborated in material particulars for this purpose meaning evidence which will have relevancy both to the crime as well as to the criminal. This rule of prudence and caution is derived from the principle set out in illustration (b) to Section 114 of the Evidence Act, that Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This presumption presupposes that the witness in question is an accomplice in the sense of one who has assisted the accused in the crime in some way so that he is "tarred with the same brush" as the other accused persons, though not to the same extent. It is usual in such circumstances to rule out for the purpose of treatment as an accomplice a person who totally exculpates himself. The further question that arises is whether the same rule as to corroboration that is required in the case of an accomplice who turns approver and gives evidence for the prosecution should be insisted upon in the case of a person whose evidence discloses that he is not an accomplice at all. In such cases, apart from the provision in Section 133 and the presumption in illustration (b) to S. 114 of the Evidence Act, prior decision have laid down that the principle of caution and the requirement of corroboration on material particulars should also be applied if the circumstantial evidence calls for it.

10. Thus in *Vemi Reddy Satyanarayan v. Hyderabad State*, AIR 1956 SC 379 the concerned witness was P. W. 14 who took no part whatever in the commission of the offence or in any active or passive preparation for the same. He was not a participis criminis. After securing his release from his temporary masters he went away with his father to his village. He did not divulge the secret of the murder to anyone except his own father. The Supreme Court observed that though he was not an accomplice the Court would still want corroboration on material particulars as he was the only witness to the crime and as it would be unsafe to hang the accused on his sole testimony unless the Court was convinced that he was speaking the truth.

11. In *Hafijuddi v. The Emperor*, 38 Cal WN 777 = (AIR 1934 Cal 678) it is observed

"So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission should only be relied upon to the

same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness, and that depends on all the facts and circumstances of the particular case."

12. In the present case P. W. 5 had been made to go through all the formalities of grant of pardon, before he was called on to give evidence as an approver. It is a mystery to us why all these formalities were adopted in his case, even though from the very beginning he has not implicated himself in any manner in the occurrence and claimed to be only a direct eye witness. There is a further evidence that he along with Accused 1 assisted other people in carrying the dead bodies to a safe place after they were discovered in the tank on 19-2-1968. It is only after he was arrested along with the other accused, and taken to the police lock up and kept there for sometime that he came with the version of his having been an eye witness. The version itself was given on the 20th two days after the occurrence. The belated appearance of his testimony will be a strong circumstance which will require independent corroboration of his testimony. Secondly there are several intrinsic improbabilities and suspicious features in what he has deposed. All the three accused are young people. Their ages ranging between 18 and 20. The two deceased also are 19 and 17 years of age. P. W. 5 wants us to believe that without any struggle or resistance D. 1 and D. 2 allowed themselves to be tied up by three other young men and then hurled into the break pressure tank. These young Harijans would have strongly resisted and inflicted some injuries on the bodies of their assailants at least nail marks and the like, in the ordinary circumstances. But according to P. W. 5 none of these things happened. To say the least this is improbable as well as surprising. P. W. 5 would go to the extent of saying that none of the deceased raised shouts. In Sessions Court he said that D. 1 Subban did not shout because he was unconscious. But before the police he stated that D. 1 shouted. In any event there is no reason why D. 2 should not have shouted. In the Sessions Court P. W. 5 mentioned that accused 1 and 2 attempted to strangle D. 1. But to the police P. W. 5 did not mention anything about this attempt to strangle D. 1. To the police P. W. 5 did not mention that D. 1 became unconscious. In the Sessions Court he said that D. 1. became unconscious and therefore did not shout. There are several other discrepancies as to the manner in which the actual occurrence took place between the evidence of P. W. 5 in court and his earlier statements.

The learned Sessions Judge was of the opinion that these are not material discrepancies. We are unable to agree. Considering the fact that we are required to accept the evidence of P W 5 that two apparently healthy young men allowed themselves to be tied and thrown into the tank without any struggle or protest by three other young men, these discrepancies in the evidence of P W 5 assume significance. Along with this we should take into account the fact that though P W 5 did not inculpate himself to all intents and purposes he was treated as an approver. Pardon was given to him and he was kept under arrest throughout even during the time of his giving evidence. He was therefore acting under strong pressure to give evidence according to a particular pattern. Further the occurrence took place on the night of the 18th. From the morning of 19th P W 5 was present along with the other villagers. It was not till the 20th two days later that he came forward with the present version. These are circumstances which are very strong infirmative features in his testimony. It is therefore necessary to look for independent corroboration, both as to the crime and criminal before we could accept his testimony for convicting the accused. We have referred to the circumstantial evidence in the earlier part of the judgment and expressed our conclusion that they are not sufficient to connect the accused with the crime. There was also evidence about the recovery of some items of property of the deceased persons on the information supplied by P W 5. This evidence about the place wherefrom M Os 11 and 12 were recovered places where the tiffin carrier and chappals worn by one of the deceased were recovered on the information furnished by P W 5 would amount to an awareness on the part of P W 5 of the places where these articles were concealed or thrown. But they cannot provide circumstantial evidence for connecting the particular accused with the particular offence with which they are charged. The requirements of prudence and caution make it necessary for the prosecution to supply such evidence in this case. This has not been done.

13 For the aforesaid reasons we are of the opinion that the evidence of the approver P W 5 is not in itself reliable and safe to be acted upon, that it requires material corroboration both as regards the crime and the criminal but the rest of the evidence does not afford such corroboration.

14 We therefore find the accused not guilty and acquit them and direct them to be set at liberty.

Accused acquitted

1970 Cri L J 292 (Vol 76 C N 64)
(MYSORE HIGH COURT)

NARAYANA PAI J

Annegowda and others Petitioners v
State of Mysore Respondent

Criminal Revn Petn, No 399 of 1965
D/ 28 7-1966

Criminal P C (1898), Ss 112 118 119 and 117 — Issue of notice under S 112 on information by police — Order under S 118 not possible on information — Magistrate must discharge notice — Magistrate calling fresh information from police and issuing second notice — Illegal

If after issue of a notice under S 112 on receipt of a information from police under S 107 the Magistrate entertains an opinion that a positive order under S 118 is not possible on the information already lodged he must discharge the notice under S 119 he cannot call upon the police to file further particulars or lodge fresh information with him so as to enable him to issue second notice under S 112 on the basis of such additional or further information.

(Para 4)

The scheme of the Code is complete and excludes the possibility of an argument that there is no difference in substance between the Police furnishing the Magistrate with information and the Magistrate calling for information from the Police. The initiative is necessarily left in the hands of the Police by the Code because primarily it is their duty to maintain law and order. It is unnecessary for the Magistrate to call upon the Police to lodge information with him, because if upon information lodged under S 107 he feels the necessity for further information, he can do that by calling upon the parties to adduce further evidence before him in the course of enquiry under Section 117.

(Para 3)

A C Nanjappa for Petitioners G Dayananda for State Public Prosecutor for Respondent

ORDER The Ex-Officio Magistrate at Chikmagalur issued a notice dated 20 6-1964 to the petitioners under S 112 CrI P C calling upon them to show cause why they should not be ordered to execute a bond for Rs 500/- with one surety each for a like sum of Rs 500/- for a period of one year to keep the peace. The said notice was issued by the Magistrate on receipt of a report from the Police. On receipt of the notice the petitioners appeared before the Magistrate and contended that the information disclosed was insufficient to take any action under Section 112 and connected Sections and that the Magistrate should discharge the notice. Thereupon the Magistrate called

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ed upon the Police to furnish further particulars, on receipt of which he issued a second notice, also purporting to be under Section 112, CrI. P. C. on 18-12-1965.

2. The petitioners, contending that the said procedure was irregular or illegal, moved the Sessions Judge at Chickmagalur to report the matter to the High Court for action under Sections 435 and 439 CrI P. C. The Sessions Judge thought that the second notice was or may be regarded as in the nature of an amendment of the previous notice and that the Magistrate had same powers of amendment in regard to notice as a Criminal Court has with reference to actual charges. The other points considered by him bear on the merits of the case, partly relating to the nature of the information on the basis of which notices were issued and partly relating to the length of the period fixed for the bond under the second notice amounting to an extension of the original period. He found no substance in either of them and declined to report the matter to the High Court. The petitioners have therefore approached the High Court.

3. That the Magistrate took action on receiving the information from the Police under Section 107, CrI P. C. admits of no doubt. Acting on the said information, he did issue a notice under S 112 CrI P. C. Having done so and the parties having appeared before him, it was his duty to hold an enquiry as required by Section 117 to proceed further in the matter. It is not disputed that the petitioners served with notices having appeared there was a reading out of the notice in the eye of the law which was the starting point of the enquiry. The next stage contemplated by the Code is either to make the original order absolute under Section 118 if he is satisfied that the execution of the bond is necessary for maintenance of peace or to discharge the notice under Section 119 if he is not so satisfied. There is not any provision in the group of sections dealing with this topic enabling the Magistrate to act otherwise than on information received from the Police. Section 117 relating to the enquiry, however, enables the Magistrate to take further evidence if he thinks it necessary. The scheme therefore is complete and excludes the possibility of an argument that there is no difference in substance between the Police furnishing the Magistrate with information and the Magistrate calling for information from the Police. The initiative is necessarily left in the hands of the Police by the Code because primarily it is their duty to maintain law and order. It is unnecessary for the Magistrate to call upon the Police to lodge information with him, because if upon information

lodged under S 107 he feels the necessity for further information, he can do that by calling upon the parties to adduce further evidence before him in the course of enquiry under Section 117.

4. I find therefore no basis in any of the relevant provisions of the Code of Criminal Procedure for the action taken by the Magistrate in this case in calling upon the Police to file further particulars or lodge fresh information with him and for the issue of a second notice by him on the basis of such additional or further information. The legal effect of his having done so is that on hearing the petitioners pursuant to the first notice, he did entertain the opinion that a positive order under Section 118, CrI P. C. was not possible on the information already lodged, on the basis of which the first notice had been issued. Once he came to entertain such an opinion, the clear mandate of the law is that he should have discharged the notice under S. 119 of the Code.

5. There is therefore no alternative but to interfere in revision and set aside both the notices issued by the Magistrate, the first on the basis of his own opinion that it was not possible to act upon it without further information, and the second on the ground that the Code does not empower him to issue it. I order accordingly.

Revision allowed

1970 CRI. L. J. 293 (Vol. 76 C. N. 65)
(MYSORE HIGH COURT)

AHMED ALI KHAN J

Narasappa, Accused, Petitioner v State of Mysore, Complainant, Respondent

Criminal Revn. Petn. No 173 of 1968, D/- 15-11-1968 against judgment of S. J. Raichur, D/- 31-1-1968.

Essential Commodities Act (1955), Section 7 — Mysore Food Grains (Wholesale) Dealers Licensing Order (1964) Sections 3, 2 (e) — Wholesale dealer — Who is — There must be continuity in transaction of person carrying on business of purchase, sale or storage — Order of conviction cannot be based under S. 3 for single casual solitary transaction of transportation of food grains.

The definition contained in clause (e) of S. 2 of the Mysore Food Grains Licensing Order (1964) makes it clear that a wholesale dealer is a person who engages himself in business of purchase, sale or storage for sale. The word business envisages a person who ordinarily trades in that commodity, in other words it envis-

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ages a continuity in the transaction. Consequently unless a continuity in transaction is proved by the prosecution, no order of conviction can be based under Section 3 of the order. A single casual or solitary transaction of transportation of food grains above the prescribed quantity would not amount to a business so as to warrant conviction under Section 7 of the Essential Commodities Act (1955) 1966 (2) Mys LJ 79 & AIR 1964 SC 1533 Rel on. (Paras 6-8)

Cases Referred Chronological Paras

(1966) 1966 2 Mys LJ 79 = 1966-7
Law Rep 252, Shrivallabh v
State of Mysore 8
(1964) AIR 1964 SC 1533 (V 51) =
1964 (2) Cri LJ 465 Manipur
Administration v Nila Chandra
Singh 7 8

N Santhosh Hegde for K Jagannatha
Shetty for Petitioner G M Rego for
State Public Prosecutor for Respondent.

ORDER The petitioner along with one C Hanumanthappa was convicted by the First Class Magistrate Sindhnur under Section 7 of the Essential Commodities Act for the contravention of Clause 3 of the Mysore Food Grains (Wholesale) Dealers Licensing Order 1964, and each of them were sentenced to pay a fine of Rs 200/ and in default to undergo simple imprisonment for one month

2. In an appeal, the Sessions Judge Raichur allowed the appeal of Hanumanthappa and acquitted him, but he dismissed the appeal filed by the petitioner and confirmed the decision of the Magistrate in this regard by his order dated 31st January 1968 passed in Criminal Appeal No 49/6 of 1967 on the file of his court. It is against that order of the Sessions Judge that the petitioner has preferred this revision petition.

3. The facts of the case briefly stated, are that on 4th May 1967 the petitioner and one Hanumanthappa were found transporting 75 bags of jawar in lorry No MYR 3537 and that they had no valid licence with them as required by law. The petitioner was convicted by the trying Magistrate and his conviction was upheld by the Sessions Judge as mentioned above.

4. Mr Hegde the learned counsel for the petitioner argued that both the courts below have based the conviction solely on the explanation to clause (e) of Section 2 of Mysore Food Grains (Wholesale) Dealers Licensing Order 1964 but did not record any finding with regard to the continuity of the transaction as required by law. His grievance was that the courts below were wrong in proceeding mainly on the explanation to clause (e) of Section 2 of the Order and convict-

ing the petitioner under Section 3 of the said Order.

5. There appears to be substance in the argument. Section 3 of the Mysore Food Grains (Wholesale) Dealers Licensing Order 1964 (which will be referred to as 'the order') reads

"3 Licensing of wholesale Dealers — No person shall carry on business as wholesale dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority.
Clause (e) of Section 2 of the Order defines that

Wholesale dealer' means a person engaged in the business of purchase sale or storage for sale of any one of the foodgrains in quantity of ten quintals or more at any one time or in quantity of twenty five quintals or more of all foodgrains taken together but does not include the Food Corporation of India, or a person who—

The remaining portion of clause (e) is not relevant for our purpose

6. Reading the definition contained in clause (e) it is clear that a wholesale dealer is a person who engages himself in the business of purchase sale or storage for sale. So the word "Business" envisages a person who ordinarily trades in that commodity in other words there should be a continuity in the transactions.

7. The Supreme Court in Manipur Administration v Nila Chandra Singh, AIR 1964 SC 1533 interpreting the Manipur Foodgrains Dealers Licensing Order (1953) containing substantially similar provision, observed as follows:

The definition in Cl. 2 (a) shows that before a person can be said to be a dealer it must be shown that he carries on business of purchase or sale or storage for sale of any of the commodities specified in the Schedule and that the sale must be in quantity of 100 mds or more at any one time. The requirement is not that the person should merely sell, purchase or store the foodgrains in question, but that he must be carrying on the business of such purchase sale or storage, and the concept of business in the context must necessarily postulate continuity of transactions. It is not a single casual or solitary transaction of sale purchase or storage that would make a person a dealer. If this element of continuity is ignored it would be rendering the use of the word business redundant and meaningless."

8. Now in the instant case both the trying Magistrate and also the Sessions Judge proceeded on the basis of presumption contained in the explanation to Sec-

tion 2 clause (e), and this is what the Sessions Judge has stated in the Order:

"From the above explanation it is evident that any person who stores foodgrains more than ten quintals will not only be held to be a 'Wholesale Dealer' but also would be presumed to be carrying on business as a Wholesale Dealer. That being the case, according to the Mysore Foodgrains (Wholesale) Dealers' Licensing Order, the presumption is that the said person is carrying on business as a wholesale dealer, and it is for him to rebut that presumption. In the instant case, the accused persons have been found in possession of more than ten quintals of foodgrains. Therefore, it will be presumed that they store the foodgrains for carrying on business as 'Wholesale Dealers' and it is for them to rebut that presumption, and it is not for the prosecution to prove of their being wholesale dealers."

Evidently the learned Sessions Judge misconceived the provision of the relevant law. No conviction can be based unless a finding is recorded to the effect that the petitioner was a wholesale dealer as defined in Clause (e) to Section 2 of the Order, and the Wholesale Dealer as defined in that clause means a person who is engaged in the business of purchase, sale or storage for sale. Before conviction could be ordered, the prosecution will have to establish that the petitioner was engaged in business. In other words unless continuity in transaction is proved by the prosecution, no order of conviction can be made under Section 3 of the Order. That was the principle enunciated in the decision of the Supreme Court in Manipur Administration's case, AIR 1964 SC 1533 which was followed by this court in Sri Vallabhai v. State of Mysore, 1966 (2) Mys LJ 79. The instant case is fully covered by decisions referred to above.

9. Following the principle laid down in those decisions, I hold that the order passed by the Sessions Judge is liable to be set aside, and the conviction of the petitioner under Section 7 of the Essential Commodities Act for the contravention of Section 3 of the Mysore Food Grains (Wholesale) Dealers Licensing Order, 1964 cannot be sustained.

10. This revision petition is allowed, and the conviction and sentence passed against the petitioner is set aside and the petitioner is acquitted.

Petition allowed

1970 CRI. L. J. 295 (Vol. 76, C. N. 66)

(MYSORE HIGH COURT)

A NARAYANA PAI AND

M. SANTHOSH, JJ.

M/s. New India Corporation, Petitioners v. The Director, Enforcement Directorate, Government of India and another, Respondents.

Writ Petns Nos. 1489 to 1492 of 1966, D/- 17-1-1969.

Foreign Exchange Regulation Act (1947), Ss. 23 (1), 23 (3) Proviso and 23-D (1) — Scope — Section 23 (1) does not provide for two procedures — Opportunity contemplated by Proviso to S. 23 (3) can also be afforded in course of adjudication under Section 23-D (1).

In every case of a contravention of any of the provisions of statute mentioned in S. 23 (1) of the Act, the first step that the Director of Enforcement is required by the statute to take is to institute adjudication proceedings. He is empowered or authorised by the statute to make a complaint to the Magistrate only if he considers that a more severe penalty than he can impose is called for, and such an opinion he can entertain according to the express provision contained in the statute, only when the stage in the adjudication proceedings referred to in the proviso to Section 23-D (1) is reached. The fact that the proviso to Section 23 (3) provides for a further safeguard before a complaint is made does not mean that the said safeguard dispenses with the safeguard of an initial adjudication provided under S. 23-D (1). Indeed, the opportunity contemplated by the proviso to S. 23 (3) need not necessarily be afforded by means of the issue of a notice, but can also be afforded in the course of an adjudication under Section 23-D (1). Section 23 (1) by itself does not provide for two procedures. The said sub-section does not provide for a minimum sentence in the case of an adjudication by the Director while providing for a maximum sentence in the case of a prosecution before a Magistrate. That section merely formulates and imposes penalties in respect of offences mentioned therein. AIR 1962 SC 1764 & AIR 1966 SC 1206, Foll.

(Paras 12 & 13)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 1206 (V 53) =
1966 Cri LJ 946, Union of India
v. Sukumar Pyne 5, 13
- (1962) AIR 1962 SC 1764 (V 49) =
(1963) 2 SCR 297, Shanti Prasad
Jain v. Director of Enforcement 5, 11, 13
- (1952) AIR 1952 SC 75 (V 39) =
1952 SCR 284, State of W. B.
v. Ansar Ali 7, 11

GM/HM/C811/69/AKJ/BDB

D R Venkatesh Iyer for Petitioners
B S Keshava Iyengar for Respondents
NARAYANA PAI J Messrs New India Corporation named as the petitioner in these four Writs Petitions appears to be the trade name or the name and style under which the deponent of the affidavit V V Iyer is trading. According to the affidavit except for some period between 1954 and 1958 during which there were others trading with him in partnership for the rest of the period he was trading alone as sole proprietor of the trade and business.

2 These four writ petitions are occasioned by the four notices served on the petitioners by the Director of Enforcement Directorate Ministry of Defence Government of India calling upon the petitioner to show cause why adjudication proceedings as contemplated by Section 23-D of the Foreign Exchange Regulation Act 1947 should not be instituted against him for or in respect of four alleged contraventions by him of specific provisions of said Act Sections 4 (1) 5 (1) (a) 5 (1) (d) and 9. The petitioner has presented these petitions almost immediately after the service of the said notices and he prays in each case for the issue of a writ of prohibition prohibiting the Director of Enforcement impleaded as the 1st respondent from initiating adjudication proceedings against him.

3 In support of the prayer the principal contention raised is that Sections 23 and 23 D of the Foreign Exchange Regulation Act are invalid as being violative of Article 14 of the Constitution. It is on this basis that it is contended that the proposed adjudication should not therefore be permitted to be even initiated. As the validity of the statute itself is questioned the Union of India has been impleaded as the 2nd respondent.

4 So far as the merits of the case stated in the several notices are concerned nothing is stated except that the alleged contraventions are said to have taken place several years ago and that to ask the petitioner to search for papers relating to few of the several transactions he had entered into years ago would in effect result in extreme harassment to the petitioner.

5 In the common counter affidavit filed on behalf of the respondents it is stated that the plea of invalidity of Sections 23 and 23-D of the Act raised by the petitioner is no longer available. The Supreme Court having upheld their validity in the case reported in *Shanti Prasad Jain v Director of Enforcement* AIR 1962 SC 1764 reiterated by the subsequent decision of the Supreme Court in the Union of India v Sukumar Pyne AIR 1966 SC 1206. Regarding the plea of alleged harassment it is stated in the

counter affidavit that in the circumstances such a plea is not available and that in any event the Directorate will furnish the petitioner with whatever clarification he may require to enable him to defend himself in the adjudication proceedings.

6 The only question for consideration is the alleged invalidity of the Sections 23 and 23 D of the Foreign Exchange Regulation Act.

7 Briefly stated the case of the petitioner is that the impugned sections provide for two different procedures to punish the alleged contraventions of the provisions of the statute — one under the normal Code of Criminal Procedure and the other by way of adjudication by the Director of Enforcement in accordance with the special rules prescribed therefor that the Director of Enforcement is the common authority both for the purpose of initiating adjudication proceedings under Section 23 D and regular prosecution pursuant to sub section (3) of Section 23 and that the statute is utterly devoid of any guidance to the Director in the matter of making a choice between the two proceedings. This situation, according to the argument on behalf of the petitioner is one which comes directly within the principles stated by the Supreme Court in the case of the State of West Bengal v Ansar Ali AIR 1952 SC 75.

8 Portions of Section 23 which are relevant to the argument are—

'23 (1) If any person contravenes the provision of S 4 S 5 Section 9 Section 10 sub-section (2) of Section 12, Section 17 Section 18 A or Section 18-B or of any rule direction or order made thereunder he shall —

a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place or five thousand rupees whichever is more as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

b) upon conviction by a court be punishable with imprisonment for a term which may extend to two years, or with fine or with both

xx	xx	xx
xx	xx	xx

23 (3) No court shall take cognisance—

a) of any offence punishable under sub-section (1) except upon complaint in writing made by the Director of Enforcement.

xx	xx	xx
xx	xx	xx

Provided that where any such offence in the contravention of any of the provisions of this Act or any rule direction or order made thereunder which prohibits the doing of an act without permission.

no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

Section 23-D (1) which is relevant to the argument reads:

"23-D (1) For the purpose of adjudging under clause (a) of sub-section (1) of section 23 whether any person has committed a contravention the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if, on such enquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as thinks fit in accordance with the provisions of the said Section 23:

Provided that if, at any stage of the enquiry the Director of Enforcement is of the opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing any penalty himself, make a complaint in writing to the court"

9. The manner in which adjudication proceedings under Section 23-D should be held is prescribed under what are called the Adjudication Proceeding and Appeal Rules, 1957. Among other things the rules provide that in taking evidence the Director is not bound to observe the provisions of the Indian Evidence Act. The rules provide for regulation of procedure of the Appellate Board constituted under Section 23-E. They conclude with savings to the effect—

"Rule 12 Savings — Nothing in these rules shall be considered as preventing the Director from making a complaint in writing to the court under the proviso to sub-section (1) of Section 23-D of the Act instead of imposing any penalty himself"

10. The argument, is, first, that sub-section (1) of Section 23 itself enables recourse being had to one of the two different procedures; second, that the choice between two has to be made at the very inception when the Director of Enforcement considers that there is a contravention of any of the provisions of the statute mentioned in sub-section (1) of section 23, calling for action being taken, third, that a complaint by the Director of Enforcement under clause (a) of sub-section (3) of Section 23 is quite different from a complaint which he may make under the proviso to sub-section (1) of Section 23-D, and that that the two are different is obvious from the fact that a complaint under Section 23 (3) (a) has in certain cases necessarily to be preceded by the previous opportunity mentioned in the proviso to section 23 (3).

11. We may at once state that it is not the contention that if section 23-D

(1) alone is taken into account, there is anything in it to render it invalid as being violative of Article 14 of the Constitution. Indeed, no such contention can at all be raised in view of the express decision of the Supreme Court in the case of Shanti Prasad Jain, AIR 1962 SC 1764. In paragraph 7 of the judgment which occurs at page 1768 of the report, their Lordships state:

"It is not disputed by the appellant that the subject matter of the legislation viz, Foreign Exchange, has features and problems peculiarly its own, and that it forms a class in itself. A law which prescribes a special procedure for investigation of breaches of foreign exchange regulations will therefore be not hit by Article 14 as it is based on a classification which has a just and reasonable relation to the object of the legislation. The vires of Section 23 (1) (a) is accordingly not open to attack on the ground that it is governed by a procedure different from that prescribed by the Code of Criminal Procedure. That indeed is not controverted by the appellant. That being so, does it make any difference in the legal position that Section 23-D provides for transfer by the Director of Enforcement of cases which he can try, to the court? We have not here, as in 1952 SCR 284 = AIR 1952 SC 75 a law, which confers on an officer an absolute discretion to send a case for trial either to a court or to a Magistrate empowered to try cases under a special procedure. Section 23-D confers authority on the very officer who has power to try and dispose of a case to send it on for trial to a court, and that too only when he considers that a more severe punishment than what he is authorised to impose, should be awarded. In a judicial system, in which there is a hierarchy of courts or tribunals, presided over by Magistrates or officers belonging to different classes, and there is a devolution of powers among them graded according to their class, a provision such as Section 23-D is necessary for proper administration of justice. While on the one hand a serious offence should not go without being adequately punished by reason of cognisance thereof having been taken by an inferior authority, the accused should on the other hand have in such cases the benefit of a trial by superior court. That is the principle underlying Section 349 of the Criminal Procedure Code, under which Magistrates of the second and third class, are empowered to send the case for trial to the District Magistrate or sub-divisional Magistrate, when they consider that a more severe punishment than they can inflict is called for. In our view the power conferred on the Director of Enforcement under Section 23-D to trans-

fer cases to a court is not unguided or arbitrary and does not offend article 14 and Section 23 (1) (a) cannot be assailed as unconstitutional'

This paragraph, Mr Venkatesh Iyer for the Petitioner says confines its attention to the position as under Section 23 D In the situation contemplated by Section 23-D he concedes as he has to the proviso to the sub section (1) thereof contains the clearest guidance to the Director of Enforcement in making the choice between continuing his adjudication proceedings to their conclusion or sending the case to a Magistrate by means of a complaint The distinction however which he wants to make is that the complaint referred to in the proviso to Section 23D (1) is quite different from the complaint under the proviso to Section 23 (3) (a)

12 It seems to us that even this argument has been made unavailable by the same ruling of the Supreme Court In the immediately preceding paragraph 6 of the same page 1768 their Lordships observe

'It will be seen that when there is a contravention of section 4 (1) action with respect to it is to be taken in the first instance by the Director of Enforcement He may either adjudge the matter himself in accordance with Section 23 (1) (a) or he may send it on to a court if he considers that a more severe penalty than he can impose is called for'

This observation in our opinion, clearly means that in every case the first step that the Director of Enforcement is required by the statute to take is to institute adjudication proceedings He is empowered or authorised by the statute to make a complaint to the Magistrate functioning under the Code of Criminal Procedure only if he considers that a more severe penalty than he can impose is called for and such an opinion he can entertain according to the express provision contained in the statute only when the stage in the adjudication proceedings referred to in the proviso to Sec. 23 D (1) is reached. If the only officer on a complaint by whom alone a criminal court can take cognizance of an offence punishable under Sub sec (1) of S 23 is the Director of Enforcement and if the said officer is empowered to make such a complaint only if he considers that his own powers of punishment are inadequate to meet the situation or the gravity of the offence and the statute makes provision for the manner in which he can come to entertain such an opinion, then, there can be no doubt whatever that the first step which the Director of Enforcement is required by the statute to take is to institute adjudication proceedings under Section 23 D The fact that the

proviso to Section 23 (3) provides for a further safeguard before a complaint is made does not mean that the said safeguard dispenses with the safeguard of an initial adjudication provided under S 23D (1) Indeed the opportunity contemplated by the proviso to Section 23 (3) need not necessarily be afforded by means of the issue of a notice but can also be afforded in the course of an adjudication under Section 23-D (1)

13 It is also not correct in our opinion to say that Section 23 (1) by itself provides for two procedures That section merely formulates and imposes penalties in respect of offences mentioned therein In other words the contraventions of sections specified therein are made punishable offence by it That the said sub section does not provide for a minimum sentence in the case of an adjudication by the Director while providing for a maximum sentence in the case of a prosecution before a magistrate is the view expressed by the Supreme Court in the subsequent case of Durga Prasad (Sukumar Pyne)? AIR 1966 SC 1206 at p 1209 The said case followed and applied the previous decision in the case of Shanti Prasad Jain, AIR 1962 SC 1764

14 We are therefore of the opinion that the contentions now raised by the petitioner are fully concluded against him by the said two rulings of the Supreme Court

15 All the four writ petitions are therefore dismissed

16 The petitioner will pay the costs of the respondents one set which we fix at a lump sum of Rs 200/

Petitions dismissed

1970 CRI L J 298 (Vol 76 C N 67)
(ORISSA HIGH COURT)

A. MISRA, J

Purna Chandra Parida and others Petitioners v Ganeswar Parida, Opposite Party

Criminal Revn. No 137 of 1967 D/
28-8-1969 from order of Addl. S J Puri.
D/- 20-1-1967

(A) Evidence Act (1872) S 5—Interest ed witnesses — Credibility

Interestedness of witnesses even if proved will not justify rejection of their evidence in toto though it may necessitate scanning their evidence more carefully and with caution

(Para 4)

(B) Penal Code (1860) S 447 — Conviction under — Essentials — Absence of

KM/KM/F238/69/DRR/M

finding as regards intent under S. 441 — Effect.

Every trespass by itself is not criminal. To constitute criminal trespass, the prosecution has to prove and the Court has to give a finding on the evidence that the trespass was committed with one of the intents enumerated in Section 441 I P C. The trial court while convicting an accused for an offence under S 447 I. P. C. must apply its mind to this aspect and come to a specific finding as to whether the accused committed trespass, and if so, if it was with one of the requisite intents. (Para 6)

In the absence of any such finding, the conviction under section 447 I. P. C. cannot be sustained simply because some assault was committed on the complainants (Para 6)

R. C. Patnaik, for Petitioners; N. K. Mukherjee, for Opposite Party

ORDER: Each of the four petitioners has been convicted u/s 447 and 323 I P C. and sentenced to fine of Rs. 30/- and Rs 40/- respectively, and in default, to undergo S I. for fifteen days on each count

2. Petitioners nos 1 and 2 are sons of petitioner no 4 and petitioner no 3 is their cousin. According to the complainant (P. W. 2), on 28-3-64, petitioner no 1 entered his bari which is plot no 933 and was about to climb and pluck cocoanuts from his tree. On protest, himself and his cousin (P. W. 5) were assaulted by all the petitioners P. Ws. 2 and 5 were treated by the doctor in Nima-para for some days, thereafter they came to Puri where they received further treatment and then filed the complaint petition. Petitioners, in defence, deny the occurrence and allege that out of existing enmity P. W. 2 has filed a false case against them and other P. Ws. have falsely deposed. The courts below accepting the testimony of the P. Ws convicted and sentenced the petitioners, as stated above

3. The convictions are assailed mainly on two grounds. Firstly, it is contended that the courts below erred in placing reliance on the testimony of P Ws 3 and 4 in spite of proof of their interestedness. Secondly, it is contended that the conviction u/s 447 I P C is bad in law in the absence of a finding that all or any of the petitioners committed criminal trespass

4. It has no doubt been elicited during cross-examination of P. Ws. 3 and 4 that the former's father has filed an O T. R case against petitioner no 2 and petitioner no. 4 has filed a case against the father of P W. 4. Both the courts below have noticed these facts, while

considering the evidence. These P. Ws. who claim to have witnessed the occurrence have deposed about different petitioners committing assault. Merely because each of them may have some bias against individual accused, it will not justify rejection of their evidence as they have no ostensible reason for deposing against the others. Further, interestedness, even if proved, will not justify rejection of their evidence in toto, though it may necessitate scanning their evidence more carefully and with caution. In the present case, these two P. Ws. have corroborated P. Ws 2 and 5, the victims of the assault. The Courts below have accepted their testimony and I find no valid reason to differ from the assessment of the evidence by them. Thus, there is no merit in the first contention.

5. Each of the petitioners has been convicted u/s 323 I P C for causing hurt to P Ws 2 and 5 and each of them has also been convicted u/s 447 I P. C for having committed criminal trespass. It is contended by learned counsel for petitioners that the conviction u/s 447 I P C. is not sustainable in the absence of a finding that the trespass was with one of the intents enumerated in Section 441 I P. C. In my opinion, there is considerable force in this contention

6. Every trespass by itself is not criminal. To constitute criminal trespass, the prosecution has to prove and the Court has to give a finding on the evidence that the trespass was committed with one of the intents enumerated in Section 441 I P. C. Neither of the courts below appears to have applied its mind to this aspect nor come to a specific finding as to whether all the petitioners committed trespass, and if so, if it was with one of the requisite intents. Not a single question has been put to any of the petitioners during their examination u/s 342 Cr. P. C. as to whether they committed the trespass with intent to annoy, assault, etc. The learned Additional Sessions Judge has not given any finding on this question, while the trying Magistrate has made a vague observation that petitioners trespassed into the land of P W 2 to cause him annoyance. Learned counsel for opposite party contends that when petitioners entered into P. W. 2's land and assaulted him, obviously the trespass was committed with the intention of committing an offence. There is no finding to that effect by either of the courts below. In the absence of any such finding, the conviction u/s 447 I P. C cannot be sustained simply because some assault was committed on P. W 2 and 5. The conviction and sentence u/s 447 I P. C are therefore set aside.

7. In the result, the revision is allowed in part. While maintaining the con-

viction and sentence passed against each of the petitioners u/s 323 I P C the conviction and sentence passed against each of them u/s 447 I P C are set aside
Revision allowed in part

1970 CRI L J 300 (Vol 76, C N 68) =
AIR 1970 RAJASTHAN 32 (V 57 C 6)
B P BERI J

Manglaram Petitioner v State of Rajasthan
Opposite Party

Criminal Revn No 23 of 1968 D/ 10-2
1969 against order of City Magistrate Jodhpur D/ 11 12 1967

Rajasthan Armed Constabulary Act (12 of 1950) Ss 6(c), 4 and Schedule — Scope — S 4 is mandatory — Statement under S 4 signed by constable of Rajasthan Armed Constabulary — Constable not knowing English — Statement neither explained to him nor attested by person of requisite rank — Constable committed to trial on charge under S 6 (e) — Commitment illegal — (Civil P C (1908) Preamble — Interpretation of Statutes — Mandatory provision — Determination)

Section 4 of the Rajasthan Armed Constabulary Act is mandatory. Where a constable not knowing English signs a statement under S 4 but that statement is neither explained to him nor it is attested by a person of the requisite rank and he is committed to trial on a charge under S 6(e) the commitment is illegal (Paras 15 and 16)

In determining the effect of such failure to explain and attest that statement on his commitment first the legislative intent is to be ascertained (Para 9)

Under S 4 it is not open to a member to be enrolled in the constabulary to sign a declaration in any words that he likes. Even the form is prescribed as a part of the statute. The condition in that statement that the member will not be entitled to obtain discharge at his own request is evidently a condition different from the ordinary contracts of master and servant. To ensure that the executant understood its legal implications the Legislature has prescribed that the executant shall sign it in acknowledgment of that statement having been read over to him and if necessary it shall be explained to him. In addition the making of an endorsement to the effect that the declaration had been signed in the presence of an officer of a requisite rank evidencing the fact that he had ascertained that the executant had understood the purport of what he had signed, has also been prescribed. This important function of attestation has not been entrusted to any English knowing person capable of translating the purport of the statement but the official ranks qualified to attest have also been laid down. Trust

for this duty has thus been reposed only on officers of specified status. Perhaps the legislature wanted to impart solemnity to the transaction. In this view an attestation by an Inspector is clearly contrary to the law (Para 10)

Where a heavy penalty by way of liability is imposed the requirements of the law can not be construed as merely directory. For certain acts and omissions under S 6, a member of the constabulary is liable to heavy punishment. The severe penalty under S 6 is the liability of a person fulfilling certain requirements of law and it can be inflicted only if he is an officer of the constabulary duly appointed under the Act. Under S 4 the appointment of a person to the constabulary is dependent on his signing and attestation of the declaration as given in the schedule. Thus on the plain language of the statute as well as on the principles guiding the courts in determining what is directory or mandatory it is not correct to call a lack of proper attestation a mere technicality. Section 4 is thus mandatory. There is no reason why the steps intended to be taken before a person is subjected to liabilities should not be rigorously observed. Sutherland on Statutory Construction, Third Edition Vol 3 p 77. Craies on Statute Law, Sixth Edition p 63 and Maxwell on "Interpretation of Statutes" Eleventh Edition p 364. Rel on AIR 1961 SC 1494 Ref (Paras 12 13 14 15 and 16)

Cases	Referred:	Chronological	Paras
(1964) AIR 1964 Raj 17 (V 51) =			
ILR (1963) 13 Raj 1063, Jain Bros and Co Bundi v State of Rajasthan			4
(1961) AIR 1961 SC 1494 (V 48) =			
1961 (2) Cr LJ 696 M V Joshi v M U Shumpi			3 15
(1957) AIR 1957 SC 912 (V 44) =			
1953 SCJ 150 State of U P v Manbodhanlal Srivastava			5
S D Rajpurohit for Petitioner M L Shrivastava Dy G A for the State			

ORDER This criminal revision application is directed against the order dated the 11th December 1967 passed by the City Magistrate Jodhpur. The petitioner prays for the quashing of the order of his commitment to face a trial under S 6(e) of the Rajasthan Armed Constabulary Act 1950, hereinafter called the Act.

2. The circumstances which have led up to this application briefly stated are these. Manglaram applicant was appointed as a constable in the Rajasthan Armed Constabulary (RAC) on the 20th of June, 1963. On the 10th of October 1964 he was attached to the 5th Battalion stationed at Jodhpur when he absented from duty. His case is that he had orally taken permission to leave the service from the Platoon Commander whereas the case of the prosecution is that he absented without leave. It is not in dispute that on the 11th of October 1964, he

joined as a soldier in the Indian Army. On the 13th of October, 1964, a first information report was lodged at the Police Station, Udaimandir, Jodhpur, against Manglaram for his having deserted the R. A. C. He came to be arrested on the 15th of May, 1966, while he was still in service in Jammu and Kashmir where he was stationed as a member of the Indian Army, and on that very day he was discharged from that service.

Enquiry was made against him by the City Magistrate, Jodhpur, and it was urged on his behalf that he was not an officer of the R. A. C. as defined in S. 2(3) of the Act as he did not sign any statement as required by S. 4 of the Act because there was no attestation by the appropriate authority as envisaged by the said provisions, and therefore, he was not an officer liable to be prosecuted for an offence under S 6 (e) of the Act. The learned Magistrate framed a charge under S 6(e) of the Act, and committed Manglaram to face his trial before the Sessions Judge, Jodhpur, holding that the plea of the applicant was merely a technical one. Against that order he has come up in revision before me.

3. Mr. S. D. Rajpurohit appearing on behalf of the applicant has submitted that for the sake of argument let it be assumed that Manglaram had signed his statement as required by Section 4 of the Act, but the said statement was not explained to him and duly attested by anyone of the authorities mentioned in Section 4 of the Act. Assuming again, the learned counsel submitted that Shri Amarsingh explained and attested the said statement signed by Manglaram, Shri Amarsingh being only of the rank of an Inspector, was not competent to attest it, as required by the provisions of Section 4 of the Act, and therefore, Manglaram did not come to acquire the status of a member of the Rajasthan Armed Constabulary and could not incur the liability laid down by Section 6 of the Act. His further submission is that Section 6 of the Act is a penal provision which must be strictly construed. He relied on *M. V. Joshi v. M. U. Shumpi*, AIR 1961 SC 1494.

4. Mr. Rajpurohit also submitted that the expression "Officer of the Rajasthan Armed Constabulary" is an expression which should be given the same meaning as envisaged by the definition clause, and in support of this argument, he relied on *Jain Bros and Co. Bundi v. State of Rajasthan*, ILR (1963) 13 Raj 1063 = (AIR 1964 Raj 17).

5. Mr. Mohanlal Shirmal, Deputy Government Advocate argued that the provisions of Section 4 are merely directory and not mandatory notwithstanding the fact that the word "shall" has been employed therein. He relied on *State of U. P. v. Manbodhanlal Srivastava*, AIR 1957 SC 912. He further submitted that the fact that Manglaram did not run away from the service out of cowardice

may influence the eventual punishment that may be awarded to him because he joined the Army and remained in an area which was critical in view of the Indo-Pakistan conflict in 1965 but merely because the statement was attested by a person inferior in rank to those mentioned in Section 4, he could not escape the liability as envisaged by Section 6 of the Act. He submitted that attestation was merely intended to facilitate the recall to the mind of the witness for the purposes of evidencing the fact that Manglaram had signed a statement as required by Section 4 of the Act. In this view of the matter, Manglaram should face his trial and this is not a fit case for quashing the commitment order.

6. Let me examine the provisions of law which require consideration.

7. Section 2(3) of the Act defines an "Officer of the Rajasthan Armed Constabulary" as follows.

"'Officer of the Rajasthan Armed Constabulary' means a person appointed to the Rajasthan Armed Constabulary under this Act, who has, in accordance with the provisions of this Act, signed a statement, in the form given in the Schedule"

8. Section 4 of the Act reads as follows: "Enrolment and discharge of officers of the Rajasthan Armed Constabulary. Before any person whether already enrolled in the Rajasthan Police Force or not so enrolled, is appointed to be an officer of the Rajasthan Armed Constabulary, the statement in the schedule shall be read, and if necessary, explained to him by a Magistrate, Inspector-General, Deputy Inspector General, Commandant, or Assistant Commandant, shall be signed by him in acknowledgment of its having been so read and explained to him and shall be attested by the Magistrate, Inspector-General, Deputy Inspector General, Commandant, or Assistant Commandant, as the case may be"

The statement mentioned in Section 4 reads as follows:

"STATEMENT

(See Section 4)

At no time during the period of your service in the Rajasthan Armed Constabulary, you will be entitled to obtain your discharge at your own request. On the liquidation of the force or of the battalion in which you may for the time being be posted, you will be discharged from the Rajasthan Armed Constabulary and, unless you were already a confirmed member of the Rajasthan Police Force before joining the Rajasthan Armed Constabulary, from the Rajasthan Police also (you will, however, be eligible for re-enlistment in the Rajasthan Police Force). In the event of your continuing in the Rajasthan Police Force or your re-enlistment therein, your services in the Rajasthan Armed Constabulary will count for promo-

tion and pension in the Rajasthan Police Force

Signature of Police Officer in acknowledgment of the above having been read over to him

Signed in my presence, after I had ascertained that _____ understood the purport of what he signed

Magistrate Inspector General Deputy Inspector General Commandant or Assistant Commandant

*This portion in brackets will be deleted in the case of officers who are already members of the Rajasthan Police Force on joining the Rajasthan Armed Constabulary. It is common ground that the petitioner did sign a statement as required by Section 4. Mere reading over to him of the declaration would have served no purpose because the petitioner did not know English. It had to be explained to him and attested by a person of the requisite rank. This was not done. What is the effect of this failure on his prosecution for desertion is the point which falls for consideration?

9 In determining the aforesaid question as indeed all questions of statutory constructions the first object is to ascertain the Legislative intent. What Section 4 lays down is that before any person is appointed to be an Officer of the R A C the statement in the Schedule shall be read and if necessary explained to him by a Magistrate Inspector General Deputy Inspector General etc and shall be signed by him in acknowledgment of its having been so read and explained to him and it shall further be attested by the Magistrate Inspector General Deputy Inspector-General Commandant or Assistant Commandant as the case may be

10 It is not open to a member to be enrolled in the Rajasthan Armed Constabulary to sign a declaration in any words that he likes. The Legislature has prescribed even the form as a part of the statute. The language of the declaration, inter alia provides that at no time during the period of service of the executant in the force he will be entitled to obtain his discharge at his own request. It is evidently a condition different from the ordinary contracts of master and servant. In order to ensure that the executant has understood its legal implications the Legislature prescribes that the executant shall sign it in acknowledgment of the above having been read over to him and if necessary explained to him

Not content with this the Legislature probably having regard to the large percentage of illiteracy in our country has prescribed an endorsement to the effect that the aforesaid declaration has been signed in the presence of an officer of a requisite rank evidencing the fact that he has ascertained that the executant had understood the purport of what he had signed. This important function of attestation again has not been entrusted to any English knowing person, capable of

translating the purport of the statement, but the Legislature has further laid down the official ranks of the persons who alone are qualified to attest. In doing so the Legislature reposed trust for this duty only on officers of specified status and has apparently declined to trust the linguistic attainments of an ordinary person. Perhaps the Legislature intended to impart an element of solemnity to the transaction. In this view of the matter an attestation by an Inspector is clearly contrary to the law.

11 The learned Deputy Government Advocate urged that it should be treated as merely directory and not mandatory. Let me recall the principles which guide Courts in determining what is directory and what is mandatory. In Sutherland "Statutory Construction" Third Edition, Volume 3 at page 77 it is observed as follows:

"No statutory provisions are intended by the legislature to be disregarded but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. In doing so they must necessarily consider the importance of the literal and punctilious observance of the provision in question to the object the legislature had in view. If it is essential it is mandatory and a departure from it is fatal to any proceeding to execute the statute or to obtain the benefit of it."

Sutherland further says at the same page:

"The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of or omission to adhere to statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid acts or proceedings pursuant to the statute or rights powers privileges or immunities claimed thereunder. If the violation or omission is invalidating, the statute is mandatory if not it is directory."

Craies on "Statute Law", Sixth Edition at page 63 says:

"When a statute is passed for the purpose of enabling something to be done and prescribes the formalities which are to attend its performance those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute but those which are not essential and may be disregarded without invalidating the thing to be done are called directory."

12 A broad survey of the relevant statute is proper and profitable at this stage. Under Section 5 of the Act, every member of the R A C shall upon his appointment and as long as he continues to be a member thereof be deemed to be a police officer and subject to any terms conditions and restrictions as may be prescribed, to have

and be subjected to in so far as they are not inconsistent with this Act or any rules made thereunder, all the powers, privileges, liabilities, penalties, punishments and protection as a Police Officer duly enrolled under the Police Act, 1861. For certain acts and omissions under S. 6, he is liable to heavy punishment. Relevant portion of S. 6 reads as follows.

"An officer of the Rajasthan Armed Constabulary, who—

(a)

(b)

(c)

(d)

(e) deserts the service;

shall on conviction, be punished with transportation for life or with imprisonment for a term which may extend to fourteen years and shall be liable to fine."

13. Thus when a person is appointed as an Officer of the R. A. C., he acquires certain rights, privileges and liabilities under the Act as well as under the Police Act. Desertion from duty for which the petitioner before me is facing his trial is punishable with transportation for life or 14 years rigorous imprisonment. The liability arises only if he is an Officer duly appointed under the Act.

14. In this connection, it will be relevant to remember what Maxwell has to say in his "Interpretation of Statutes", Eleventh Edition at page 364:—

"Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature."

Where heavy penalty by way of a liability is imposed, I have no ground to construe the requirements of the law as merely directory.

15. In AIR 1961 SC 1494 (supra) their Lordships of the Supreme Court have observed.

"When it is said that all penal statutes are to be construed strictly it only means that the court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt, the construction favourable to the subject should be preferred. But these rules do not in any way

affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the court is bound to accept the expressed intention of the legislature."

According to the language of S. 4, the appointment of a person to the Rajasthan Armed Constabulary is dependent on his signing and attestation of a declaration as set out in the schedule to the Act. The penalties under S. 6 can only be inflicted if a person is an officer of the Rajasthan Armed Constabulary. The severe penalty envisaged by Section 6 of the Act is the liability of a person who fulfils certain requirements of law. Thus on the plain language of the statute as well as on the principles I have set out above, it is not correct to call the lack of proper attestation as a mere technicality. The legislature intended certain steps to be taken before a person could be subjected to the liabilities. The liability in this case is severely penal. There is no reason why it should not have been rigorously observed. The provision is mandatory.

16. Accordingly on the aforesaid point of law I quash the order of commitment. The revision application is allowed.

Petition allowed.

1970 CRI. L. J. 303 (Vol. 76, C. N. 69) ==

AIR 1970 JAMMU & KASHMIR 31

(V 57 C 8)

JASWANT SINGH J.

Anant Ram and another, Petitioners v. Chairman, Panchayati Adalat, Tehsil, Hira-Nagar and others, Opposite Party.

Writ Petn. No. 167 of 1968, D/- 13-3-1969

Penal Code (1860), S. 430 — Offence under, read with Jammu and Kashmir Village Panchayat Act (23 of 1958), S. 72 — Imposition of recurring fine is illegal — Proper course in case of continuing breach is to issue notice to accused for days during which breach continued, afford opportunity to defend himself and in case offence is proved, punish him according to law: (1900) ILR 27 Cal 565 and (1910) ILR 37 Cal 671 & AIR 1924 Nag 66 & AIR 1925 Pat 322 & AIR 1926 Lah 248 & AIR 1965 Punj 232, Rel. on.

(Para 7)

Cases Referred: Chronological Paras-

(1965) AIR 1965 Punj 232 (V 52) =

67 Pun LR 134, Jai Singh Pyara Singh v. Gram Panchayat Singhanwala

7

(1926) AIR 1926 Lah 248 (V 13) =

27 Cri LJ 465, Aisha v. Emperor

7

GM/IM/D38/69/RSK/D

(1925) AIR 1925 Pat 322 (V 12) =
 25 Cri LJ 1357 Pancham Sao v
 Emperor
 (1924) AIR 1924 Nag 66 (V 11) =
 24 Cri LJ 318 Baburao v
 Nagpur Municipal Committee
 (1910) ILR 37 Cal 671 = 11 Cri LJ
 540 Nilmani Ghatak v Emperor
 (1900) ILR 27 Cal 565 Ram Krishna
 Biswas v Mohendra Nath

R N Bhargotra for Petitioners V S
 Malhotra, for Opposite Party

ORDER This is a petition for issue of a writ of certiorari quashing the order of the Panchayati Adalat, Bhaya Tehsil Hiranagar dated 10-8-1966,

2 The facts material for the purpose of this petition are

On 9-8-1964 one Ram Chand filed a complaint before the Panchayati Adalat Bhaya alleging therein that Anant Ram and Mulk Raj petitioner and respondent No 3 respectively herein had committed an offence punishable under Section 430 R P C by obstructing the water channel which irrigated his land. On receipt of the complaint the accused were summoned by the said Panchayati Adalat and after protracted proceedings the Panchayati Adalat vide its order dated 5-12-1965 acquitted Mulk Raj but convicted Anant Ram under the aforesaid section of the Ranbir Penal Code and sentenced him to a fine of Rs 25. Against this order the petitioner went up in appeal to the Sessions Judge Kathua who vide his order dated 30-5-1966 upheld the conviction and sentence and dismissed the appeal. As the petitioner did not remove the obstruction a notice again appears to have been issued to him by the Panchayati Adalat to remove the obstruction, and on his refusing to do so the Panchayati Adalat vide its order dated 10-8-1966 imposed on him a recurring fine of Rs 2 per diem till he removed the obstruction. It is this order which the petitioner has challenged by means of this writ petition.

3 Notice with regard to this petition was issued to the respondents who have appeared through Shri V S Malhotra.

4 The respondents have contested the petition inter-alia on the grounds that the petition is not maintainable as another alternative remedy is open to the petitioner and the impugned order is warranted by the provisions of the Jammu and Kashmir Village Panchayat Act, 1958 hereinafter referred to as the Act.

5 Appearing for the petitioner Shri Bhargotra has contended before me that the order of the Panchayati Adalat imposing a recurring fine on the petitioner is not warranted by any provision of law. Shri Malhotra has on the other hand contended that the impugned order can be

passed under Sections 46 121 and 125 of the Act.

6 I have gone through the aforesaid provisions of law relied upon by Shri Malhotra and I am of the opinion that though under Section 72 of the Act the Panchayati Adalat can convict a person for an offence contrary to Section 430 R P C to wit when he commits mischief by doing an act which causes or which he knows to be likely to cause a diminution of the supply of water for agricultural purposes i.e. when he mischievously cuts off another person's water supply for cultivation, the order of the nature made on 10-8-1966 imposing continuing fine could not be passed as the same cannot be traced to any provision of law.

7 It is now well settled that the imposition of continuing fine cannot be prospective but can only follow on proof that the offence has been committed. A sentence of daily fine for offence which may be committed in future is illegal. It is in fact imposition of fine in anticipation of commission of an offence which cannot be done. Reference in this connection may be usefully made to (1900) ILR 27 Cal 565 where it was held as follows—

An order for payment of a daily fine is illegal inasmuch as it is in adjudication in respect of an offence which has not been committed when such order is passed.

Again in (1910) ILR 37 Cal 671 it was held—

"A sentence of daily fine in anticipation of a continuing offence which may be committed after the date of the proceeding in which it was passed is illegal."

Again in AIR 1924 Nag 66 it was held as follows—

"Since no person can be punished for a thing he has not done but may possibly do in the future or is even likely to do in future a daily fine until the accused complies with the order passed against him is illegal."

Then again in AIR 1925 Pat 322 it was observed—

"It is not permissible in law to impose a daily fine in anticipation of a commission of an offence."

Reference in this connection may also be usefully made to another decision reported in AIR 1926 Lah 248. The position that the Panchayati Adalat cannot impose a recurring fine would also be clear from a decision of the Punjab High Court in Jai Singh Pyara Singh v Gram Panchayat Singhanwala AIR 1965 Punj 232 wherein it has been held as follows—

"The imposition of recurring fine on an offender on his first conviction for the breach of the provisions of Section 21 of the Punjab Gram Panchayat Act is illegal as it tantamounts to imposing fine for an offence not yet committed which cannot be done. In a case of this type the course

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—S 128—Detention of diamonds under S 80 — Subsequent seizure of diamonds under S 110 — Writ petition challenging order of seizure — Held contention that provisions in the Act for appeal and revision against any action taken under the Act barred petition could not be accepted — See Customs Act (1962) S 80

Delhi 417 D (C N 94)

—S 130—Detention of diamonds under S 80 — Subsequent seizure of diamonds under S 110 — Writ petition challenging order of seizure — Held contention that provisions in the Act for appeal and revision against any action taken under the Act barred petition could not be accepted — See Customs Act (1962) S 80

Delhi 417 D (C N 94)

—S 131—Detention of diamonds under S 80 — Subsequent seizure of diamonds under S 110 — Writ petition challenging order of seizure — Held contention that provisions in the Act for appeal and revision against any action taken under the Act barred petition could not be accepted — See Customs Act (1962) S 80

Delhi 417 D (C N 94)

Defence of India Act (51 of 1962)

—Ss 1 and 3 — Act enacted by Parliament on 12-12-1962 and the Defence of India Rules 1962 framed under Section 3 extend to the whole of India including the territory of Goa Daman and Diu which became part of India with effect from 20-12-1961 by virtue of Section 2, Constitution (Twelfth Amendment) Act 1962 — No express extension of the Act and the Rules to those territories was necessary as in the case of pre-liberation laws in force

Goa 421 C (C N 93)

—S 1 (3) — Prosecution under R 126-P Defence of India Rules 1962 started in 1962 is not in any way affected by expiry of Act due to revocation of proclamation of emergency on 10-1-1968 under Article 352 (2) (a) of Constitution in view of Section 1 (3)

Goa 421 E (C N 95)

—S 3 — Act enacted by Parliament on 12-12-1962 and the Defence of India Rules 1962 framed under S 3 extend to the whole of India including the territory of Goa, Daman and Diu which became part of India with effect from 20-12-1961 by virtue of S 2 Constitution (Twelfth Amendment) Act (1962) — No express extension of the Act and the rules to

Defence of India Act (contd.)

those territories was necessary as in the case of pre-liberation laws in force — See Defence of India Act (1962), S 1

Goa 421 C (C N 95)

—S 43 — Rule was added by Defence of India (Seventh Amendment) Rules 1963 on 24-6-1963 — Offence under R 126-P committed in Goa on 25-6-1963 — Offence is triable summarily by a Magistrate in accordance with procedure prescribed in Chap 22, Criminal P. C (1898) and not by the Portuguese Criminal P. C by virtue of R 126-P (4) read with S 43 Defence of India Act — Object of this rule is speedy trial in a summary way of offences relating to contravention for which penalties are provided in R 126-P — See Defence of India Rules, (1962), R 126-P (4)

Goa 421 B (C N 95)

Defence of India Rules (1962)

—S 126-J — Pendency of appeal before Administrator under R 126-J has no bearing on validity of prosecution for offence under R 126-P — See Defence of India Rules (1962), R 126-P

1970 Cri LJ 421 (Goa)

—R. 126-P (4) — Rule was added by Defence of India (Seventh Amendment) Rules, 1963 on 24-6-1963 — Offence under Rule 126-P committed in Goa on 25-6-1963 — Offence is triable summarily by a Magistrate in accordance with procedure prescribed in Chapter 22, Criminal P. C (1898) and not by the Portuguese Cri P. C. by virtue of R. 126-P (4) read with Section 43, Defence of India Act — Object of this Rule is speedy trial in a summary way of offences relating to contravention for which penalties are provided in Rule 126-P — (Defence of India Act (1962), Section 43)

Goa 421 B (C N 95)

Essential Commodities Act (10 of 1955)

—Ss 2 (b) and (c), 3 — Scheme of Cls. (b) and (c) of Sec 2 and Sec 3 — Scheme intended to bring under control cultivation and sale of food crops—Sugar-cane does come within ambit of Act and cultivation and sale of sugar-cane can be regulated under Section 3 — Sugar-cane (Control) Order (1955), R 3 (3) is valid

SC 367 A (C N 83)

—S. 3 — Scheme of Cls (b) and (c) of S. 2 and S 3 — Scheme intended to bring under control cultivation and sale of food crops — Sugar-cane does come within ambit of Act — See Essential Commodities Act (1955), S 2 (b) and (c)

SC 367 A (C N 83)

—S 3 — Order under Sugar-cane (Control) Order (1955), R 3 (3) — Regulation of price of sugar-cane — Provision expressly contained in Bihar Sugar Factories Control Act (1937) and also in Sugar-cane (Control) Order (1955), R 3 (3) — Provision of Order prevails over the Act, the Act being a pre-Constitution Act

SC 367 B (C N 83)

Essential Commodities Act (contd.)

—S 3 — Law relating to control of sugar-cane — Parliament is competent to enact law by virtue of Entry 33 of List 3 — Power conferred on Government under S. 3 of Essential Commodities Act cannot be challenged as invalid — See Constitution of India Sch. 7, List 3, Entry 33

SC 367 C (C N 83)

—S 3 — Assam Foodgrains (Licensing and Control) Order, 1961, Cl 3 — Violation of — Requirements — Cri Rev No 4 of 1967 (Assam) held not good law

Assam 323 (C N 73)

—S. 7 — Complaint regarding offence under S 7 of Essential Commodities Act — Offence punishable with three years imprisonment — Is cognizable offence within meaning of S 4 (1) (f), Criminal P. C. — See Criminal P. C (1898), Section 4 (1) (f)

SC 367 D (C N 83)

Evidence — Dog tracking evidence

See Evidence Act (1872), S 45

Evidence Act (1 of 1872)

—Ss 3, 5 and 101 — Appreciation of evidence — Criminal Trial — Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground of defence — (Criminal P. C (1898), Section 367) — (Prevention of Food Adulteration Act (1954), S 16(1) and (7) — 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'food grain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held, immaterial

Cal 340 C (C N 76)

—S 3 — Appreciation of evidence — Circumstantial evidence — Duty of Court — See Criminal P. C (1898), S. 367

Cal 403 H (C N 93)

—S 5 — Appreciation of evidence — Criminal trial — Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground of defence—'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'foodgrains' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held immaterial — See Evidence Act (1872), Section 3

Cal 340 C (C N 76)

—S. 5 — Appreciation of evidence — Interested witnesses — Testimony not final

Punj 352 B (C N 80)

—S. 13 — Complaint under Ss 426, 447 and 506 IPC — Rent note executed by tenant of complainant in respect of land in question and copy of judgment of Nyaya Panchayat in rent recovery case filed by complainant — Documents are not irrelevant but are admissible to prove the offences

Manipur 360 B (C N 81)

—Ss 24 and 26 — Accused kept in remand for fifteen days — Then after being kept in jail custody for three days produced before executive Magistrate for

Evidence Act (contd)

recording confession — After preliminary questioning and a warning accused sent back to jail — Confession recorded on next day held was voluntary — Accused had spent four days in judicial custody and he was not under influence of investigating agency for at least four days — (Criminal P C (1898) Sec 164)

SC 373 A (C N 85)
—S 24 — Applicability — Arrest and custody — Distinction — Person under surveillance making statement — Statement is not hit by Section 24 Evidence Act — See Criminal P C (1898) S 46

Bom 325 B (C N 74)
—Ss 24 25 — Extra-judicial confession — Confession made to private person in presence of police officer is inadmissible Cal 403 C (C N 93)

—S 24 — Retracted confession — Absence of any corroborative evidence — Conviction solely based on retracted confession is illegal

Cal 403 D (C N 93)
—S 25 — Extra-judicial confession — Confession made to private person in presence of police officer is inadmissible — See Evidence Act (1872) S 24

Cal 403 C (C N 93)
—S 26 — Accused kept in remand for fifteen days — Then after keeping in jail custody for three days produced before Magistrate for recording confession — After preliminary questioning and a warning accused sent back to jail — Confession recorded on next day held was voluntary — Accused had spent four days in judicial custody and he was not under influence of investigating agency for at least four days — See Evidence Act (1872) Section 24 SC 373 A (C N 85)

—S 30 — Retracted confession by one of co-accused — Use of against other co-accused — It has very weak evidentiary value — Great extent of corroboration is necessary for conviction Case law discussed Cal 403 E (C N 93)

—S 45 — Dog tracking evidence — Admissibility SC 373 B (C N 85)

—S 45 — Expert depending on probabilities and not on firm conviction in his ultimate opinion — Opinion carries little value Cal 403 F (C N 93)

—S 45 — Evidence of footprint expert — Evidentiary value — Unsafe to convict accused solely on his opinion — Science of identification of foot-print impression is not exact science Case law discussed Cal 403 G (C N 93)

—S 101 — Appreciation of evidence — Criminal Trial — Material on record justifying finding in favour of accused — Court held could act on it though accused had not taken it as a specific ground of defence — Matar dal — Analyst testing it only for pulse — Court also treating it as foodgrain — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held

Evidence Act (contd)

immaterial — See Evidence Act (1872) Section 3 Cal 340 C (C N 70)

—Ss 145 155 — Statement of a witness made in previous case — Use of it in subsequent case to contradict him or impeach his character — Before so using it the party should be allowed to draw the witness's attention to his previous statements Pat 350 A (C N 79)

—S 155 — Witness's attention should be drawn to his previous statement before using it — See Evidence Act (1872) Section 145 Pat 350 A (C N 79)

Goa, Daman and Diu (Administration) Act (1 of 1962)

—S 10(2) — Code came into force in Goa on 1-11-1963 and Portuguese Criminal P C stood repealed by virtue of S 3 and 4 of Goa Daman and Diu (Laws) Regulation 1962 — Offence punishable under R 126-P Defence of India Rules 1962 committed in Goa on 25-6-1963 — Offence is triable in accordance with Criminal P C and not Portuguese Criminal P C — Order dated 6-11-1963 passed by Lt Governor providing to the contrary is ultra vires under G D & D (Administration) Removal of Difficulties Order 1962 — Nor can the 1962 order be saved under S 4 of the 1962 Regulation or under S 10 (1) of the Administration Act 1962 — See Criminal P C (1898) S 1

Goa 421 A (C N 95)
—S 11 (2) — Code came into force in Goa on 1-11-1963 and Portuguese Criminal P C stood repealed by virtue of Section 3 and 4 of Goa Daman and Diu (Laws) Regulation 1962 — Offence punishable under R 126-P Defence of India Rules 1962 committed in Goa on 25-6-1963 — Offence is triable in accordance with Criminal P C and not Portuguese Criminal P C — Order dated 6-11-1963 passed by Lt Governor providing to the contrary is ultra vires under G D and D (Administration) Removal of Difficulties Order 1962 — Nor can the 1962 order be saved under Sec 4 of the 1962 Regulation or under Section 10 (1) of the Administration Act 1962 — See Criminal P C (1898) S 1 Goa 421 A (C N 95)

Goa Daman and Diu (Administration) Ordinance (1962)

—S 8 — Code came into force in Goa on 1-11-1963 and Portuguese Criminal P C stood repealed by virtue of S 3 and 4 of Goa Daman and Diu (Laws) Regulation 1962 — Offence punishable under R 126-P Defence of India Rules 1962 committed in Goa on 25-6-1963 — Offence is triable in accordance with Criminal P C and not Portuguese Criminal P C — Order dated 6-11-1963 passed by Lt Governor providing to the contrary is ultra vires under G D & D (Administration) Removal of Difficulties Order 1962 — Nor can the 1962 Order be saved under S 4 of the 1962 Regulation or under S 10 (1)

Goa, Daman & Diu (Administration) Ordinance (contd.)

of the Administration Act, 1962 — See Criminal P. C. (1898), S. 1

Goa 421 A (C N 95)

Goa, Daman and Diu (Laws) Regulation (1962)

—S. 3 — Code came into force in Goa on 1-11-1963 and Portuguese Criminal P C stood repealed by virtue of Ss 3 and 4 of Goa, Daman and Diu (Laws) Regulation 1962 — Offence punishable under R 126-P Defence of India Rules 1962 committed in Goa on 25-6-1963—Offence is triable in accordance with Criminal P. C and not Portuguese Criminal P. C—Order dated 6-11-1963 passed by Lt. Governor providing to the contrary is ultra vires under G D & D. (Administration) Removal of Difficulties Order 1962—Nor can the 1962 Order be saved under Section 4 of the 1962 Regulation or under Section 10 (1) of the Administration Act, 1962 — See Criminal P C. (1898), S 1

Goa 421 A (C N 95)

—S 4 — Code came into force in Goa on 1-11-1963 and Portuguese Criminal P C. stood repealed by virtue of Ss 3 and 4 of Goa, Daman and Diu (Laws) Regulation 1962 — Offence punishable under Rule 126-P Defence of India Rules 1962 committed in Goa on 25-6-1963 — Offence is triable in accordance with Criminal P C. and not Portuguese Criminal P C—Order dated 6-11-1963 passed by Lt Governor providing to the contrary is ultra vires under G. D & D (Administration) Removal of Difficulties Order 1962 — Nor can the 1962 Order be saved under Section 4 of the 1962 Regulation or under Section 10 (1) of the Administration Act, 1962 — See Criminal P C (1898), S 1

Goa 421 A (C N 94)

—S. 7 — Code came into force in Goa on 1-11-1963 and Portuguese Criminal P. C. stood repealed by virtue of Ss 3 and 4 of Goa, Daman and Diu (Laws) Regulation 1962 — Offence punishable under Rule 126-P Defence of India Rules 1962 committed in Goa on 25-6-1963 — Offence is triable in accordance with Criminal P C. and not Portuguese Criminal P C — Order dated 6-11-1963 passed by Lt Governor providing to the contrary is ultra vires under G D & D. (Administration) Removal of Difficulties Order 1962 — Nor can the 1962 Order be saved under S 4 of the 1962 Regulation or under Sec. 10 (1) of the Administration Act, 1962 — See Criminal P. C (1898), S. 1

Goa 421 A (C N 95)

Limitation Act (36 of 1963)

—Art. 131 — Revision against order of Magistrate — Party filing revision application before Sessions Judge in spite of established rule of filing revision direct to High Court — Party alleging that they followed that procedure under wrong legal advice — Condonation of delay — Held, that since substantial question of law was

Limitation Act (contd.)

involved in the case the delay would be condoned Pat 348 A (C N 78)

Madras General Clauses Act (1 of 1891)

—S. 15 — Expression "specially empowered" under — Meaning of — State Government can specially empower not only particular individual Additional District Magistrate but also entire class of such Magistrates, under the section — See Public Safety — Preventive Detention Act (1950), Section 3 (2) (b)

Ker 344 (C N 77)

Manipur Land Revenue and Land Reforms Act (33 of 1960)

See under Tenancy Laws

MUNICIPALITIES

—Calcutta Municipal Act (33 of 1951)

—S 30 — Complaint was held to be neither by the Corporation nor person authorised by 'local authority' — Complaint to Magistrate about an offence — Complaint to be signed by the Commissioner — Rubber stamp impression of signature not enough — Complaint not properly authorised — Magistrate cannot take cognizance of — See Prevention of Food Adulteration Act (1954), S 20 (1)

Cal 340 A (C N 76)

—S. 585 — Complaint was held to be neither by the Corporation nor person authorised by 'local authority' — Complaint to Magistrate about an offence — Complaint to be signed by the Commissioner — Rubber stamp impression of signature not enough — Complaint not properly authorised — Magistrate cannot take cognizance of — See Prevention of Food Adulteration Act (1954), S 20 (1)

Cal 340 A (C N 76)

Penal Code (45 of 1860)

—S 34 — Free fight between two groups of persons — Injuries sustained by persons of both groups in course of such fight — Death of two — Only persons found to have inflicted injuries can be convicted for the injuries caused by them — See Penal Code, (1860), S 149

SC 363 B (C N 82)

—Ss 34 and 304, Part I—Bona fide assertion of right of way through uncultivated portion of private land by villagers — Does not amount to common intention to commit a criminal act — Conviction under Sections 304 Part I/34, held, illegal — Decision of Guj High Court, Reversed

SC 363 C (C N 82)

—S. 53 — Convictions and sentences under Sections 467, 471, 477-A and 409 of Code — Revision — Held, ends of justice would be met by reducing sentence of imprisonment to period already undergone by accused because (1) he was first offender (2) was likely to be weeded out of co-operative institution, wherein he was the President, the position which was used

Penal Code (contd)

by him for committing offences and (3) was pretty old man of 62 or 63 years — (Criminal P C (1898) Ss 439 and 32 — Reduction of sentence)

Mad 431 (C N 98)

—Ss 97 99 — Right of private defence — Persons constructing permanent water course on land of another without his consent — They commit criminal trespass and mischief — Occupier of land has right of private defence of property — He need not resort to public authorities

Punj 352 A (C N 80)

—S 99 — Right of private defence — Persons constructing permanent water course on land of another without his consent — They commit criminal trespass and mischief — Occupier of land has right of private defence of property — He need not resort to public authorities — See Penal Code (1860) S 97

Punj 352 A (C N 80)

—S 103 — Complainant's party armed with deadly weapons entering upon land occupied by accused and constructing permanent water course on it without any right — Party of accused resisting them — Fight between the parties resulting in death of two persons on complainant's side and injuries to persons on both sides — Held that accused had right of private defence of property and had not exceeded it — Being protected by the right there was no offence committed by them.

Punj 352 C (C N 80)

—S 109 — Conspiracy and abetment — Offences are distinct — See Penal Code (1860) Section 120-B Cal 332 C (C N 75)

—Ss 120-B and 109 — Conspiracy and abetment — Offences are distinct

Cal 332 C (C N 75)

—Ss 149 and 34 and 323 and 304 — Free fight between two groups of persons — Injuries sustained by persons of both group in course of such fight — Death of two persons — Only persons found to have inflicted injuries can be convicted for the injuries caused by them

SC 363 B (C N 82)

—S 182 — Offence falling under Section 182 of Penal Code — Application under Section 476 (1) cannot lie — See Criminal P C (1898) Section 476 (1)

Guj 425 B (C N 96)

—S 218 — Alterations in entries in village revenue records by Lekhpal in exercise of powers given under Law — Alterations though erroneous cannot be a ground for prosecution under S 218

All 384 (C N 87)

—S 302 — Trial for murder — Absence of corpus delicti — Crime can be proved by circumstantial evidence

Cal 403 A (C N 93)

—S 302 — Trial for murder — Circumstantial evidence leading to commission of crime by accused — Non-establishment of motive — Trial is not vitiated

Cal 403 B (C N 93)

Penal Code (contd)

—S 304 — Free fight between two groups of persons — Injuries sustained by persons of both groups in course of such fight — Death of two persons — Only persons found to have inflicted injuries can be convicted for the offences individually committed by them — See Penal Code (1860) S 149 SC 363 B (C N 82)

—S 304 Part I — Bona fide assertion of right of way through uncultivated portion of private land — Common intention to commit criminal act within Section 34 if can be inferred — Conviction under Sections 304 Part I/34 held illegal — See Penal Code (1860) S 34

SC 363 C (C N 82)

—S 323 — Free fight between two groups of persons — Injuries sustained by persons of both groups in course of such fight — Death of two — Only persons found to have inflicted injuries can be convicted for the injuries caused by them — See Penal Code (1860) S 149

SC 363 B (C N 82)

—Ss 391 395 — Conviction of less than five persons — Legality

All 386 (C N 88)

—S 395 — Conviction of less than five persons — Legality — See Penal Code (1860) S 391

All 386 (C N 88)

—S 406 — Scope — Offence under Section 406 I P C — Where neither entrustment nor conversion has taken place within the territorial jurisdiction of the Court where complaint is lodged the Court has no jurisdiction to proceed with complaint — See Criminal P C (1898) Ch XV

Cal 332 A (C N 75)

—S 426 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of for purposes of Section 426 or 447 I P C — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960) S 119

Manipur 360 C (C N 81)

—S 447 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of for purposes of S 426 or 447 I P C — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960) S 119

Manipur 360 C (C N 81)

—S 506 — Charge under — Intention which weighs with accused in entering upon land in possession of another has no relevancy to charge under Section 506 — Complaint under Section 506 cannot be thrown out on ground that dominant intention of accused in entering upon land was in his capacity as its owner

Manipur 360 D (C N 81)

Prevention of Food Adulteration Act (37 of 1954)

—Ss 2 13 and 23 — 'Matar dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be foodgrain — Accused acquitted for non-performance of

Prevention of Food Adulteration Act (contd.)

additional tests under A 18.06 (i) and (ii) — Decision, held, could not be assailed — Absence of evidence about it being 'food-grain', held, immaterial

Cal 340 B (C N 76)
—Ss 2 (13), 7, 10 (1), 10 (2) — Sale for analysis — Included in definition 'sale' under Section 2 (13) — Article actually sold for purpose of analysis — Prosecution need not prove that article was intended for sale. AIR 1959 Mad 333, Dist from Andh Pra 388 (C N 89)

—Ss 2 (xiii) and 2 (i) (a) — Food Inspector taking sample of article of food — Seller accepting amount as cost of it — Sale is presumed — See Prevention of Food Adulteration Act (1954), S 16 (1) (a) (i) Andh Pra 393 (C N 90)

—S 7 — Sale for analysis — Included in definition 'sale' under Section 2 (13) — Article actually sold for purpose of analysis — Prosecution need not prove that article was intended for sale — See Prevention of Food Adulteration Act (1954), S 2 (13) Andh Pra 388 (C N 89)

—S 7 — Sale of adulterated article of food—Offence liable to be punished under Sections 16 (1) (a) (i) & 7 read with Section 2 (i) (a) and Rule 44 (b) under the Act — See Prevention of Food Adulteration Act (1954), S 16 (1) (a) (i) Andh Pra 393 (C N 90)

—S 7 (1) — Conviction under S 7 (1) read with S 16 (1) — Acquittal in appeal — Appeal by State against appellate order—Held, as a matter of form proceeding was appeal and not proceeding in revision, though in substance it made no difference whatever view was taken of the matter — Appeal by State was competent — See Criminal P C (1898), S 423 Madh Pra 427 A (C N 97)

—Ss 10 (1), 10 (2) — Sale for analysis — Included in definition 'sale' under Section 2 (13) — Article actually sold for purpose of analysis — Prosecution need not prove that article was intended for sale — See Prevention of Food Adulteration Act (1954), S 2 (13) Andh Pra 388 (C N 89)

—S. 10 (3) — Food Inspector taking sample of article — Inspector has to tender price of it — See Prevention of Food Adulteration Act (1954), S 16 (1) (a) (i) Andh Pra 393 (C N 90)

—S. 13 — 'Matar dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be 'foodgrain' — Accused acquitted for non-performance of additional tests under A 18.06 (i) and (ii) — Decision, held, could, not be assailed — Absence of evidence about it being 'foodgrain', held immaterial — See Prevention of Food Adulteration Act (1954), S 2 Cal 340 B (C N 76)

—Ss. 16 (1) (a) (i), 7, 2 (i) (a), 2 (xiii)

Prevention of Food Adulteration Act (contd.)

and 10 (3) — Food Inspector taking sample — Whether a sale — A question of fact — Seller can refuse to accept price — Acceptance of amount as cost of article — A sale is presumed within S. 2 (xiii) — Sale is offence liable to be punished under the section — (Prevention of Food Adulteration (Central) Rules (1955), R 44 (b))

Andh Pra 393 (C N 90)
—S 16 (1) and (7) — Appreciation of evidence — Criminal Trial — Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground of defence — 'Matar del' — Analyst testing it only for 'pulse' — Court also treating it as 'foodgrain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held, immaterial — See Evidence Act (1872), Section 3 Cal 340 C (C N 76)

—S. 16 (1) — Conviction under Section 7 (1) read with Section 16 (1) — Acquittal in appeal — Appeal by State against appellate order—Held, as a matter of form proceeding was appeal and not proceeding in revision, though in substance it made no difference whatever view was taken of the matter — Appeal by State was competent — See, Criminal P. C (1898), Section 423

Madh Pra 427 A (C N 97)
—S 20 (1) — Complaint was held to be neither by the Corporation nor person authorised by 'local authority' — (Municipalities — Calcutta Municipal Act (33 of 1951), Ss 585 and 30 — Complaint to Magistrate about an offence — Complaint to be signed by the Commissioner — Rubber stamp impression of signature not enough — (Criminal P. C (1898), Ss 190 (1) (a) and 200 (a) — Complaint not properly authorised — Magistrate cannot take cognizance of) Cal 340 A (C N 76)

—S. 23 — 'Matar dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be 'foodgrain' — Accused acquitted for non-performance of additional tests under A 18.06 (i) and (ii) — Decision, held, could not be assailed — Absence of evidence about it being 'foodgrain', held immaterial — See Prevention of Food Adulteration Act (1954), S 2 Cal 340 B (C N 76)

Prevention of Food Adulteration (Central) Rules (1955)

—R 44 (b) — Sale of adulterated article of food — Offence liable to be punished under S 16 (1) (a) (i) and S 7 read with Section 2 (i) (a) and R 44 (b) under the Act — See Prevention of Food Adulteration Act (1954), S. 16 (1) (a) (i) Andh Pra 393 (C N 90)

Preventive Detention Act (4 of 1950)
See under Public Safety.

PUBLIC SAFETY

—Preventive Detention Act (4 of 1950)
 —S 3 (2) (b) — Expression specially empowered under — Meaning of — State Government can specially empower not only particular individual Additional District Magistrate but also entire class of such Magistrates under the section — Criminal P C (1898) S 39 — Madras General Clauses Act (1 of 1891) S 15 AIR 1951 Mad 1159 & AIR 1956 Sau 73 Dissented from Ker 344 (C N 77)

Sugar Cane Control Order (1955)

—R 3 — Validity of power conferred on Government under Section 3 of Essential Commodities Act and Sugar Cane Control Order cannot be challenged — See Constitution of India Sch VII List III SC 367 C (C N 83)
 —R 3 (3) — Rule is valid — See Essential Commodities Act (1955) S 2 (b) & (c) SC 367 A (C N 83)
 —R 3 (3) — Provision of Order prevails over Bihar Sugar Factories Control Act (1937) the Act being a pre Constitution Act — See Essential Commodities Act (1955) S 3 SC 367 B (C N 83)

TENANCY LAWS

—Manipur Land Revenue and Land Reforms Act (33 of 1960)
 —Ss 119 126 — Scope — Tenant surrendering land — Landlord entering

Tenancy Laws — Manipur Land Revenue and Land Reforms Act (contd)

into possession — Such possession can be availed of for purposes of Section 426 or 447 I P C — (Penal Code (1860) Sections 426 447) — (Criminal P C (1898) S 200) Manipur 360 C (C N 81)
 —S 126 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of for purposes of Section 426 or 447 I P C — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960) S 119 Manipur 360 C (C N 81)

Tourists' Baggage Rules (1958)

—Cl 3 Expln — There is no import within meaning of Customs Act in a case where goods are entrusted under S 80 and are not carried by passenger beyond customs barrier — See Customs Act (1962) S 111 Delhi 417 B (C N 94)
 —Cl 3 (1) — Term baggage as used in Sections 77 and 80 Customs Act is not confined merely to personal effects as defined by Cl 3 and includes any article contained in baggage even though it be in commercial quantities — See Customs Act (1962) S 77 Delhi 417 A (C N 94)
 Words and Phrases
 —Expression specially empowered — Meaning of — See Public Safety — Preventive Detention Act (4 of 1950) Section 3 (2) (b) Ker 344 (C N 77)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC, IN 1970 CRI L J MARCH

DISS = Dissented from in NOT F = Not followed in OVER = Overruled in Revers = Reversed in

Companies Act (1 of 1956)

—Ss 159 to 162 — (1967) 2 Com LJ 92 (All) — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —Ss 159 to 162 — AIR 1963 Andh Pra 389 — Over 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —Ss 159 to 162 — (1935) 39 Cal WN 1152 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —Ss 159 to 162 — AIR 1948 Cal 42 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —Ss 159 to 162 — 1963 (1) Cri LJ 521 (Cal) — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —Ss 159 to 162 — 1964 Mad WN 103 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —Ss 159 to 162 — AIR 1966 Mad 415 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —Ss 159 to 162 — AIR 1963 Raj 134 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — (1967) 2 Com LJ 92 (All) —

Companies Act (contd)

Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — AIR 1963 Andh Pra 389 — Over 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — (1935) 39 Cal WN 1152 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — AIR 1948 Cal 42 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — 1963 (1) Cri LJ 521 (Cal) — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — 1964 Mad WN 103 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — AIR 1966 Mad 415 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 166 — AIR 1963 Raj 134 — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 210 — (1967) 2 Com LJ 92 (All) — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S 210 — AIR 1963 Andh Pra 389 — Over 1970 Cri LJ 313 (C N 72) (Andh Pra)

Companies Act (contd.)

- S. 210 — (1935) 39 Cal WN 1152 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S. 210 — AIR 1948 Cal 42 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S. 210 — 1963 (1) Cri LJ 521 (Cal) — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 210 — 1964 Mad WN 103 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 210 — AIR 1966 Mad 415 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 210 — AIR 1963 Raj 134 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 220 — (1967) 2 Com LJ 92 (All), Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 220 — AIR 1963 Andh Pra 389 — Over. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 220 — (1935) 39 Cal WN 1152 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 220 — AIR 1948 Cal 42 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra)
 —S. 220 — 1963 (1) Cri LJ 521 (Cal) — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 220 — 1964 Mad WN 103 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 220 — AIR 1966 Mad 415 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).
 —S. 220 — AIR 1963 Raj 134 — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra)
Criminal Procedure Code (5 of 1898)
 —S. 6-A — AIR 1967 Bom 41 — Held no longer good law in view of (1968) 70 Bom LR 588 as interpreted 1970 Cri LJ 399 (C N 92) (Bom)
 —S. 17-B — AIR 1967 Bom 41 — Held no longer good law in view of (1968) 70 Bom LR 588 as interpreted. 1970 Cri LJ 399 (C N 92) (Bom)
 —S. 145, sub-sections (4) & (9)—AIR 1959 All 763 — Over. 1970 Cri LJ 305 (C N 70) (All)
 —S. 145, Sub-sections (4) and (9) — AIR 1961 Punj 187 — Diss. 1970 Cri LJ 305 (C N 70) (All).

Criminal P. C. (contd.)

- S. 195 (3) — AIR 1967 Bom 41 — Held no longer good law in view of (1968) 70 Bom LR 588 as interpreted 1970 Cri LJ 399 (C N 92) (Bom)
 —S. 239 — AIR 1968 Orissa 26 — Revers. 1970 Cri LJ 369 A (C N 84) (SC).
 —Ss 417 (3) & 417 (1) — AIR 1968 Orissa 26 — Revers. 1970 Cri LJ 369 A (C N 84) (SC).
 —S. 423 — Decision of Guj H. C. — Revers. 1970 Cri LJ 363 A (C N 82) (SC).
 —S. 439 — AIR 1968 Orissa 26 — Revers. 1970 Cri LJ 369 A (C N 84) (SC).
 —S. 476 — AIR 1967 Bom 41 — Held no longer good law in view of (1968) 70 Bom LR 588 as interpreted 1970 Cri LJ 399 (C N 92) (Bom).
 —S. 476-B — AIR 1967 Bom 41 — Held no longer good law in view of (1968) 70 Bom LR 588 as Interpreted. 1970 Cri LJ 399 (C N 92) (Bom)
Essential Commodities Act (10 of 1955)
 —S. 3 — Cri Revn No 4 of 1967 (Assam) — Held not good law as interpreted 1970 Cri LJ 323 (C N 73) (Assam)
Penal Code (45 of 1860)
 —S. 34 — Decision of Guj H. C. — Revers. 1970 Cri LJ 363 C (C N 82) (SC).
 —S. 304 — Decision of Guj H. C. — Revers. 1970 Cri LJ 363 C (C N 82) (SC).
Prevention of Food Adulteration Act (37 of 1954)
 —S. 2 (13) — AIR 1959 Mad 333 — Diss. 1970 Cri LJ 388 (C N 89) (Andh Pra)
 —S. 7 — AIR 1959 Mad 333 — Diss. 1970 Cri LJ 388 (C N 89) (Andh Pra)
 —Ss 10 (1) & 10 (2) — AIR 1959 Mad 333 — Diss. 1970 Cri LJ 388 (C N 89) (Andh Pra)

PUBLIC SAFETY

- Preventive Detention Act (4 of 1950)
 —S. 3 (2) (b) — AIR 1915 Mad 1159 — Diss. 1970 Cri LJ 344 (C N 77) (Ker)
 —S. 3 (2) (b) — AIR 1956 Sau 73 — Diss. 1970 Cri LJ 344 (C N 77) (Ker)

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC., IN 1970 CRI. L. J. MARCH

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; REVERS.=Reversed in.

ALLAHABAD

- AIR 1959 All 763 = 1959 Cri LJ 1384, Bhagwat Singh v State — Over. 1970 Cri LJ 305 (C N 70) (All)
 (1967) 2 Com LJ 92 = (1966) 36 Com Cas 585 (All), Ramachandra and Sons (P) Ltd v. State — Diss. 1970 Cri LJ 313 (C N 72) (Andh Pra).

ANDHRA PRADESH

- AIR 1963 Andh Pra 389 = 1963 (2) Cri LJ 368, Public Prosecutor v H. R. Basava Raj — Over. 1970 Cri LJ 313 (C N 72) (Andh Pra)

ASSAM

- (1967) Criminal Revn No 4 of 1967 (Assam) — Held not good law 1970 Cri LJ 323 (C N 73) (Assam)

BOMBAY

- AIR 1967 Bom 41 = 68 Bom LR 233, Ramchandra Nagoji Kadam v Dhondiram Nagoji Kadam — Held no longer good law in view of (1968) 70 Bom LR 588 = 1970 Cri LJ 399 (C N 92) (Bom).

CALCUTTA

- (1935)-39 Cal WN 1152 Ballav Dass v Mohanlal Sadhu — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 AIR 1948 Cal 42 = 48 Cri LJ 236 Bhagirath v Emperor — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 1963 (1) Cri LJ 521 = (1962) 32 Com Cas 1143 (Cal) Dulal Chandra Bhar v State of West Bengal — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)

GUJARAT

- Decision of Gujarat H C — Pevers 1970 Cri LJ 363 A C (C N 82) (SC)
 AIR 1956 Sau 73 = 1956 Cri LJ 1231 Polubha v Tapu Ruda — Diss 1970 Cri LJ 344 (C N 77) (Ker)

MADRAS

- AIR 1915 Mad 1159 = 16 Cri LJ 268 Md Kasim v Emperor — Diss 1970 Cri LJ 344 (C N 77) (Ker)
 AIR 1959 Mad 333 = 1959 Cri LJ 997, Public Prosecutor v Kandaswami Reddiar — Diss 1970 Cri LJ 388 (C N 89) (Andh Pra)

MADRAS (contd)

- (1964) Mad WN 103 = (1964) 34 Com Cas 1 Neptune Studios Ltd v State — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)
 AIR 1966 Mad 415 = 1966 Cri LJ 1279 Ambalavana Chettiar P S N S and Co (P) Ltd v Registrar of Companies — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)

ORISSA

- AIR 1968 Orissa 26 Jagabandhu Behera v Kshetrabasi Samal — Revers 1970 Cri LJ 369 A (C N 84) (SC)

PUNJAB

- AIR 1961 Punj 187 = 1961 (1) Cri LJ 708, S Jodh Singh v Mahant Bhagambar Das — Diss 1970 Cri LJ 305 (C N 70) (All)

RAJASTHAN

- AIR 1963 Raj 134 = 1963 (2) Cri LJ 48 State v T C Printers (P) Ltd — Diss 1970 Cri LJ 313 (C N 72) (Andh Pra)

COMPARATIVE TABLE

(28-2 1970)

1970 MARCH**1970 Criminal Law Journal = Other Journals**

CriLJ	Other Journals	CriLJ	Other Journals	CriLJ	Other Journals	CriLJ	Other Journals
305	AIR 1970 All 154 1969 All Cri R 527 1969 All W R (HC) 828 ILR (1968) 2 All 345	325	AIR 1970 Bom 79 71 Bom L R 599 332 AIR 1970 Cal 110 340 AIR 1970 Cal 120 344 AIR 1970 Kerala 50 ILR (1969) 1 Kerala 371	359	AIR 1970 SC 272 (1969) 2 SCC 571 35 Cal L T 65 (1970) 1 SCWR 75	386	1969 All Cri R 34 1969 All W R (HC) 37 (1970) 1 Andh W R 101
310	AIR 1970 All 185 1969 All W R (HC) 143	348	AIR 1970 Patna 89 1969 BLJR 624	373	AIR 1970 SC 283 (1969) 2 SCC 234 (1969) 2 SCJ 570 1969 Mad L J (Cri) 882	393	Andh Pra H C Assam L R (1969) Assam 158 71 Bom L R 387 1969 Moh L J 617
313	AIR 1970	350	AIR 1970 Patna 95	378	1970 All W R (HC) 43	398	ILR (1970) Bom 125
FB	Andh Pra 70 39 Com Cas 1000 ILR (1969) Andh Pra 1131	352	AIR 1970 Punj 85	384	1969 All W R (HC) 119 1969 All Cri R 89	403	73 Cal W N 467
323	AIR 1970 Assam 38 Assam L R (1969) Assam 155	360	AIR 1970 Manipur 23	378	1969 All W R (HC) 192	417	Cal H C
		363	AIR 1970 SC 219	384	1969 All W R (HC) 192	421	Delh H C
		367	AIR 1970 SC 287 (1969) 2 SCJ 340	384	1969 All W R (HC) 192	425	Guj H C
					1969 All Cri R 127	427	Madh Pra H C
						431	1969 Mad L W (Cri) 189

THE LAW OF EVIDENCE

BY

RATANLAL RANCHHODDAS, B.A., LL.B.,
Advocate (O. S.), Bombay High Court,

AND

DHIRAJLAL KESHAVALAL THAKORE, B.A.,
Barrister-at-Law

15th Edition 1968 Price Rs. 12 Demi 8vo Pages 454

1. This is a companion volume to the authors' Indian Penal Code and the Criminal Procedure Code. A critical study of the book will enable a student to acquire a sound knowledge of the law of evidence, a complete mastery of which is a *sine qua non* to one who seriously aspires to rise in the profession.

2. Under each section of the Indian Evidence Act the commentary lucidly explains the object, principle and meaning of the provision in the light of leading Indian and English decisions, the facts of which are given to elucidate and illustrate the principle and meaning of each provision. The Summary of the provisions of the Act, given at the end of the book, will give to the beginner a bird's-eye view of the whole Act and to one who has mastered the subject it will be useful for revision when the examination is at hand.

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Shri P. P. DEO, Chairman of the Board of Directors, A. I. R. Ltd.
garlanding the honoured guest.



The Chief Justice addressing the gathering.



The Chief Justice being shown the Binding Section of the
A I R Press by Shri D W CHITALEY General Manager of the A I R



Shri D V CHITALEY Manager Law & Editorial Division explaining a
point to the Chief Justice when he was being shown round the Press

VISIT OF THE CHIEF JUSTICE OF INDIA TO A.I.R. OFFICE

[15th February, 1970]

The A. I. R. had the pleasure and privilege of welcoming to its premises and receiving the Hon'ble Shri Muhammad Hidayatullah, Chief Justice of India, on the evening of Sunday, the 15th February last. Shri V. V. Chitaley, the founder of the concern, read a welcome address on the occasion. Several Judges of the Nagpur Bench of the Bombay High Court and other eminent persons graced the occasion with their presence. The Chief Justice responded suitably to the welcome address. An important theme of both the welcome address and the Reply by the Chief Justice was judicial candour seen in Judges admitting, when necessary, that their previous judgments were not correct and overruling themselves. The function ended with light refreshments and coffee.

WELCOME SPEECH

By

Shri V. V. Chitaley.

1. "May it please your Lordship,—It gives me very great pleasure, indeed, to welcome you to the All India Reporter, this evening. We have been looking forward to this visit for a long time. Sir, we are proud that a Nagpurian is adorning the highest seat of justice in the country and we consider it a privilege and honour to have you in our midst this evening, for however short a time. We are indeed grateful to you, that in spite of your many engagements, you have been kind enough to make it convenient to spare a short time for us also and to honour and encourage us by your acceding to our request to grace this occasion with your presence.

2. My Lord, I may be excused for pointing out on this occasion that, the Nagpur High Court has contributed not less than four Judges to the Supreme Court and in your Lordship's person Nagpur is justly proud of having contributed a second Chief Justice of the Supreme Court, (the first being Mr. B. P. Sinha).

3. The fact that when the office of the President of India falls vacant, the mantle of the highest office in the country falls on the Chief Justice of India shows the exalted nature of the office of Chief Justice. And, permit us to express our humble congratulations to your Lordship, on the fact that this unique honour also was yours.

4. It is not necessary and perhaps it would be impertinent on my part to praise the very high quality, both legal and literary, of your pronouncements from the Bench. But permit me to say that your judgment in Ranjit Udesi's case was not only an illuminating exposition of what constitutes obscenity in literature but was a piece of literature in itself. Your separate judgment in Golak Nath's case, concurring with Chief Justice Subba Rao's conclusion but on different grounds, was, again, a remarkable pronouncement which will be a permanent landmark in our law reports, representing an altogether original point of view.

5. Before concluding, it is my wish to draw attention with special pride to one quality which I have noticed in your judgments — your exemplary frankness in freely stating that in some previous judgment of yours you expressed a certain view which, owing to certain factors which were responsible for the oversight, was not correct. In this connection, I beg leave to mention your Lordship's judgment in *State of Gujarat v. Shantilal*, AIR 1969 SC 634 at p. 637.

6. In this connection, I am reminded of certain eminent Judges in our country who were so noble that they would consider it below their dignity to try to avoid stating plainly that on a former occasion they had expressed a view of the law which on further consideration they found was not correct. One of these noble persons was Justice Holloway of the Madras High Court who, if I remember right, once wrote, "At that time, the jargon of English law was in my head."

7. The other honoured name which I remember in this connection is that of Ismay, J. C. of our own Judicial Commissioner's Court of Nagpur,

8 Your Lordship I have recently read somewhere that Gladstone used to say that infallibility is not expected of any human being but it is useful to be sure of one man's integrity

9 I mean no disrespect to the Bench when I say that the same noble words of Gladstone may also be applied to the Judiciary from the highest echelons downwards That will make the rule of law an accomplished fact in our beloved motherland

10 Let me say that in my humble opinion your Lordship stands for the highest judicial ideals from every point of view

11 Let me again thank your Lordship for having made it convenient to be in our midst this evening and honouring us by your presence"

Reply by the Hon'ble Mr Justice M. Hidayatullah, Chief Justice of India.

"Mr Chairman my former colleagues and friends — It was one year back that I promised Mr Chitaley that I would like to pay a visit to the All India Reporter Press Chief Justice Mr Sinha once came to the A. I. R. Press and I had then a chance to visit this Press along with him but for some reason or other I was not able to do so

I am glad to be here today for two reasons Firstly because this is a premier law publishing house Secondly I am very familiar with the Chitaley family and the Chitaleys have been knowing me for the last so many years My father knew Mr V. V. Chitaley very well. I was also very fortunate to know him from my student days

As I went round the Press and saw the mechanisation and automation process etc I was reminded of a rotary club where they have a method of classifying members as representing different professions In classifying members of the judiciary for purposes of admission an appellate Judge was classified as "judicial wholesale" and other Judges as "judicial retail" Just so I think among law reports the All India Reporter may be classified as Law Reports "wholesale" and other reports may be classified as Law Reports "retail"

In the section relating to the Supreme Court alone the All India Reporter covers about 2000 pages per year And then there are the reports of the cases of the various State High Courts It is indeed a colossal work that the All India Reporter is doing and it is doing a very good job of it The price also is very moderate when we consider the vastness of the publication and its usefulness"

Then His Lordship proceeded to dwell on the place of law reports in the work of Courts He observed that one should first study the problem in each case with reference to its own circumstances before turning to the law reports

His Lordship also dealt with the question of Judges frankly admitting their mistakes and retracting their own previously expressed views on law when they find that they were not correct His Lordship called this "judicial honesty" His Lordship went on to observe that he was always ready to rectify his own views on law when he found them not to be sound He also instanced the case of Mr Justice Bose who on an error being pointed out, immediately and readily corrected it His Lordship also gave the instance of Lord Hewart who while sitting as an appellate Court in a criminal case reversed his own decision which he had given in the court of first instance

His Lordship observed that Judges must always keep their minds open to new ideas In this connection he remarked that Judges take the law from the lawyers and are sometimes misled This is one of the reasons why decisions of the same Court are overruled sometimes

NATIONAL CONFERENCE ON LEGAL AID

PUBLIC NOTICE

The Centre for the Study of Law and Society of the Institute of Constitutional and Parliamentary Studies is organising a National Conference on Legal Aid on Saturday, the 28th and Sunday, the 29th March, 1970. The Conference would be inaugurated at the Vigyan Bhavan, New Delhi on Saturday, the 28th March, 1970 at 10.30 A. M. by Shri V. V. Giri, President of India. The President would also be inaugurating the National Legal Aid Association of India at the same time.

(Centre for the Study of Law and Society, Institute of Constitutional and Parliamentary Studies, 18, Vithalbhai Patel House, Rafi Marg, New Delhi-1.)

THE LAWYER, DEVELOPING NATIONS AND LEGAL AID:

A PROPOSAL *

(By ARTHUR L. BERNEY, Consultant on Legal Education Centre for the Study of Law and Society.)

[This paper was submitted to the Bangkok World Conference on World Peace through Law, September 10, 1969. Excerpts from it, particularly portions of Part II including the proposal section, were read at Session IV: Man, Rights and Law.]

*NOTE: (The views expressed in this paper are the author's and not those of the Centre for the Study of Law and Society nor of The Ford Foundation which has made his services available to the Centre)

PART I

ONE VIEW OF THE LAWYER: A CHANGE BROKER

To say that we are living in a period of revolutionary change is commonplace. Let's leave the accuracy of this description to others to quibble over, along with the endless inquiry about its causes. It is enough for us lawyers — Professional contingency discounters — that the possibility of revolutionary change exists. For that possibility alone thrusts upon us the basic question: Will the revolution, should it come, be bloody or bloodless? And never mind that too, for the final question for the lawyer — professional pragmatist — is: How to make sure it is bloodless?

Failing this — the ascertainment of the bloodless way — we fail our very selves, for in cataclysm we lawyers cease to exist. We function only within the bounds of order. Only there can we serve our calling as brokers of change. If this characterisation is doubted, then may I challenge you to think of any engagement, great or trivial, in which the lawyer serves, that does not involve him in negotiating, facilitating, channelizing or resisting change.

Often, too often, the profession is identified with the status quo — "hand-maidens of vested interests" and that sort of declamation. Well, there is no use denying that our services are generally sought by those who would resist and retard change for the simplest reason: those clients consider their present state satisfactory. And it may be that resistance is sometimes the best counsel, but it is more often the worst. For, by nature, man and his world are not static. A good broker is an accommodator.

This means that the lawyer must constantly exercise a judgement about the validity, force and imminence of the impinging changes if he is to serve well. It is this judgement that distinguishes his activity, by the way, from that of a legal technician. And the converse holds that when he shirks the exercise of this judgement he surrenders his professional role. So it is when he counsels resistance or is immobilized because he perceives that the change he foresees is fraught with danger. It is best to remember in such circumstances Alfred North Whitehead's observation that major advances in civilization are processes which all too nearly wreck the societies in which they occur.

Enough of abstractions The change to which the author invites your examining judgement is the uprising of the poor — the outward signs of which run from the rage of the riot torn streets of affluent urban centers to the zeal of the revolutionary guerrilla fighter Like it or not these are the manifestations of a change struggling to become Somehow it carries more impact when its read in the words of an assessment from spokesmen of a people whose qualities of passivity, forbearance and patience we profess to admire To quote

"It is the patience of the Indian people sometimes mistaken for inertness or passivity which has created an impression that a revolt of the masses is unthinkable If poverty is not treated adequately in the next ten years the Indian rural proletariat may produce the classic spearhead for mounting a revolutionary instead of an evolutionary, process of change Indian democracy, which has hitherto not had to absorb the active discontent of the masses can be shaken to the core if it cannot devise new policies to change the militant psychology of the disillusioned poor" 1

This is no excerpt from some revolutionary tract either It is a note of urgency struck by men who have studied poverty in India and despite their seeming despair reflect in their call for Government action continued commitment to orderly change 2 in their prescription for action modesty and proportion 3 and in a poignant paean hope 4

The document from which these passages are drawn replete with its graphs and charts is the kind of muffled anguish that convinces this observer Others may prefer to draw their conclusions from the explosive episodes of the daily front pages

LAWYERS OF INDIA — PROFESSIONAL FORFEITURE?

Of particular interest to this writer is the judgement exhibited by the Indian legal profession This not merely because he lives and works there but because India with its enormous numbers of destitute people and its depth of commitment to social uplift through orderly change 5 epitomizes the challenge of discovering the bloodless way

If the observations and findings of commentators are to be relied on a bleak prospect emerges For it is difficult not to conclude that, if the Indian legal profession indeed perceives the need to produce drastic social reform it must have long since forfeited its professional role of contributing to that reform

In 1963 Dr Richard Schwartz 6 a careful student of the Indian scene wrote

"Limitation of legal activity largely to litigation leaves the Indian lawyer far from the center of power in contemporary India" 7

One consequence of this he continued in an article that outlined the decline of the profession since preindependence is the professions failure to help counter balance the power of Government through "negotiation and enforcement of contracts legislative lobbying and challenging the power of administrative agencies in the Courts" 8

In a more recent remark that same author recognized what is for this observer, the more significant failure of the profession the failure to produce "real changes in the life conditions of the underprivileged segments of Indian Society" 9 The reference made to Myrdals multiple examples of laws intended for the poor paradoxically being turned against them through the legal processes (e.g. the land reform law which produces Court backlogs and lawyers bills but no land for the landless and co-operatives intended to reduce debt slavery actually strengthening the creditor with Government funds) is most telling 10

This tantalizing divergent failing on the part of the profession on the one hand to assume a part in controlling national destiny through existing power vortices and on the other to play a role in articulating and formulating the modes of social reformation are captured in Dean Mukerjees dilemma in attempting to state the objects of Indian legal education

"The truth is probably that the object of law teaching being so intimately bound up with other social and economic problems crying for urgent solutions, defies definition in clear and unambiguous terms We in India may outwardly still be wedded to the doctrinal law but are unable to shut our eyes completely to the sociological factor" 11

The picture one gets is of a profession in a "hang-up." One might surmise from his closing remarks on the "objects of law teaching" that the Dean believes the lack stems from the fact that "(i)n the sociological context. . . Our legal education and knowledge has always been singularly irrelevant." Therefore, he concludes, "we are a long way away from . . . education that will train a man not merely in the work of solving problems of individual clients but of the society in which he lives. . . ."12

OR PROFESSIONAL RECLAMATION?

It may be the personal need to shake pessimism but this observer, for one, senses a shift. Not so much a new wave yet as a ripple. It may have been just this sort of wishful intuition that led Professor Schwartz to end his "prefatory" introduction to the papers prepared for the Conference on the Comparative Study of the Legal Profession with Special Reference to India,13 on this note:

"Indian lawyers gained great esteem during the struggle for independence. Are they now ready to recapture this position by joining and leading the struggle for social justice?" 14

There is much in the Conference papers themselves to sustain hope. And this in the context of full appreciation of the shortcomings.15 For example, a prominence of lawyers as organizers and spokesmen of civic and reform groups denotes that lawyers are playing the role of agents of change.16 Likewise, lawyers were seen as "instrumental in devising modern organizational forms articulated to action in the national world of Government policies and plans."17 Perhaps most promising was the reference to the lawyer's work in the district towns which related to cases involving enforcement of Government regulations or the accountability of Government officials under the law. This was the aspect of the lawyer's work viewed as "creating in the public mind a sense of political efficacy and . . . establishing an image of the judiciary as an independent intermediary between Government and citizen."18

These, of course, were only straws or leanings. There was nowhere a claim that these preliminary findings were more than suggestive concerning such queries the investigators set themselves as:

(1) does the Indian lawyer function as an intermediary, linking the "higher law" with the law as applied at the lower level?

(2) does the Indian lawyer act as a carrier of a nationwide "legal culture" who disseminates official norms while putting them in the service of various groups?19

Or from the political scientist's point of view:

(3) is the lawyer instilling that sense of satisfaction with the legal system in the citizenry, such as would give them to perceive that system as a modality for realizing justice, and thereby presumably gain from them acceptance of the underlying political system?20

But nothing in the existing studies pretends to answer the delineation Professor Galanter gives to Dr. Schwartz's challenge:

"India's simultaneous commitments to economic development, a welfare State and democracy imply vast new demands on the legal system—demands for systematic but flexible regulation, for new forms of protection and participation, and for broader distribution of legal resources. Will the Indian legal profession expand its role to meet these new demands? . . . Such a transformation depends upon the adaptive capacity of the profession and upon the capacity of legal education to impart the needed skills and attitudes. But to an equal extent it requires that the demand for more differentiated, complex and widely distributed legal services be made effective."21

A PROVING GROUND

Only the future can tell whether the profession will meet these demands and reclaim its status and role. There are recent positive signs in the horrendous efforts of the leading law colleges to transform themselves.22 A crescendo of legal scholars are sounding the call to action in the law journals of India. But the proving ground will come, if we are to look for signs, in the fate of the latest efforts to establish a meaningful legal aid scheme in India.

Our reasons for this assertion are twofold

(1) On four occasions since Independence serious efforts to establish wide-ranging legal aid programs have been mounted and failed. Once more the battle is being joined, this time by one of the most vigorous institutes of legal reform in India. If it fails too it would be difficult to deny that there exists an insurmountable paralysis of will on the part of the profession.

(2) A legal aid program is more than symbolically relevant to the question of whether the profession can meet the challenge of ushering in the requisite social reforms. In the very operation of such a program dual basic objectives are served

(a) the impoverished, the downtrodden and the underprivileged — In a word the alienated ones — receive along with their woe a sense of hope, uplift, entitlement and may be even involvement and

(b) the attorneys who organize and operate these programs are especially as they learn to perform with imagination and scope fulfilling their calling as the brokers of change and the instruments of justice.

So it is that the natural testing ground of the Indian legal profession may be seen in its capacity to establish a national legal aid program.

PART I—FOOTNOTES

1. The Anatomy of Indian Poverty, Monthly Commentary, Indian Institute of Public Opinion, December 1968 at page 28.

2. "The Fourth Five Year Plan has brought this country face to face with the problem of its own poverty. It has also arrived at a time when the green revolution (has) opened the eyes of the nation to the possibility that a solution might be in its own hands. A moderate plan of investing Rs 500 crores (\$2/3 billion) on a crusade against poverty each year is capable now of making a major impression on the problem. The time is ripe for a major transformation of the minds of the leaders of Indian society in respect of the priorities which they must lay down as imperative in all India's future plans" (Id at 154).

3. "firstly, a new approach to education among the underprivileged, secondly, a special contribution to their health and productivity, thirdly, the allocation of specific employment particularly for those left outside the operation of a crude market place for labour, and finally, the provision of leadership capable of initiating and running new enterprises on which the momentum of change can be enduringly built" (Id at 16).

4. "To be a leader in this epic fight against the most persistent of the world's enemies would be glory in itself. To be a victor by a grand strategy to defy mankind's degradation by its failure to mobilise its resources, in peace as in war, will be truly to inherit the earth" (Ibid).

5. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life. Indian Const. Article 38.

6. Professor of Law, Northwestern University, Chicago, Illinois, USA. Dr. Schwartz is a sociologist by training.

7. Schwartz, Reflections on the Status and Functions of the Indian Lawyer "1" Kerala University Law Review 17, 21 (1968) (Paper delivered at American Sociological Association, 1963).

8. Ibid.

9. Schwartz, Preface, Lawyers in Developing Societies, Especially India 3, Law and Society Review 195, 196 (1969).

10. Ibid.

11. B. N. Mukerjee, Legal Education in Indian Universities, Vol. V, Journal of All India Law Teachers Association 24, 25 (December 1968).

12. Id. at 25-26.

13. Conference sponsored by the Committee on Southern Asia Studies of the University of Chicago, held in Highland Park, Illinois, U. S., from August 10-12, 1967. Published as a Special Issue of *Law and Society Review*, Vol. III, Nos 2 and 3, November 1968 — February 1969. (Hereafter referred to as Conference)

14. *Id.* at 199.

15. In the Introduction, Study of the Indian Legal Profession, Prof Marc Galanter recounts such insights as:

"the Indians' strong orientation to Courts (as compared to other legal settings); their orientation to litigation rather than advising, negotiating or planning, the conceptualism in their handling of rules, and their individualism and lack of specialization." (Conference at 207).

"Writing and teaching are, with significant exceptions, confined to close textual analysis on a verbal level with little consideration either of underlying policy . . . or problems of implementation." (*Id.* at 208).

Professor Rowe, *Indian Lawyers and Political Modernization*, reported dryly that "District Lawyers had given little or no thought to the relationship of the law to the social and economic goals of contemporary India" (*Id.* at 239)

16. Conference, at 212.

17. Galanter, Conference at 212; Rowe, Conference at 236

18. Rowe, Conference at 228.

19. Galanter, Conference at 202.

20. Rowe, Conference at 220-21.

21. Galanter, Conference 216-17.

22. See e. g. All India Legal education seminar issue, IV Jaipur Law Journal (1964), P. K. Tripathi, In the Quest for a Better Legal Education, 1968, Journal of the Indian Law Institute (forthcoming); Report of the Committee on the Reorganization of Legal Education in the University of Delhi, P. B. Gajendragadkar, Chairman (1964).

Von Mehren, *Law and Legal Education in India*, 78 Harvard Law Review 1180 (1965). The Ford Foundation in India has helped support reforms in legal education at Delhi and Banaras Universities during the last five years.

PART II

THE INSTITUTE OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES: A PROPOSAL

Recognizing a need to bolster India's democratic institutions and to focus her attention of her political leaders on the problems of democratic development, a group of parliamentarians, jurists and distinguished private citizens formed the Institute of Constitutional and Parliamentary Studies in March 1965.

In general the Institute, under the chairmanship of one of India's foremost Supreme Court Advocates, Dr. L. M. Singhvi, has pursued with steadfastness, vigor and imagination its goals of improving the functioning of political, legislative and judicial institutions through research and training in parliamentary affairs, legislative process, judicial interpretation and constitutional developments.

Its more innovative and successful programs include a Parliamentary Fellowship Program, an Orientation course for Freshman Legislators, Diploma courses in such subjects as legislative drafting, and parliamentary institution and procedure, and a Legislative Reference Service.

It cannot be gainsaid that this Institute has had an invigorating and stimulating impact on the legislative process in India. The recent passage of a bill establishing the office of Lokpal (Ombudsman), for example, may well be attributed in some measure to scholarly work on that subject carried forward at the Institute.¹

THE CENTER FOR THE STUDY OF LAW AND SOCIETY

In 1969 the Institute expanded its purpose along lines that had been already emerging to focus attention on the dynamics of the process of interaction between the legal system and the social fabric of the nation. In order to accommodate its new purview the Institute dramatically extended its self mandate by establishing a Center for the Study of Law and Society. With this step the Institute openly affirmed its willingness to confront the problems of securing a democratic welfare state, even though this might mean exceeding its original confinement to constitutive and procedural matters. Although in its list of objects² the Center maintains a promise of scholarly objectivity and neutrality it can be expected in its work to forthrightly address the congeries of demands for social reform that summons the nation.

In this endeavor the Institute may be understood as taking on the burden of the legal profession itself — the pursuit and securement of social justice and civil rights — perhaps in the faith that through its example it may bestir that profession to its potential contribution to a stable and democratic India.

THE LEGAL AID PROJECT

Remaining true to its mother institution's custom of not shrinking from its challenge the Center initially set for itself a task which India had failed to surmount on at least four previous serious efforts. The illusiveness of the goal of a comprehensive legal aid system for India is told in the history of these failures.³ The Center staff has studied that history and determined to go ahead not because it perceived any significant change in the circumstances that conspired to defeat previous attempts nor because it viewed the earlier proposals as ill-conceived⁴ but simply because the establishment of such a program was intrinsic to the Center's very purpose and design. Almost every other program and research aim of the Center presupposed the ultimate identification of a class of lawyers spread throughout the nation from city to village, who could conceive of themselves as "brokers of change" as representatives of aggrieved communities and interests⁵ and who above all aspired to "a high moral purpose of service to the nation."⁶ The Center would not be impatient or unrealistic with the job of discovering and mobilizing such a force⁷ but it had to know at the outset if it was forthcoming. No other technique lent itself better to that need than the active development of a legal aid program.

Given the diverse motivations and thorough awareness of the pitfalls of prior attempts it is not surprising that the Center determined to pursue a quite different course from that of its predecessors. First it saw nothing to be gained from setting out any particular scheme at the outset. On the one hand many that had already been devised had obvious merit⁸ on the other none that existed or might be dreamed up could claim any special relevance to the Indian scene.⁹ Secondly with no scheme to pedal there was no point in approaching any official or private body in search of support. So much for what was not done.

The initiatives the Center took immediately were dictated by (1) the motivation of discovering and generating supporters what we called "our constituency" and (2) utilizing that which we believed to be our resources — needless to say this was not money but manpower. In the words of the program advisor a major working premise was

that any workable program must be grounded in community organized and operated schemes. Any superimposed centrally run program will have an inhibitive effect on local initiative and responsibility. The immensity of the job and heavy financial burdens it would entail would doom any effort that did not rely substantially on community resources. In poor nations such as India, these resources are mainly human — in this context the lawyers (social workers) and law students of each district or community.¹⁰

Consistent with this thinking the Center has embarked on two initiatives thus far.

1. It has begun a series of mailings to all judges, governmental officials, social workers and lawyers who it has reason to believe would be interested with the purpose of soliciting and fathoming the depth of their interest. In this series of mailings culminating in a number of regional workshops information will be

exchanged regarding the existence of legal aid programs (a questionnaire accompanied the first issuance), the history of efforts in India, and foreign programs, and monographs on such subjects as the "Constitutional Brief" for Legal Aid and the Role of the Lawyer and the Social Worker will be distributed. The major purpose of this effort, to quote from the first mailing, is:

...to identify, inspire and inform the individuals, associations and organizations who are capable of making the indispensable basic contribution of will and effort.

2. A research effort, engaging the services (and not insignificantly the involvement) of law and social work students, relating to the legal needs, and their current fulfillment, of poor people in urban and rural India. This aspect was also elucidated in the first mailing.

Concurrent to all its operative activities the Center shall be engaging in sociological research of the poor ... In this we shall be seeking to learn something about the legal service needs of the poorer classes, how and to what degree such needs are being fulfilled or sublimated, the receptivity to legal assistance that may be exhibited, the possible disruptive consequence of such assistance, and the like.

This research was viewed as essential to correct resource requirement and feasibility assessment. It was also seen as an important preliminary¹¹ to the formulation stage, by which time we would want to know something about the possibility of building on indigenous dispute resolution systems, articulating with traditional norms, and the degree of congruence between the value premises of official law and customary practice. For example, it would be useful to do more than speculate about the chance that an Indian legal aid scheme might partake of the consensual techniques of conflict resolution — arbitration, conciliation and accommodation — typical of the communal society of traditional India.¹²

A MISSING ELEMENT — FINANCIAL RESOURCES

The Center is currently moving ahead according to plans, with a healthy sense of industry, save for one nagging misgiving. Would the necessary financial support be forthcoming? In 1962 the Law Ministry called a meeting of the law ministers of the various states to discuss provision for legal aid services. At that conference the State Governments recorded their inability to bear the financial burdens of a broad-scale legal aid scheme. The Central Government likewise designated financial limitations as the barrier.¹³ There is, underlying this fact, the probability that the Government still regards legal aid, as it did a decade ago, "as of very minor importance."¹⁴

In the letter to its "constituency" the Center bravely promised to "seek, in whatever ways are open to it, to attract support from every available source — private or public, domestic or international — that is free and willing to contribute."

AN APPEAL TO THE INTERNATIONAL LEGAL COMMUNITY

In the report entitled the Anatomy of Indian Poverty¹⁵ of last year it was made perfectly clear that in its drive to become a modern industrial state the poor were being left behind — if anything, the gap between the haves and the have-nots was widening. And the state of poverty becomes increasingly difficult to forbear when the signs of betterment are coming up all around you.

This brutal fact should mean something to lawyers, who as a class thrive on order, and particularly to a special group of lawyers who have travelled around the globe in a quest for world order. For two reasons then the participants of this meeting ought to be especially concerned to relieve the plight of the poor in the developing nations by devoting themselves to discovering means of providing them meaningful alternatives:

1. if such means are not provided then ultimately the resort to disruptive force will come, carrying threat of shattering world peace;

2. peace through law can only be pursued in a community where widespread respect for law has been generated. The absence of respect is especially acute today among the impoverished sections of every society.¹⁶ Only when the poor

come to see lawyers as champions of their causes and law as a potent instrument of social change then alone will some hope of abandoning force as the primary means of dispute resolution emerge

A PROPOSAL

It is proposed that this international Conference adopt a resolution requiring its executive officers to investigate the possibility of identifying promoting or establishing an international agency which would devote itself to the raising of funds for the broad purpose of securing to the poor peoples of the nations of the world justice under law with particular reference to the provision of legal assistance through lawfully constituted programs to such people. It is further suggested that unless some existing organization assumes this undertaking the organization that may be established be called, for reason of clearly fixing its specific aim, the Foundation for International Legal Assistance to the Poor

PART II—FOOTNOTES

1 See e.g. M. P. Jain *The Ombudsman in India* (1969) (forthcoming). Generally the *Journal of Constitutional and Parliamentary Studies* (a quarterly that often reflects current activities at the Institute)

2 (a) "To study legislation administrative practice and judicial trends with a view to examining on the one hand the impact of socio economic forces on legislation and judicial trends and on the other, to analyse the impact of legislation and judicial pronouncements on social change"

(b) "To analyse social realities study new ideas for legislation and prepare draft legislation"

(c) "To generate and sustain interest among intellectuals and the wider public in the processes of interaction between the legal system and the society"

3 See Koppell *Legal Aid in India* 8 *Journal of the Indian Law Institute*, 224 (1966) Legal Department, Government of Bombay Bhagwati Committee Report on Legal Aid and Legal Advice in the State of Bombay (1950) Law Commission Fourteenth Report Ch. 27 p. 587 (1958), India Ministry of Law, Outline of a Scheme for Legal Aid to the Poor (1961)

4 On the contrary the plans all the way back to the Bhagwati Committee Report, are carefully worked out. See Appendices A and B Koppell *supra* at 246 and 249

5 Cahn and Cahn *The War on Poverty: A Civilian Perspective* 73 *Yale Law Journal* 1317 1346 (1964)

6 Among a group of attorneys who were dissatisfied with their profession, a sub-group the author denominated "Gandhians" claimed such a high moral purpose and saw the profession as "self-serving, immoral and materialistic" Rowe *Indian Lawyers and Political Modernization* 3 *Law and Society Review* 219 238 (1969)

7 A Legal Services Clinic operated by the Bombay Committee for Legal Aid, established in 1967, represents one known group of such persons

8 Note 4 *supra*.

9 Most of the older schemes bore a marked resemblance to the British model Legal Aid Advice Act, 1949 and one the Bombay Legal Services Clinic is fashioned on the American Neighborhood Law Office pattern. The danger of employing foreign models with careful regard to their relevance and adaptability to Indian conditions cannot be over-emphasized.

10 It should be stressed that this was merely a working premise directed toward heading off the tendency to devise schemes at headquarters level without awaiting participation of those who would be expected to implement and run the programs. It should not be understood as a predisposition against centrally-controlled, unitary schemes

11. Prior to the formulation stage, we informed our correspondents, the Center;

"....will continue to perform its more characteristic functions of research and study. The step preceding the formulation stage — the gathering and systemization of existing information and data — is essential even in an activist-oriented program. Even while it presses for development, the Center can attempt to make its study systematic and comprehensive. Carrying no responsibility for program adoption, the Center can treat any programs that may be instituted during the course of the research as experimental. Because it need not work against a deadline as such, the Center can entertain long-term, open-ended and continuous investigation, even performing evaluative functions subsequent to the establishment of a legal aid program. And most importantly, because it holds no brief for any particular approach, the Center can maintain that critical objectivity required of a scientific contribution; its work can serve any and all proponents or, if this should be the case, intimate the unworkability of any and all proposed schemes."

12 Just as it may be dangerous to impose foreign models, there is the need to guard against the near fetish of the foreigner to idealize ancient customary models. These may well have as much irrelevance to modern India. Prof. Rowe, for one, expressed the belief that there could be no accommodation between the customary and modern legal cultures. The value premises of the modern (competitive, contractual and individualistic) were in basic conflict with those of the traditional system (hierarchical, status-oriented and communal). Rowe, *Indian Lawyers and Political Modernization*, 3 *Law and Society Review*, 219, 235 (1969).

13. Personal interview with Mr. R. S. Gae, Secretary, Ministry of Law, February 1966, reported by Koppell, *supra* at 226.

14. Law Commission of India, *supra* Note 3, at 589.

15. Indian Institute of Public Opinion, *Monthly Commentary*, Annual Number, 1968.

16. "American Lawyers, sociologists, and Government officials now recognize that in order to rehabilitate members of society who are culturally and economically deprived, it is necessary to provide them with a means for redressing their grievances and asserting their rights. If the law can be made to work for people, they will be more likely to become contributing members of society. If the law, on the other hand, is an "enemy" and if a poor person cannot find a way in which to redress his grievances through the instruments of the law, he may turn against the legally constituted authorities and his destructive impulses will be encouraged." Koppell, *supra* note 3, at 244.

PRESS RELEASE

(From — Secretary Bar Council of Maharashtra)

BAR COUNCIL OF INDIA ELECTS VICE CHAIRMAN

At the recent meeting of the Bar Council of India held on 10th and 11th January 1970 Shri R B Jethmalani LL M

Advocate of Bar Council of Maharashtra has been elected Vice Chairman of the Bar Council of India

POWERS OF A SPECIAL JUDGE AND SECTIONS 167 & 173, CR P C

(By JOGENDRA SINGH, B A, LL B, Senior Public Prosecutor Agra)

Has a Special Judge appointed under S 6 of the Criminal Law Amendment Act 1952 (hereinafter referred to as Act) power to accept a final report submitted under S 173 Criminal P C by a Police Officer investigating a case under Ss 161 to 165 A, I P C or under S 5 of the Prevention of Corruption Act with a recommendation that no case is made out against the accused? Has a Special Judge power to remand an accused to custody under S 167 Criminal P C?

The answer to these questions will turn upon the fact whether the Special Judge is a Magistrate within the meaning of Ss 173 and 167 Criminal P C. If he is not a Magistrate then he cannot act under the Sections and if he does then certain illegal consequences are bound to follow as would be seen from the discussion hereinafter.

The key to the answer whether a Special Judge has the powers of a Magistrate for the purposes of Ss 173 and 167 Criminal P C would be provided by S 8 of the Act. It will be useful to quote the Section in full.

'8 Procedure and powers of special Judges

(1) A Special Judge may take cognizance of offences without the accused being committed to him for trial and in trying the accused persons shall follow the procedure prescribed by the Code of Criminal Procedure 1898 (Act 5 of 1898) for the trial of warrant cases by Magistrate.

(2) A Special Judge may with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor

in the commission thereof, and any pardon so tendered shall for the purposes of Ss 339 and 339A of the Code of Criminal Procedure 1898 be deemed to have been tendered under S 338 of that Code.

(3) Save as provided in sub s (1) or sub s (2) the provisions of the Criminal P C 1898 shall so far as they are not inconsistent with this Act apply to the proceedings before a Special Judge.

(3A) In particular and without prejudice to the generality of the provisions contained in sub s (3) the provisions of Ss 350 and 549 of the Criminal P C 1898 (5 of 1898) shall so far as may be apply to the proceedings before a Special Judge and for the purposes of the said provisions, a Special Judge shall be deemed to be a magistrate.

This Section conclusively indicates that a Special Judge would be deemed to be a magistrate only for the purposes of Ss 350 and 549 Criminal P C. *Vide* sub-section (3A) of S 8 quoted above. Under sub s (1) of S 8 mentioned above he only follows the procedure prescribed by Criminal P C for the trial of warrant cases by a magistrate but he is not deemed a magistrate for the purpose. For all other purposes he remains a Sessions Judge as laid down in sub para (3) of the said S 8.

The Hon'ble Supreme Court had an occasion to consider this point in the case *Major E G Barsay v State of Bombay* AIR 1961 S C 1762=1961 (2) Cri L J 823. The Hon'ble Supreme Court after discussing Ss 8 and 9 of the Act held as follows: "These provisions equate a special Judge with a Sessions Judge and the provisions of the Code of Criminal Procedure applicable to a Sessions Judge in so far as they are not inconsistent with the Act are made applicable to a Special Judge". This ruling resulted in the incorporation of sub s (3A) in the Act, by virtue of

which a Special Judge came to be deemed a magistrate for the purposes of Ss. 350 and 549 of the Criminal P. C. only. For all other purposes, the Special Judge remains a Sessions Judge as already discussed, except that he has to follow procedure for trial of warrant cases.

That being the legal position, can a special Judge exercise powers under Ss. 167 and 173, Criminal P. C.? The answer is obviously in the negative, as the powers under these Sections have been conferred on and exercisable by a magistrate only. This legal anomaly is full of complications. Whenever any person is arrested by police for offences triable by a Special Judge, he cannot be lawfully remanded to jail or police custody under S. 167 by the Special Judge. If he does, the detention of the accused would be illegal and if the accused person escapes from police or jail custody after being remanded by a Special Judge he commits no offence. Therefore, the police must always obtain the remand for the first fifteen days (unless the accused is released on bail) from a magistrate and only after that from the Special Judge under S. 344, Criminal P. C. if the investigation has not been completed within 15 days.

Section 173 of the Criminal P. C. provides that every investigation under Chap. XIV shall be completed without unnecessary delay and as soon as it is completed, the officer-in-charge of the police-station shall forward a report to a magistrate empowered to take cognizance of the offence on a police report.

Now, there would be no difficulty, if a Special Judge takes cognizance of the offences mentioned in the police report, which he would normally do if the police report discloses facts which constitute offences triable by a Special Judge. But if the police report on the conclusion of the investigation shows, that the allegations against the accused were false and no offence was committed by the accused, then the Special Judge would not be competent to pass any order on the police report, if he decides to agree with the police report. This is so because, the Act vide S. 8 (1) empowers the Judge only to take cognizance, but makes no provisions for dealing by the Special Judge with the police report in any other way. The acceptance of police report in which no prosecution is recommended carries certain legal consequences.

If the information given to the police about the commission of offences triable

by the Special Judge is found to be false, and the final report is presented to the Special Judge and accepted by him, the person against whom the false information and accusation was made may request the Special Judge to make a complaint against the informant under S. 211, Penal Code, as the accused person cannot file a complaint under S. 211, Penal Code himself, as orders passed on the final report by a Special Judge would be judicial orders and in view of the provisions of S. 195, Criminal P. C., a complaint under S. 211, Penal Code would be only on the complaint of the Court which accepts the final report. This procedure has to be followed in view of the ruling of Saurashtra High Court in case *State v. Vipra Khimji Ganga Ram*, A I R 1952 Sau 67 : 1952 Cri. L J 1084 which was followed with approval by the Hon'ble Allahabad High Court in the case *Sunder Lal v. State* 1965 All Cri R 208.

But as the Special Judge is not a Magistrate his order accepting a final report would be without jurisdiction and any action taken by him such as the filing of a complaint under S. 211, Penal Code would also be without jurisdiction.

Legally, an officer-in-charge of police-station may present a final report to the Magistrate having jurisdiction, as the Magistrate is fully competent to accept a final report submitted to him in cases exclusively triable by a Special Judge. See AIR 1960 All 618 : 1960 Cri L J 1290 and 1959 Cri L J 1155 (Bom). However, there is a practical difficulty in this situation too. According to S. 8(1) of the Act, a Special Judge is free to take cognizance of offences triable by him in any manner. No particular condition is prescribed for the mode and manner in which cognizance may be taken by the Special Judge unlike a Magistrate who can take cognizance only in the manner provided in S. 190 of the Criminal P. C. There may be cases in which the Special Judge may validly take cognizance notwithstanding the final report stating that no offence has been committed, if in his view it was appropriate to proceed with the trial. However what should he do if he agrees with the final report? As he has no power to act under S. 173, Criminal P. C., himself, he should send the final report to the Magistrate having jurisdiction for passing orders according to law.

All these legal defects and shortcomings show that the framers of the Criminal

Law Amendment Act failed to visualise and anticipate these flaws which are creating not only practical difficulty but may result in miscarriage of justice

It is therefore very necessary that the Criminal Law Amendment Act 1932 is

amended suitably to give the Special Judge all the powers of a Magistrate since he basically and essentially acts as a Magistrate while trying the cases according to the procedure prescribed for trial of warrant cases

REVIEW

CRIMES AND CASES By P Basi Reddy, Barrister at-law formerly Judge of the Andhra Pradesh High Court 1st Edition. Vivekananda Printers, Lakdikapul, Nilowfer Hospital Road, Hyderabad 4. With a foreword by N Somasundaram, Retired Judge, Madras High Court, Pages 166 Price Rs 8

The slender Volume under review is an account in racy and readable style of fourteen murder cases in which the author participated either as Judge or Counsel for accused. Mr Basi Reddy is well known to the members of the Andhra and Madras Bars; he was practising in the Madras High Court till the formation of the Andhra High Court. A prominent member of the Andhra Bar on the Criminal Side before his elevation to the Bench, his is supposed to be a unique instance of prisoners in jail appealing to their lawyer from inside the jail not to accept a Judgeship as they felt there would be none to defend them as ably as he did. No wonder then that in cases where the author has come out with flying colours he shares with the reader his undisguised pleasure.

The first criminal case of any importance in which the author appeared forms the first of the fourteen cases. It was a case in which an agricultural labourer was charged with the murder of his wife by strangulation while in the process of enforced sexual intercourse. The accused was found guilty and sentenced by the trial Court and the Division Bench. On a subsequent petition for mercy presented by author the sentence of transportation for life was reduced to one of five years imprisonment. This first case which the author lost, we are informed, was what led him paradoxically enough to settle down as a criminal lawyer. The titles of the various cases such as *The Love*

Potion that Killed, *The Innocent Man Hanged*, *The Dead Man comes to Life*, *A Son's Revenge*, *The Perfect Alibi*, and *Gamekeeper Turns Poacher* remind one forcibly of the titles of numerous thrillers and detective novels which are bound to catch the reader's attention and hold it to the last. As apt as they are catching are other titles such as *The Female of the Species*, *The Worm Turns*, *Unnatural Vengeance*, *A Daughter's Vow*, *The Sub Inspector Murder case*, *The Poisoning Plan that Miscarried* and *The Death Warrant that was not Executed*.

Besides raising purely legal issues the cases reveal different facets of human nature and the variety of motives that determine human conduct. These are real cases of murder out of dozens which came up before the Andhra Pradesh High Court at the appellate stage. Under each case heading or chapter title are given the facts of the case, the course of proceedings in the different Courts, the basic principles on which the judgments have been or should be based, and the final judgments. They would seem to make it clear that justice according to law does not always coincide with truth. As observed by the author, technical rules of evidence and procedure, faulty police investigation, prevalence of perjury and misapplication of the principle of benefit of doubt are some of the causes that have led to this gap between justice and truth which in the name of humanity has to be bridged as far as possible.

The book is of value to junior lawyers who wish to specialise on the criminal side and should be of considerable interest to the layman also. But there are some typographical errors and idiomatic lapses which could perhaps have been avoided by more careful editing of the manuscript.

RSS

to be adopted by the Panchayat is to summon the offender from time to time if he has not removed the encroachment and continue imposing on him the recurring fine as it becomes due up to the limit prescribed by Section 23 of the Act".

The proper course for a Panchayati Adalat in case of continuing breach therefore, is to issue a notice to the accused for the days during which the breach continued, afford him an opportunity to defend himself and in case the offence is proved punish him according to law. But the imposition of recurring fine seems to be clearly illegal. Moreover, the Panchayati Adalat could at best have imposed a fine of Re. 1 only per diem and imposition of fine of Rs. 2 per diem is not at all warranted by any provision of the Act. That being so the order passed by the Panchayati Adalat cannot be sustained.

8. Accordingly I allow this petition and quash the order of the Panchayati Adalat dated 10-8-1966 imposing a recurring fine on the petitioner. In the circumstances of the case there shall be no order as to costs.

Petition allowed

1970 CRI. L. J. 305 (Vol. 76, C. N. 70) =
AIR 1970 ALLAHABAD 154 (V 57 C 19)
R. CHANDRA AND K. C. PURI JJ.

Ram Khelawan Bhagwati, Applicant v
Sunder Nankau and another, Opposite
Parties

Criminal Ref No 89 of 1966, D/- 24-9-1968 from order of Sessions J. Lucknow
D/- 27-9-1966.

Criminal P. C. (1898), S. 145, sub-sections (4) and (9) — Power of Magistrate under sub-section (9) to summon any witness — Not subject to first proviso to sub-section (4) — Witness can be summoned to file affidavit. AIR 1959 All 763, Overruled; AIR 1961 Punj 187, Diss.

The Magistrate can in suitable cases summon any witness irrespective of the fact whether he has filed an affidavit and direct him to attend or produce any document or thing. Thus an order of the Magistrate summarily dismissing the petition of a party requesting to summon a witness for filing an affidavit is erroneous. AIR 1959 All 763, Overruled, AIR 1961 Punj 187, Diss (Paras 8 and 14)

Neither in sub-section (9) nor in the proviso to sub-section (4), a party has a right to examine a witness. In either case, the discretion lies with the Magistrate. When it is not possible for a party to obtain affidavits from persons who may be competent to speak about the possession, the Magistrate has the discretion to examine such persons as witnesses under

sub-section (9). The first proviso to sub-section (4) is quite independent of sub-section (9). That proviso would govern only sub-section (4) and not other sub-sections which follow it. The view that sub-section (9) is subject to the proviso to sub-section (4) would be violating all rules of interpretation of the statutes. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined only to that case. AIR 1957 Bom 20, Rel. on. (Para 8)

A plain reading of sub-section (9) clearly indicates that it was quite independent of sub-section (4). It empowers the Magistrate where necessary 'at any stage' of the proceedings on the application of either party to summon 'any witness' directing him to 'attend or to produce any document or thing.' The words used in the proviso to sub-section (4) are 'any person' but in sub-section (9) the words are 'any witness'. The said proviso is restricted to the evidence of only those persons who have filed the affidavit. But sub-section (9) says that 'any witness' could be summoned at any stage. There is not the least indication that its scope is also confined only to the persons who have filed affidavits in the case. 'At any stage' occurring in the sub-section may even be prior to the filing of the affidavits. AIR 1965 Pat 25 and AIR 1960 Raj 15 and AIR 1961 Madh Pra 302 and AIR 1964 Mad 263 and AIR 1965 All 294, Rel. on. (Para 8)

Cases Referred: Chronological Paras

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|---|-------------|
| (1965) AIR 1965 All 294 (V 52) = | |
| 1965 (2) Cri LJ 39, Lalta Ram v. Dalip Singh | 12 |
| (1965) AIR 1965 Pat 25 (V 52) = | |
| 1965 (1) Cri LJ 69, Sheo Kumar Dubey v Tribhuwan Rai | 9 |
| (1964) AIR 1964 Mad 263 (V 51) = | |
| 1964 (1) Cri LJ 674, Challamuthu Padayachi v Rajavel | 12 |
| (1961) AIR 1961 Madh Pra 302 (V 48) = 1961 (2) Cri LJ 642, Kanhaiyalal v Devi Singh | 11 |
| (1961) AIR 1961 Punj 187 (V 48) = | |
| 1961 (1) Cri LJ 708, S. Jodh Singh v. Mahant Bhagambar Das | 2, 9, 12 |
| (1960) AIR 1960 Raj 15 (V 47) = | |
| 1960 Cri LJ 116, Bahori v. Ghure | 10, 12 |
| (1959) AIR 1959 All 763 (V 46) = | |
| 1959 Cri LJ 1384, Bhagwat Singh v. State | 1, 2, 9, 12 |
| (1957) AIR 1957 Bom 20 (V 44) = | |
| ILR (1957) Bom 56, Keshavlal Premchand v Commr. of Income-tax Bombay | 8 |
| Govt. Advocate, for the State, S S. Chauhan, for Opposite Party. | |

R. CHANDRA J.:— This reference arises out of the proceedings under Section 145 of the Code of Criminal Pro-

cedure Ram Khelawan the petitioner, applied to the Magistrate for summoning the Lekhpal for filing an affidavit in that case. The Magistrate disallowed the prayer on the ground that under the existing law there was no provision for summoning a witness for giving evidence in a case under Section 145 of the Cr. P. C. In the revision filed against that order the Sessions Judge Lucknow did not agree with that view. So he made a reference to the High Court recommending that the order of the Magistrate be quashed and he be directed to decide the application of Ram Khelawan for summoning the Lekhpal on the merits. The reference came up for hearing before Brother Misra J. He thought that the view expressed by Desai, J. (as he then was) in the case of Bhagwat Singh v State AIR 1959 All 763 that the Magistrate can summon only those persons for examination whose affidavits have been put in, needed reconsideration. So he referred the matter to a Bench. In these circumstances this reference has come up for hearing before us. We have heard Sri Chauhan Counsel for the opposite parties. Nobody however appeared from the side of the applicant in spite of sufficient service. Since the matter was of some importance we also called upon the Government Advocate to address us.

2. In AIR 1959 All 763 (Supra) Desai J. interpreting the provisions of sub-sections (4) and (9) of Section 145 of the Criminal P. C. observed:

The provisions of Section 145 were amended with effect from 1-1-1956 by the Criminal P. C. (Amendment) Act (No 26 of 1955). Previously affidavits were not allowed to be produced and witnesses had to be examined orally. Now the law has been changed and the legislature has provided that only affidavits should be put in evidence and that if any witnesses are to be examined they must be the persons whose affidavits have already been put in. No person can be examined as a witness unless his affidavit is on the record.

Sub-section (4) lays down how the sub-Divisional Magistrate is to proceed after the parties have appeared before him. He is required to peruse the written statements, documents and affidavits if any put in, hear the parties and decide which party was in possession on the relevant date. There is a proviso to the effect that he 'may if he so thinks fit summon and examine any person whose affidavit has been put in as to the facts contained therein'. This provision means that he is required to peruse only the statements, documents and affidavits and then hear the parties and conclude the inquiry. He is not required to examine any person as a witness.

Sub-section (9) does not confer any right upon a party to examine a person as its witness. It only lays down the procedure to be followed in procuring the attendance of its witnesses. Whether it has a right to examine a witness or not has to be ascertained from other provisions. All that the sub-section means is that if a party has a right to examine a witness orally it may obtain from the Magistrate a summons directing him to attend the Court. The first proviso to sub-section (4) is the only provision which confers a right upon a party to examine a witness orally in the Court so sub-section (9) must be read with the first proviso to sub-section (4).

The Magistrate's failure to pass a proper order contemplated by Section 145 (1) and to require the parties to put in affidavits does not confer any right on the parties to examine witnesses whose affidavits are not on the record.

This view was also followed by the Division Bench in the case of S. Jodh Singh v Mahant Bhagambar Das AIR 1961 Punj 187.

'Though we feel that the continued existence of sub-section (9) in its present form is certainly not very apt and requires looking into by the Legislature yet we have no doubt in our mind that it gives no right to a party to summon or examine any witness orally apart from the right given to it to adduce evidence as detailed in sub-section (1) and that oral examination of a witness must be confined within the limits imposed by the newly added proviso namely the first proviso to sub-section (4)'.

With the greatest respect we do not agree with the view expressed in these cases. Our reasons shall follow.

3. For finding out the real intention of the Legislature we propose to examine in detail the provisions of Section 145 of the Criminal P. C. as they stand after the amendment by Act 26 of 1955. The section reads:

(1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute and further requiring them to put in such documents or to adduce by putting in af-

fidavits, the evidence of such persons, as they rely upon in support of such claims'.

(2) For the purposes of this section the expression 'land or water' includes buildings, markets, fisheries

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute

(4) 'The Magistrate shall then without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable, within a period of two months from the date of the appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

'Provided that the Magistrate may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein':

'Provided further that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed he may treat the party so dispossessed as if he had been in possession at such date'.

'Provided also that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section,

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final

(6) If the Magistrate decides that one of the parties was or should under the second proviso to sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, and when he proceeds under the second proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed

... ..
(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this

section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.....".

(The underlined (here into ' ') portions indicate amendments made to the section by Act No. 26 of 1955).

4. Section 145 is intended only to provide a speedy remedy for the prevention of breaches of peace arising out of disputes relating to immoveable property by allowing one or either of the parties in possession. By Act No 26 of 1955, certain important changes have been introduced. The main object of the amendments is quicker disposal of enquiries under this section. Sub-sections (1), (4) (5) and (6) of this section are complementary. Once an order has been passed under sub-section (1), it is obligatory for a Magistrate to make the enquiry provided for in sub-section (4) subject only to the obligation under sub-section (5) to determinate proceedings in the circumstances therein contemplated. The words of sub-section (4) "the Magistrate shall then....." are mandatory. The word 'then' refers to the stage when in compliance with the order under sub-section (1) the parties have put in their written statements and attended the Court. Sub-section (5) is emphatic that the order under sub-section (1) shall be final subject to the one exception that the Magistrate shall cancel the order and stay all further proceedings if it is shown that no dispute likely to cause breach of the peace exists or has existed. On the completion of the enquiry under sub-section (4) a final order under sub-section (6) must follow it being obvious that the holding of the said enquiry is a condition precedent to the making of the order under sub-s (6)

5. The use of the word 'then' in the beginning of sub-section (4) indicates that the question of determination of factum of possession under sub-section (4) arises only after the requirements of sub-sections (1) and (3) have been complied with.

6. The words 'hear the parties' occurring in sub-section (4) of Section 145 as amended by Act No 26 of 1955 would mean 'hear the arguments of the parties' and would not include taking the evidence of the parties if they desired to appear as witnesses. The words 'receive all such evidence as may be produced by them respectively' have now been omitted from Section 145 (4) and in the first proviso to Section 145 (4) the examination of witnesses whose affidavits have been filed alone has been provided.

7. Taking of oral evidence is now not compulsory. The Magistrate may now ordinarily decide the question of possession on perusal of the written statements, documents, and affidavits, if any, and upon hearing the parties. If, however, he thinks it proper, he may summon and examine a

person whose affidavit has been filed as to the facts contained in his affidavit

8 Though the amendments made under this section in 1955 aimed at expeditious disposal of proceedings and for that purpose this section has been extensively amended sub-section (9) has been retained in its old form. The newly added proviso to sub-section (4) empowered the Magistrate to summon and examine any person whose affidavit has been put in. He is also empowered under sub-section (9) to summon any witness at any stage of the proceedings on the application of either party. Neither in sub-section (9) nor in the proviso to sub-section (4) a party has a right to examine a witness. In either case the discretion lies with the Magistrate. When it is not possible for a party to obtain affidavits from persons who may be competent to speak about the possession the Magistrate has the discretion to examine such persons as witnesses under sub-section (9). Our reasons for this view are that the first proviso to sub-section (4) is quite independent of sub-section (9). That proviso would govern only sub-section (4) and not other sub-sections which follow it. The view that sub-section (9) was subject to the proviso to sub-section (4) would be violating all rules of interpretation of the statutes. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined only to that case. In AIR 1957 Bom 20 Keshavlal Premchand v Commissioner of Income-tax Bombay their Lordships observed

"A proviso which is in fact and in substance a proviso can only operate to deal with a case which but for it would have fallen within the ambit of the section to which the proviso is a proviso. The section deals with a particular field and the proviso excepts or takes out or carves out from the field a particular portion and therefore it is perfectly true that before a proviso can have any application the section itself must apply. It is equally true that the proviso cannot deal with any other field than the field which the section itself deals with. If a proviso is capable of a wider connotation and is also capable of a narrower connotation if the narrower connotation brings it within the purview of the section then the Court must prefer the narrower connotation—rather than the wider connotation."

The proviso to sub-section (4) of S 145 confers a right on the Magistrate in suitable cases to summon and examine any person whose affidavit has been put in as to the facts contained therein. This simply means that where necessary the Magistrate could summon and examine any person who has filed an affidavit in

the case. That evidence is also to be confined to the facts mentioned in those affidavits. That contingency would arise only in the case of ambiguity in the affidavit filed by the parties witnesses. As stated earlier this specific provision was made by the amendment of 1955. Sub-section (9) even existed prior to the amendment and was allowed to continue. So it could not be said that the same was redundant or superfluous. If that was so the Legislature could have omitted it when drastic changes were made in Section 145. A plain reading of sub-s (9) clearly indicates that it was quite independent of sub-section (4). It empowers the Magistrate where necessary, 'at any stage of the proceedings on the application of either party to summon any witness directing him to attend or to produce any document or thing'. The words used in the proviso to sub-section (4) are 'any person' but in sub-section (9) the words are 'any witness'. The said proviso is restricted to the evidence of only those persons who have filed the affidavit. But sub-section (9) says that any witness could be summoned at any stage. There is not the least indication that its scope is also confined only to the persons who have filed affidavits in the case. At any stage occurring in the sub-section may even be prior to the filing of the affidavits. On the facts of the instant case it is unnecessary to enter into the question whether the Magistrate has also the power to record the evidence of any witness summoned under that sub-section. As stated earlier the request of the petitioner was only to summon the Lekhpal for filing an affidavit but the Magistrate summarily dismissed the petition on the ground that there was no such provision under the existing law which empowered him to summon any witness to file an affidavit. That power clearly existed under sub-section (9). So we are convinced that the provisions of sub-s (9) are quite independent of sub-section (4). In suitable cases the Magistrate could summon any witness irrespective of the fact whether he has filed an affidavit in the case and direct him to attend or produce any document or thing. In the circumstances there was no bar to the Magistrate in summoning the petitioner's witness and directing him to file an affidavit.

9 Similar view was also expressed in the Division Bench case of Sheo Kumar Dubey v Tribhuwan Rai AIR 1965 Pat 25. The learned Judges disagreed with the view taken by Desai J in AIR 1959 All 763 (Supra) and AIR 1961 Punj 187 (Supra). In that connection Ramratna Singh J observed

"With the greatest respect I am unable to agree. There is nothing in the language of the proviso to sub-section (4) or in that

of sub-section (9) to indicate that the former confers a right upon a party to examine a witness orally. It will be noticed that the expression 'if he thinks fit' occurs in both the sub-sections and this expression shows that the discretion lies with the Magistrate. Further, the proviso to sub-section (4) does not speak of the application of a party, which fact indicates that the Magistrate may examine a person who has sworn an affidavit either of his own motion or at the request of a party, whereas sub-section (9) enables the Magistrate to summon a witness at the request of a party at any stage of the proceedings. It will also be noticed that the proviso to sub-section (4) contains the provision to summon and examine any person and therefore, a separate provision like the one in sub-section (9) is not required for exercising the power given by the proviso. The view taken in the aforesaid decisions can be justified only if sub-section (9) is completely ignored. This sub-section was, in its present form, before the legislature, when extensive amendments were made in Ss 145 and 146.

The retention of sub-section (9) in its old form cannot, therefore be due to mere oversight. It is true that the amendments aimed at expeditious disposal of a proceeding under Section 145; nevertheless, sub-section (9) was retained. The newly added proviso to sub-section (4) certainly empowers the Magistrate to summon and examine any person whose affidavit has been put in; but at the same time the legislature also empowered the Magistrate, under sub-section (9), to summon any witness at any stage of the proceeding on the application of either party. Neither in sub-section (9) nor in the proviso to sub-section (4) a party has been given any right to examine a witness, in either case the discretion lies with the Magistrate, and he can summon a person under either of these provisions only if he thinks fit to do so.

In my opinion, the legislature deliberately allowed sub-section (9) to continue for meeting certain contingencies. It may not be possible for a party to obtain the affidavits of some persons either because they do not want to be identified with a party to the dispute or because they are public servants, at the same time such persons may be very competent to speak about possession. What remedy has a party in such a contingency? A party may, of course, request the Magistrate to ask such a person to swear an affidavit, but the Magistrate has no power to compel such a person to do so. The only other alternative, therefore, for the party is to request the Magistrate to summon such a person and examine him as a witness; and this can be done only under sub-section (9). Of course, the Magistrate is

not bound to comply with the request of the party, but he has to exercise his discretion judiciously—not arbitrarily. For instance, the Magistrate should ordinarily accede to the request of a party to summon and examine a government servant who may be quite competent to speak about the possession of a disputed land.....

My considered opinion, therefore, is that a Magistrate may, at the request of a party, examine, if he thinks fit a person as a witness under sub-section (9) of Section 145, even if such a person has not filed an affidavit contemplated by sub-section (1) of that section."

10. In AIR 1960 Raj 15, *Bahori v. Ghure* it was held.—

"The proviso to sub-section (4) of Section 145 is merely an enabling provision of law which entitles the Magistrate to summon and examine any of the persons whose affidavits have been filed on behalf of the parties, if he so desires in order to decide the question of possession; but the proviso does not preclude the Magistrate from calling as a witness any other person that he thinks proper to examine. Sub-section (9) of S 145 contemplates such a situation. Sub-section (9) says that the Magistrate, if he thinks fit, at any stage of the proceedings under the section, on the application of either party, issue summons to any witness directing him to attend or to produce any document or thing. If on the application of either party to the proceeding the Magistrate can do so, he can do so equally in the ends of justice of his own accord....."

11. In AIR 1961 Madh Pra 302, *Indore Bench Kanhaiyalal v. Devi Singh* it was held —

"Under Section 145, summons to examine witnesses can be issued either under the first proviso to sub-section (4) or under sub-section (9). If they are issued under the former provision, obviously, the summons can be addressed only to those who have put in affidavits, the examination also should be restricted to the contents of the affidavits. The proviso enables the Magistrate to summon and examine a person who puts in affidavit possibly where he finds the affidavit vague or one otherwise calling for some clearing.

But sub-section (9) is wider than the first proviso to sub-section (4) and is not limited by the latter. Sub-section (9) really enables any party to move the Magistrate to issue summons for the attendance of any witness who may or may not be a person putting in an affidavit. But the matter of issuing summons under sub-section (9) is discretionary with the Magistrate. Indiscriminate application of that sub-section will certainly defeat the purpose of the amendment to sub-s (1) and draw over the proceedings just as long

as they could have been under the un-amended law. Thus simply because a summons had been issued to witnesses other than those putting in the affidavits and they had been examined and their oral evidence considered it cannot be said that there has been any breach of a mandatory provision. The issue of summons under sub-section (9) without any affidavit at all cannot be considered to be an illegality going to the root of the proceedings.

12 In AIR 1964 Mad 263 Challamuthu Padayachi v Rajavel it was held

The powers under sub-s (9) to summon a witness directing him to attend or produce a document at any stage of the proceedings on the application of the parties are not in any way affected by the first proviso to sub-section (4) and the Magistrate can summon any witness under Section 145 (9) to give evidence or to produce a document even though he may not have filed an affidavit under Section 145 (1)

Similar matter also came up for consideration before the Division Bench of this Court in AIR 1965 All 294 Lalita Ram v Dalip Singh. Their Lordships observed

The Magistrate may if he thinks fit at any stage of the proceedings under this section, on the application of either party issue a summons to any witness directing him to attend or to produce any document or things. The aforesaid section was amended by the Criminal P C Amendment Act No 26 of 1955. Prior to the amendment of the section the parties had the right to examine witnesses in support of their respective cases. One of the changes effected by the Amendment Act referred to above was that provision was made for the filing of affidavits and the object underlying the aforesaid change was expedition in the disposal of cases and simplification of procedure. The aforesaid change was not brought about because the procedure of examining the witnesses was considered to be either illegal or faulty and we have no doubt that in introducing the aforesaid change expeditious disposal of the proceedings under Section 145 Criminal P C was in the contemplation of the Legislature.

There is nothing in S 145 as it now stands to indicate that the intent of the Legislature was that the examination of witnesses would be illegal or that a Court would be precluded from recording oral statements of witnesses proposed to be examined by the parties even in cases in which the parties were not required to and did not file affidavits in support of their respective cases.

In AIR 1959 All 763 De. J. as our Lord the Chief Justice then was held that under the amended Section 145 of Criminal P C only affidavits could be put

in evidence and that if any witnesses were to be examined they must be persons whose affidavits had already been put in. With great respect to him we find ourselves unable to agree with the general proposition laid down in that case. The aforesaid decision was followed by the Punjab High Court in the case of AIR 1961 Punj 187. A different view was taken in the case of AIR 1960 Raj 15. In that case a patwari was examined as a Court witness and the question arose as to whether such examination was countenanced by provisions of the Code. It was held that proviso to sub-section (4) of S 145 was merely an enabling provision of law but it did not preclude the Magistrate from calling as a witness any other person that he thought proper to examine.

13 There are numerous cases which lay down that the provisions of S 540 of the Criminal P C also apply to the proceedings under S 145. In the instant case however there is no such controversy. We are only concerned with the provisions of sub-sections (4) and (9) as discussed earlier.

14 In this view we hold that the Magistrate clearly erred in summarily rejecting the application of the petitioner for summoning the Lephpal and directing him to file an affidavit. He was fully competent under S 145 (9) of the Cr. P C to have granted that prayer if it was necessary in the ends of justice and for proper decision of the rights of the parties. In the circumstances the reference is allowed and the recommendation made by the Sessions Judge Lucknow is accepted. The order of the Magistrate dated 7th June 1966 is quashed and he is directed to decide the application of the petitioner for summoning the Lephpal on the merits.

Reference allowed.

1970 CRI L J 310 (Vol 78, C N 71) =

AIR 1970 ALLAHABAD 185 (V 57 C 25)

K. B. ASTHANA J

Smt. Gauri Devi Appellant v Bishwanath Banerjee Respondent

F. A. F. O. No 44 of 1966 D/-10-12-1968 against order of Civil J Varanasi, D/- 21-10-1965

(A) Criminal P C (1898) Section 488 — Order for maintenance under Section 488 — Civil suit to set aside order made after contest — Suit barred — Order challenged on ground of fraud or concealment — Suit not barred — (Civil P C (1908) S 9 — Barred by Criminal P C)

No doubt a Civil Court will have no jurisdiction to set aside an order duly and

EM/GM/C271/69/NYR/D

properly passed by a Magistrate under Section 488 of the Criminal P. C. That is to say, if an order is made against a husband for payment of maintenance to his wife after a contest it could only be modified or set aside in appeal or revision by the higher Court as provided by the Criminal P. C. But where the order of the Magistrate is challenged on the ground that it was obtained by fraud having been played upon the Court and the cause of action is based on the fraudulent conduct of a party who obtained that order in his or her favour, its validity could always be questioned by way of a suit in the Civil Court as ultimately that order affects the Civil rights of the parties concerned relating to status, money and property. AIR 1964 SC 322 and AIR 1963 All 143 and AIR 1956 Trav-Co. 204, Ref. (Para 5)

(B) Civil P. C. (1908), S. 20 — Order for maintenance by Court of A State — Enforcement of order in B State — Civil suit to set it aside on ground of fraud or concealment — Part of cause of action held arose in B State — Civil Court in B State therefore, had jurisdiction to entertain civil suit — (Criminal P. C. (1898), S. 488). (Para 4)

Cases Referred: Chronological Paras

- {1964} AIR 1964 SC 322 (V 51) =
(1964) 1 SCR 752, Firm of Illurh Subbayya Chetty & Sons v. State of Andhra Pradesh 5
- {1963} AIR 1963 All 143 (V 50) =
1962 All LJ 786 = 1963 (1) Cri LJ 394, Km. Nafess Ara v. Asif Saadat Ali Khan 6
- {1956} AIR 1956 Trav-Co 204 (V 43) =
1956 Cri LJ 1098, Johnson v. Sarasama 6
- Narendra Kumar Verma, for Appellant.

JUDGMENT:— This appeal is directed against an order of remand passed by the lower appellate Court to the effect that the suit to be reheard and decided in accordance with law and in the light of the observations made by the lower appellate Court.

2. The suit which has given rise to this appeal was filed by Vishwanath Banerji, the plaintiff-respondent, in the Court of the Munsif of Varanasi for a declaration that an order dated 19-7-1961 passed by Sri H K Sharma, Magistrate First Class, Deoghar District Santhal Parganas Bihar in Criminal Case No 376 of 1961, misc, case No 125 of 1961, Smt. Gauri Banerji v. Vishwanath Banerji, under S 488, Criminal P. C., was illegal, ultra vires, void, ineffective and unenforceable and for a permanent injunction restraining the defendant from taking any steps to realise by distress warrants or otherwise any sum of money from the plaintiff in pursuance of the said order. Admittedly Vishwanath Banerji and Smt Gauri Banerji are husband and wife having been married at

Deoghar in Bihar in 1958 Admittedly both of them last resided in Varanasi.

It was alleged by the plaintiff that his wife Smt. Gauri went away to her father's place in May 1959 to see her ailing father but refused to return to him despite his best efforts. The plaintiff then took proceedings under Section 9 of the Hindu Marriage Act against his wife Smt Gauri Devi for restitution of conjugal rights and it was registered as case No 29 of 1960 in the Court of District Judge, Varanasi. During the pendency of the said proceedings for restitution of conjugal rights Smt. Gauri Banerji applied for interim maintenance and expenses for defending the case. This application was rejected. It was then alleged that without the knowledge of the plaintiff and without any notice being served upon him, Smt. Gauri took proceedings before the Magistrate in Deoghar under Section 488, Criminal P. C. and that she and her father fraudulently before the Court having represented that the notices had been served, got an order behind the back of the plaintiff directing the plaintiff to pay a sum of Rs 70 per month as maintenance. It was also alleged that the plaintiff only knew of the said order when distress proceedings were started against him by the police at Varanasi and a threat was made for attachment of his properties. To protect himself from the alleged illegal attachment the plaintiff filed the suit giving rise to this appeal and for the relief mentioned above.

3. The learned First Additional Munsif before whom the instant suit came up for hearing held that the Civil Court had no jurisdiction to entertain a suit for setting aside of an order duly passed by a Magistrate under Section 488 of the Cri. P. C. and dismissed the suit on this preliminary point. On appeal by the plaintiff the learned Judge of the lower appellate Court took a contrary view and held that the suit was cognizable by a Civil Court as it was based on a cause of action alleging fraud and because the order of the Magistrate of Deoghar passed under Section 488, Criminal P. C. was impugned as vitiated not having been duly passed. The learned Judge set aside the decree of the learned Munsif and remanded the suit for rehearing in accordance with law. It is against this order that Smt Gauri Banerji the defendant, has filed this appeal.

4. On behalf of the appellant it was urged by her learned counsel that an order passed under Section 488 of the Criminal P. C. even assuming there was some procedural irregularity could not be set aside by a Civil Court and the only remedy which was open to the aggrieved party was to file an appeal or revision under the Criminal Procedure Code. It was also urged that the Court at Varanasi had no jurisdiction as no part of the cause of ac-

tion arose within its jurisdiction. The submission was that the impugned order was passed by the Magistrate in Deoghar in Bihar and even if a suit would lie in a Civil Court for a declaration that the said order was null and void and for an injunction restraining the defendant from enforcing that order it could be filed only in the Civil Court at Deoghar which will have jurisdiction and where the defendant resided.

4 A In order to meet the second contention of the learned counsel for the appellant indicated above the learned counsel for the plaintiff-respondent submitted that since the order of the Magistrate under S 488 was tried to be enforced in Varanasi through the police of Varanasi and a threat was made by the police at Varanasi to attach the property of the plaintiff it was always open to the plaintiff to seek a declaration that his property was not attachable in execution of the said order and for such a suit the cause of action at any rate a part of it arose at Varanasi within the jurisdiction of the Civil Court of Varanasi. The learned counsel for the defendant-appellant strenuously contended in reply that no such plea was raised in the plaint and no such relief was sought in the plaint so as to bring the suit within the jurisdiction of the Civil Court at Varanasi. On a reading of the plaint and the reliefs claimed it did appear to me that the real intention of the plaintiff was to seek such a relief and the cause of action based on the process issued by the local police can be said to be pleaded.

But I thought it proper as the suit was still in its infancy to allow an opportunity to the plaintiff to amend his plaint so that what was implicit in the plaint be made explicit. The learned counsel for the plaintiff-respondent filed an application for amendment of the plaint which despite time having been granted to the learned counsel for the defendant-appellant has not been opposed. I have allowed the amendment to be incorporated in the plaint. It would be open to the defendant to file a fresh written statement to meet the explicit pleas raised for which reasonable time will be granted by the lower Court after the record had been received by it from this Court. The pleas of a specific nature having been raised in the plaint and the proper relief having been sought the Court at Varanasi will have jurisdiction to entertain the suit.

5 Coming to the main question arising on the appeal namely the competency of the Civil Court to set aside an order passed by the Magistrate under Section 488 Criminal P C I have no doubt in my mind that a Civil Court will have no jurisdiction to set aside an order duly and properly passed by a Magistrate under Section 488 of the Criminal P C.

That is to say that if an order is made against a husband for payment of maintenance to his wife after a contest it could only be modified or set aside in appeal or revision by the higher Court as provided by the Criminal Procedure Code. But where the order of the Magistrate is challenged on the ground that it was obtained by fraud having been played upon the Court and the cause of action is based on the fraudulent conduct of a party who obtained that order in his or her favour its validity could always be questioned by way of a suit in the Civil Court as ultimately that order affects the civil rights of the parties concerned relating to status money and property.

The learned Munsif relied upon certain reported cases in support of his view that the Civil Court will have no jurisdiction to set aside an order passed under Section 488 Criminal P C. All the cases relied upon by the learned Munsif are distinguishable on facts. In none of them the suit which was filed in Civil Court was based on a cause of action attributing fraud or concealment to the defendant. It appears to me that in the instant case the attempt of the defendant Smt Gauri Banerji to enforce that order against the plaintiff her husband, in Varanasi involving a threat to his property could only be warded off by the husband by filing a suit in the Civil Court at Varanasi for a declaration that the order was null and void and was not binding on him and for an injunction restraining the defendant from enforcing that order. If the order passed under Section 488, Criminal P C by the Magistrate at Deoghar is ultimately found to have been duly passed the suit will fail on merits. But what is found here is that the plaintiff has challenged the very jurisdiction of the Magistrate at Deoghar and his competency in law to pass such an order.

Where an order under Section 488 is not duly passed any action taken on the basis of that order affecting the status and property of an aggrieved party can always be questioned in the Civil Court by seeking the appropriate relief order or injunction. It is only a suit expressly or impliedly barred from the cognizance of the Civil Court which would not be triable by it as provided by Section 9 of the Civil P C. The learned counsel for the defendant-appellant has failed to satisfy me that a suit for a declaration that an order passed by a Magistrate under Section 488 Criminal P C is vitiated by fraud and concealment of true facts and has been fraudulently obtained is expressly or impliedly barred by the provisions of Criminal Procedure Code or any other law. It has been observed by the Supreme Court in the case of *Firm of Ilurh Subbayya Chetty & Sons v State of*

Andhra Pradesh, AIR 1964 SC 322, in para 6 of the report as follows.—

"In dealing with the question whether Civil Courts' jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind the fact that there is a general presumption that there must be a remedy in the ordinary Civil Courts to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of the Civil Courts to entertain civil cases will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the Civil Courts to deal with a case brought before it in respect of some of the matters covered by the said statute"

6. From the above quoted observations it is clear that the Supreme Court enjoins that the Civil Courts ought not to readily infer in favour of excluding their jurisdiction to entertain a civil cause unless it is found that a statute expressly or by necessary implication excludes their jurisdiction. The observations of B. N. Nigam, J. in the case of *Km Nafess Ara v Asif Saadat Ali Khan*, 1962 All LJ 786 = (AIR 1963 All 143) tend to show that a Civil Court has jurisdiction to declare an order under Section 488, Criminal P. C to be not binding on a party to it. In the case of *Johnson v Sarasamma*, AIR 1956 Trav-Co 204 a Division Bench of Travancore Cochin High Court seem to favour the view that a Civil Court has jurisdiction in such matters. I need not notice the other reported cases which had been cited before me at the Bar by the learned counsel for the parties as I am of the view that the validity of the order under Sec 488, Cri. P. C having been questioned on the alleged fraud played upon the Court by the defendant Smt Gauri Banerji, the suit was cognizable by a Civil Court at Varanasi where a part of cause of action arose when the said order was tried to be enforced at Varanasi against the plaintiff-appellant.

7. For the reasons given above, I dismiss this appeal but make no order for costs.

Appeal dismissed

1970 CRI. L. J. 313 (Vol. 76, C. N. 72) =
AIR 1970 ANDHRA PRADESH 70
(V 57 C 9)

FULL BENCH

P. JAGANMOHAN REDDY C. J.,
VENKATESAM AND SAMBASIVA RAO, JJ.

Andhra Provincial Potteries Ltd, Tadepalli, and others, Accused, Petitioners v. Registrar of Companies, Andhra Pradesh, Hyderabad, Complainant, Respondent

Criminal Revn. Case No 360 of 1968 and Criminal Revn. Petn. No 313 of 1968, D/-18-3-1969 decided by Full Bench on order of reference made by Sharfuddin Ahmed and A. D. V. Reddy, JJ.

Companies Act (1956), Ss. 220, 166, 159 to 162 and 210 — Prosecution under — Prerequisites for — Holding of Annual General Meeting and laying before it of Balance sheet and Profit and Loss Account is essential for prosecution under S. 220 (3) — Holding of meeting however, not necessary for prosecution for default under Ss. 159 to 162, 166 and 210 — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and 1963 (1) Cri LJ 521 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) 2 Comp LJ 92 (All), Dissented from; AIR 1963 Andh Pra 389, Overruled.

The holding of the annual general meeting and the laying before it of the balance sheet and the profit and loss account is a sine qua non for filing of the copies thereof before the Registrar. If no general body meeting is held, the persons concerned cannot be prosecuted under Sec 220 (3). While it is open to the Registrar to prosecute the persons who have committed default under Sections 166, 159 to 162 and 210 by wilfully not holding meeting and not fulfilling the requirements of these provisions for which no period of limitation is prescribed under the Act, any prosecution under S. 220 would be premature without such a meeting being in fact held. (Paras 7 and 17)

The reference to Section 210 by the use of the word "aforesaid" and the emphasis indicated by the words "were so laid" in Sec 220 make the filing of copies of the balance sheets and the profit and loss accounts which are laid before the general body meeting an essential prerequisite. If no general body meeting is held, it is obvious that no copies of the balance sheet and profit and loss accounts can be filed even though the default may be wilful. Both under Section 134 of the old Companies Act and Section 220 of the Act, the laying of the balance sheet and the profit and loss account before an annual general meeting is a condition precedent to the requirement that copies of such documents so laid should be filed before the Registrar. The intention is made further clear by the provision under sub-section (2) of the respective sections of both the Acts that, if the balance sheet is

not adopted at the general meeting before which it is laid a statement of that fact and of the reasons therefor have to be annexed to the balance sheet and to the copies thereof required to be filed with the Registrar. If no balance sheet is laid before a general body there can be no question of that balance sheet not being adopted nor of complying with the requirements of the sub-section (2) of Section 134 of the old Companies Act or Section 220 of the Act as the case may be though wilful omission to call a general body meeting and omit to lay the balance sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Act it certainly does not make him liable under the aforesaid provisions. AIR 1963 Andh Pra 389 Overruled AIR 1948 Bom 357 held not overruled by AIR 1961 SC 186, (1935) 39 Cal WN 1152 and AIR 1948 Cal 42 and (1967) 2 Comp LJ 92 (All) & (1961) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and 1963 (1) Cri LJ 521 (Cal) Dissented from Case law discussed (Para 7)

Cases	Referred	Chronological	Paras
(1967) 1967 2 Com LJ 92 = (1966) 36 Com Cas 585 (All) Rama Chandra and Sons (P) Ltd v State			18
(1966) AIR 1966 Mad 415 (V 53) = 1966 Cri LJ 1279 Ambalavana Chettiar P S N S and Co (P) Ltd v Registrar of Companies			16
(1964) 1964 Mad WN 103 = (1964) 34 Com Cas 1 Neptune Studios Ltd v State			16
(1963) AIR 1963 Andh Pra 389 (V 50) = 1963 (2) Cri LJ 363 Public Prosecutor v H R Basava Raj			2 17
(1963) 1963 (1) Cri LJ 521 = 1962-32 Com Cas 1143 (Cal) Dulal Chandra Bhar v State of West Bengal			16
(1963) AIR 1963 Raj 134 (V 50) = 1963 (2) Cri LJ 46, State v T C Printers (P) Ltd			16
(1961) AIR 1961 SC 186 (V 48) = 1961 (1) Cri LJ 319 State of Bombay v Bhandhan Ram			2 4 8 15 16
(1953) AIR 1953 Mad 558 (V 40) = 1953 Cri LJ 1062 Viswanathan v Assistant Registrar of Joint Stock Companies Madras			13
(1952) AIR 1952 Mad 800 (V 39) = 1953 Cri LJ 19 In re C Appayya			13
(1943) AIR 1948 Bom 357 (V 35) = 49 Cri LJ 515 Emperor v Pioneer Clay and Industrial Works			2 4, 14 15 16
(1948) AIR 1948 Cal 42 (V 35) = 48 Cri LJ 236 Bhagurath v Emperor			11, 13
(1937) AIR 1937 Mad 341 (V 24) = 38 Cri LJ 695, In re Narasimha Rao			2, 12
(1933) 39 Cal WN 1152 Ballav Dass v Mohan Lal Sadhu			10 11

(1932) AIR 1932 Mad 497 (V 19) = 33 Cri LJ 589 Lakshmana v Emperor 2 12
 (1911) 1911 1 KB 588 = 80 LJ KB 396 Park v Lawton 9 13 15 16 17
 (1875) 10 QB 329 = 11 LJ MC 81, Gibson v Barton 9
 (1875) 45 LJMC 41 = 33 LT 690 Edmonds v Foster 9
 A V Koteswara Rao for Petitioners, Public Prosecutor for the State

P JAGANMOHAN REDDY C J : The question before us is whether under S 220 of the Companies Act 1956 (I of 1956) (hereinafter referred to as the 'Act') the holding of an annual general meeting of a company and laying before it the balance sheet and the profit and loss account are prerequisites for a prosecution under Section 220 (3)

2 The High Court of Bombay in Emperor v Pioneer Clay and Industrial Works AIR 1948 Bom 357 and earlier the Madras High Court in Lakshmana v Emperor AIR 1932 Mad 497 and In re Narasimha Rao AIR 1937 Mad 341 had held under Sec 134 and the analogous provisions of the Indian Companies Act 1913 (hereinafter called the old Companies Act) corresponding to Section 220 of the Act that the omission to file with the Registrar the balance sheet and the profit and loss account of a company is not a contravention of those provisions in as much as either no general meeting was held at which the balance sheet was laid or no general meeting was due to be held. After the decision of the Supreme Court in State of Bombay v Bhandhan Ram AIR 1961 SC 186 some of the High Courts have taken the view that the decision of the Bombay High Court in AIR 1948 Bom 357 has been overruled and that therefore the Directors cannot take shelter in the defence that no general meeting was held when the non holding of the general meeting was due to their own default. It may be stated that even after the Supreme Court's decision, this Court in Public Prosecutor v H R Basava Raj AIR 1963 Andh Pra 389 took a similar view to that taken by the Bombay High Court, AIR 1948 Bom 357 (supra). But having regard to the decisions of several High Courts which have taken a contrary view, Sharfuddin Ahmed and A D V Reddy JJ have referred this matter to a full Bench.

3 The petitioners who are the Directors of the Andhra Provincial Potteries Limited have been prosecuted for contravention of the provisions of Section 220 (1) of the Act viz for not filing the balance sheet and the profit and loss account with the Registrar of Companies as contemplated in that section within the prescribed time. On 14th December 1967 a notice was issued by the Registrar of Companies informing the petitioners that the annual general meeting of the company ought to have been held at the latest on 30.9.1967, that the balance sheet and the

profit and loss account ought to have been laid before the said annual general meeting and that they should have been filed before the Registrar on or before 30th October 1967 in accordance with the provisions of Section 220 (1) of the Act. Inasmuch as the said balance sheet and profit and loss account were not filed, they being the directors of the company, it would be presumed that they are the officers of the company in default within the meaning of Section 5, and as such, are liable to be prosecuted. The Registrar therefore asked them to make good the default mentioned above within one month from the date of issue of the notice. To this, a reply was sent on 17th February 1968 by one of the petitioners, stating that they were arranging to send the concerned documents immediately and requesting for condonation of delay. As no balance sheet and profit and loss account were filed, a complaint was lodged.

4. A preliminary objection was raised before the VI City Magistrate that prosecution will not lie under Section 220 (3) of the Act, inasmuch as no annual general

meeting as required under Section 166 of the Act was held without which the question of filing copies of the balance sheet and the profit and loss account would not arise. In a considered order, the Magistrate applying the principles laid down by the Supreme Court in AIR 1961 SC 186, and taking the view that that decision had overruled the Bombay High Court's decision in AIR 1948 Bom 357, dismissed the objection. It was throughout admitted by both the prosecution and the accused that no general meeting was held on the date when the complaint was filed, namely the 4th March 1968. The learned Advocate for the petitioners, however, states that the meeting was held on the 9th March 1968 and the documents lodged on 19th March 1968.

5. Inasmuch as several decisions dealing with the provisions of the old Companies Act, 1913 and the Act have been cited before us, we give below the relevant provisions of the old Companies Act and the Act as they would assist in the understanding of the question before us.

INDIAN COMPANIES ACT (VII OF 1913)

32. (1) "Every company having a share capital shall within eighteen months from its incorporation and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

- (2)
- (3)
- (4)

(5) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty".

COMPANIES ACT, 1956 (I OF 1956)

159. (1) "Every company having a share capital shall, within sixty days from the day on which each of the annual general meeting referred to in Section 166 is held, prepare and file with the Registrar a return containing the particulars specified in Part I of Schedule V, as they stood on the day, regarding—

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)

Proviso

Explanation— Any reference in this section or in Section 160 or 161 or in any other section or in Schedule V to the day on which an annual general meeting is held or to the date of annual general meeting shall, where the annual general meeting for any year has not been held be construed as a reference to the latest day on or before which that meeting should have been held in accordance with the provisions of this Act

- (2)

160. (1) "Every company not having a share capital shall, within sixty days from the day on which each of the annual general meeting referred to in Section 166 is held, prepare and file with the Registrar a return stating the following particulars as they stood on that day:—

- (a)

INDIAN COMPANIES ACT
(VII OF 1913)

COMPANIES ACT, 1956
(1 OF 1956)

(b)
(2)

161 (1) The copy of the annual return filed with the Registrar under Section 159 or 160 as the case may be shall be signed both by a director and by the managing agent secretaries and treasurers

(2)

162 (1) If a company fails to comply with any of the provisions contained in Section 159 160 or 1761, the company, and every officer of the company who is in default shall be punishable with the fine which may extend to fifty rupees for every day during which the default continues

(2) For the purposes of this section and Sections 159 160 and 161 the expressions "officer and director" shall include any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act

166 (1) "Every company shall in each year hold in addition to any other meetings a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next

Provided that a company may hold its first annual general meeting within a period of not more than eighteen months from the date of its incorporation and if such general meeting is held within that period it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year

Provided further that the Registrar may for any special reason extend the time within which any annual general meeting (not being the first annual general meeting) shall be held by a period not exceeding three months

210 (1) "At every annual general meeting of a company held in pursuance of Section 166 the board of directors of the company shall lay before the company—

(a) a balance sheet as at the end of the period specified in sub section (3), and

(b) a profit and loss account for that period,

(2)

(3)

(4)

(5) If any person being a director of a company fails to take all reasonable steps to comply with the provisions of this section he shall in respect of each offence be punishable with imprison-

76 (1) "A general meeting of every company shall be held within eighteen months from the date of its incorporation thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting

(2) If a default is made in holding a meeting in accordance with the provisions of this section the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees

(3) If default is made as aforesaid the Court may on the application of any member of the company call or direct the calling of a general meeting of the company

131 (1) "The Directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period in the case of the first account since the incorporation of the company and in any other case since the preceding account made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interest outside British India by more than twelve months

INDIAN COMPANIES ACT
(VII OF 1913)

Provided that the Registrar may for any special reason extend the period by a period not exceeding three months.

(2) The balance-sheet and the profit and loss account or income and expenditure account shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there will be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report to the registered address of every member of the company, at least fourteen days before the meeting at which it is to be laid before the members of the company, shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least fourteen days before that meeting

134. (1) "After the balance sheet, and profit and loss account (or the income and expenditure account as the case may be) have been laid before the company at the general meeting three copies thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of Section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copies thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by Section 32 for a default in complying with the provisions of that section.

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(I of 1956)

ment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Provided that in any proceedings against a person in respect of an offence under this section, it shall be a defence to prove that a competent and reliable person was charged with the duty of seeing that the provisions of this section were complied with and was in a position to discharge that duty:

Provided further that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

(6) If any person, not being a director of the company, having been charged by the Board of Directors with the duty of seeing that the provisions of this section are complied with, makes default in doing so, he shall in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both.

Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully."

220. (1) "After the balance-sheet and the profit and loss account have been laid before a company at an annual general meeting as aforesaid, there shall be filed with the Registrar (within thirty days from the date on which the balance sheet and the profit and loss account were so laid).

(a) ... three copies of the balance-sheet and the profit and loss account, signed by the managing director, managing agent, secretaries and treasurers, manager, or secretary of the company, or if there be none of these, by a director of the company, together with three copies of all documents which are required by this Act to be annexed or attached to such balance sheet or profit and loss account:

Provided further that—

(i) in the case of a private company which is not a subsidiary of a public company, or

INDIAN COMPANIES ACT (VII OF 1913)

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(ii) in the case of a private company of which the entire paid up share capital is held by one or more bodies corporate incorporated outside India, or

(iii) in the case of a company which becomes a public company by virtue of Section 43A if the Central Government directs that it is not in the public interest that any person other than a member of the company shall be entitled to inspect or obtain copies of the profit and loss account of the company no person other than a member of the company concerned shall be entitled to inspect or obtain copies of the profit and loss account of that company under Section 610

(2) If the annual general meeting of a company before which a balance sheet is laid as aforesaid does not adopt the balance sheet a statement of that fact and of the reasons therefor shall be annexed to the balance sheet and to the copies thereof required to be filed with the registrar

(3) If default is made in complying with the requirements of sub sections (1) and (2) the company and every officer of the company who is in default, shall be liable to the like punishment as is provided by Section 162 for a default in complying with the provisions of Sections 159 160 and 161

6 A comparison of the conspectus of the sections under the Old Companies Act and the Act would show that Section 32 of the Old Companies Act has been replaced by Sections 159 160 161 and 162 of the Act with this difference that under the Old Companies Act there was nothing to indicate as to what was meant by the day of the first or only ordinary general meeting in the year" while under the Act the Explanation to Section 159 clearly indicates that a reference to "the day on which an annual general meeting" in that section or Sections 160 or 161 or in any other section or Schedule shall be construed as a reference to "the latest day on or before that meeting should have been held in accordance with the provisions of the Act" It is apparent under Section 166 (1) of the Act that the company has to hold in each year, a general meeting as its annual general meeting not more than fifteen months from the date of the previous general meeting unless of course the Registrar for any special reason extends the time within which any annual general meeting not being the first annual general meeting shall be held by a period not exceeding three months It is clear from these provisions that an annual general meeting not being the first annual general meeting has to be held within fifteen months or eighteen months, where it is extended, from the date of the last general meeting

At such an annual general meeting both under the Old Companies Act and the Act, the balance sheet and the profit and loss account etc have to be laid in default of which punishment has been provided therefor It is also apparent at any rate from the specific provision of the Act that this punishment is attracted even in cases where no meeting has been held due to wilful default of those on whom the duty was cast to call the meeting and lay the specified documents before it That this was also the position under the Old Companies Act has been the view taken by the highest Court

Now the question is whether the company or its Directors agents and servants can be held liable on the analogy of the same principle as applicable in the case of non holding of the annual general meeting or the omission to lay before that general meeting the documents specified in the earlier provisions for not fulfilling the requirements of Section 220 of the Act notwithstanding the fact that no annual general meeting was held and no balance sheet or profit and loss account laid before that annual general meeting Both Section 134 of the Old Companies Act and Section 220 of the Act provide that after these documents viz, the balance sheet and the profit and loss account have been laid before a general meeting three copies of the balance sheet and profit and loss account should be

filed before the Registrar of Companies. It is also necessary where the balance sheet is not adopted by the general body, a statement to that effect and all the reasons therefor shall be annexed to the balance sheet and to the copies thereof required to be filed before the Registrar. In default of these two requirements viz., of filing the balance sheet and the statement of the balance sheet not being adopted where it is not so adopted, the company and every officer of the company who is in default shall be liable to punishment as provided in Section 32 of the Old Companies Act or Section 162 of the Act, for not complying with the provisions of Sections 159, 160 or 161.

7. Before the Explanation to Section 159 of the Act was added defining the day on which the annual general meeting is to be held as the latest day on or before which that meeting should have been held under the provisions of Section 166 of the Act, Courts had been called upon to interpret that expression under Sections 32, 76 and 77 of the Old Companies Act. It would appear that in some cases no difference was noticed between these sections and Section 134. It may be stated that both Section 134 of the Old Companies Act and Section 220 of the Act do not use the words "on the day" or "from the day on which", which are used in Section 32 of the Old Companies Act and in Sections 159 and 160 of the Act. An examination of the language of these sections significantly demonstrates the conclusion when it is stated that after the balance-sheet and the profit and loss account have been so laid before the company at the general meeting, three copies of the same should be filed with the Registrar, that they should be the copies of the very same balance sheet and profit and loss account which are in fact laid before the annual general meeting and not those which would have been laid before an annual general meeting had such a meeting been called. Under Section 134 (1) of Old Companies Act, the time within which these documents should be filed is the same as for filing copies of the annual list of members and summary prepared in accordance with Section 32. Section 220 (1) of the Act varies the language by specifying the time viz., that after the balance-sheet and the profit and loss account had been laid before a company at an annual general meeting as aforesaid, that is to say, as required under Section 210, they shall be filed with the Registrar within thirty days on which the balance-sheet and the profit and loss account were so laid.

The reference to Section 210 by the use of the word "aforesaid" and the emphasis indicated by the words "were so laid" make the filing of copies of those balance-sheets and the profit and loss accounts which are laid before the general body meeting an essential prerequisite. If no general body meeting is held, it is obvious that no copies of the balance sheet and profit and loss ac-

counts can be filed even though the default may be wilful. Both under Section 134 of the Old Companies Act and Section 220 of the Act, the laying of the balance sheet and the profit and loss account before an annual general meeting is a condition precedent to the requirement that copies of such documents so laid should be filed before the Registrar. The intention is made further clear by the provision under sub-section (2) of the respective sections of both the Acts that, if the balance sheet is not adopted at the general meeting before which it is laid, a statement of that fact and of the reasons therefor have to be annexed to the balance sheet and to the copies thereof required to be filed with the Registrar. If no balance sheet is laid before a general body, there can be no question of that balance sheet not being adopted nor of complying with the requirements of the Sub-section (2) of Section 134 of the Old Companies Act or Section 220 of the Act as the case may be, while wilful omission to call a general body meeting and omit to lay the balance sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Act, it certainly does not make him liable under the aforesaid provisions. The punishment under these sections is for default in filing copies of the balance sheet or the profit and loss account which are laid before a general body and for not sending a statement of the fact that the balance sheet was not adopted. It may be that copies of the balance sheet so laid before the general body may have been forwarded under sub-section (1) of Section 134 of the Old Companies Act or sub-section (1) of Sec 220 of the Act but nonetheless if the requirements of sub-section (2) of the respective sections have not been complied with, even then, the persons concerned would be liable for punishment for that default.

In our view, these provisions unmistakably indicate, as we said earlier, that the holding of the annual general meeting and the laying before it of the balance sheet and the profit and loss account is a sine qua non for filing of the copies thereof before the Registrar. If no general body meeting is held, the persons concerned cannot be said to have committed a default in complying with those provisions.

8. An examination of the case law would, in our view, show that the difference in the language on the one hand of Section 134 of the Old Companies Act and 220 of the Act and on the other of the provisions of Sections 32, 76 and 77 of the Old Companies Act and analogous provisions of the Act has not been taken note of in most of the cases. Their Lordships of the Supreme Court in AIR 1961 SC 186 pointed out this difference. Notwithstanding this, cases decided subsequently in the several High Courts, in our view, with great respect, failed to appreciate the significant difference.

9. In Part v. Lawton, (1911) 1 KB 588, a similar question arose for consideration

under Section 26 of the English Companies (Consolidation) Act 1908, which is analogous to Section 32 of the Old Companies Act. In that case information was laid against the respondents by the appellant who was a staff officer of the Companies Registration Department of Somerset House alleging that the respondents knowingly and willfully permitted default to be made by the English Traders Limited in forwarding to the Registrar of Companies at Somerset House a copy of its list of members with summary as to capital and shares etc. for the year 1909 as required under Section 28 of the Companies (Consolidation) Act 1908 and that the said default had since continued for the space of sixty seven days thereafter and still continued. Though the General meetings of the Company were duly held on November 15 1907 and on December 7 1908 and the annual list of members and summary for those years were duly forwarded to and filed by the Registrar at Somerset House the Justices convicted the respondents of the offence charged in the first information.

It was contended that the words "on the fourteenth day after the first or only ordinary general meeting in the year" were words directory as to time only and that the company was in default in not forwarding the annual list of members and summary. The respondents however contended that no general meeting having been held in 1909 it was impossible to make up the list required by Section 26 and that the respondents could no therefore be convicted of a default for omitting to do that which, in fact, was impossible for them to do—and further that the time did not begin to run until after the date of the meeting mentioned in Section 26. This contention was negatived by Lord Alverstone C J, (with whom Hamilton and Avory JJ concurred) who said at page 592 "the cases of *Gib on v Barton* (1875) 10 QB 329 "and *Edmonds v Foster* (1875) 45 LJ (MC) 41", are clear authorities "that a person" charged with an offence under Section 26 is not entitled by way of defence to "plead the impossibility of complying with Section 26 by reason of no general meeting in other words a person charged with an offence cannot rely on "his own default as an answer to the charge".

10 Nearer home Mitter J in *Ballav Dass v Mohan Lal Sadhu* (1935) 39 Cal WN 1152 was considering the case of the petitioner-director of the Cash Insurance Bank Limited who had been convicted under clause (4) of Section 32 clause (6) of Sec 77 and clause (4) of Section 134 of the Old Companies Act and sentenced to pay a fine. The statutory meeting of the company had not been held within time mentioned in Section 77. The statutory report required to be forwarded under clause (2) of Section 77 was not forwarded to any member of the petitioner company and there could be no doubt that the petitioner knew of the said fact. Even after the prosecution was started

on the 14th April 1935 the register of share holders was not prepared in accordance with the provisions of Section 32 and there was no doubt that the petitioner also knew of the fact. The balance sheet of the company was not prepared and placed at a general meeting nor filed with the Registrar of the Joint Stock Companies. In fact the general meeting was never held and the petitioner also knew of the fact. According to the learned Judge the provisions of Section 134 were therefore not complied with and in his view in order to sustain a conviction under those sections the only thing the prosecution had to prove was that a particular officer knowingly and wilfully authorised or permitted these defaults. It was further held that the offence was also complete if the officer of the company knew of the defaults and permitted the defaults.

11 In *Bhagrath v Emperor* AIR 1948 Cal 42 Lodge J was also dealing with Sections 32 and 134 of the Old Companies Act and while observing that he was supported by the decision in *Ballav Dass* case (1935) 39 Cal WN 1152 said at p 45 "In England it has been consistently held that a director who is prosecuted for knowingly and wilfully permitting a company to default in respect of filing the balance sheet and profit and loss account with the Registrar cannot plead the impossibility of doing so when that impossibility is due to his own previous default. The same view has been taken in India." Both these decisions in our view did not consider the difference in the language of the several sections under which the petitioners were convicted particularly the difference between the requirements of Section 134 and other sections of the Old Companies Act.

12 In AIR 1932 Mad 497 *Walsh J.* took a different view though in fact the time for holding the general meeting had not yet come and therefore it may possibly be contended that what he said was obiter. In AIR 1937 Mad 341 *Pandurang Row J.* considered the applicability of Sections 131 and 134 and held that—

"The same persons cannot be charged in respect of the same years with offences punishable both under Sections 131 and 134 Companies Act, because Section 134 clearly contemplates the sending of a copy of the balance sheet only after it has been placed before the Company at a general meeting under Sec 131. Where in a case there is no such placing of the balance sheet before the Company at a general meeting the offence under Sec 134 cannot be committed".

Some of the cases cited before him dealt with the non sending of a copy of the balance sheet after it had been laid before a general meeting of the company. The prosecution against the persons was for default made in preparing a balance sheet or placing it before a general meeting of the company, which took place long before they ever be-

came directors or officers of the company, and indeed even before they were shareholders

13. As against this, Ramaswami, J. in *Re. G. Appayya*, AIR 1952 Mad 800 and *Viswanathan v. Assistant Registrar of Joint Stock Companies*, Madras, AIR 1953 Mad 558, dealing in the former case with Section 133 (3) and in the latter with Sections 76 and 131 did not refer to the previous decisions of the Madras High Court. However, reliance was placed on 1911-1 KB 588 and AIR 1948 Cal 42. While these cases may be an authority for the proposition that under the provisions of Sections 76 and 131, the wilful non-holding of an annual general meeting or the non-laying before such a meeting of the balance-sheet and the profit and loss account amounts to a default of the provisions, there is nothing in these decisions which throws any light on the interpretation of Sec. 134.

14. A Bench of the Bombay High Court consisting of Chagla Ag C. J. and Gajendra-gadkhar, J. (as he then was) in AIR 1948 Bom 357 did consider the question which is now before us viz., whether default was committed under Section 134 (4). The facts on which the prosecution was founded alleged that the accused had failed, as required by Section 134 (4) of the Old Companies Act, to file with the Registrar of Companies three copies of the balance-sheet and accounts of the company for the year 1944. It was common ground that no general meeting of the company had been called, at which the balance-sheet and the profit and loss account for the year 1944 had been laid. After referring to sub-sections (1) and (4) of S 134, the learned Acting Chief Justice observed at page 357: "it is to be noted that what is made penal is default in complying with the requirements of the section and the requirements of Section 134 (1) are that there is an obligation cast upon the company to file three copies of the balance-sheet and the profit and loss account after they have been laid before the company at the general meeting. There is no obligation cast upon the company to file any such copies if no general meeting has been called."

It was contended by the Government Pleader in that case that the directors are themselves in default in not calling a general meeting and it is not open to them to plead in their own defence their own fault. Dealing with this contention, the Bench pointed out that under Section 76 (1), there is an obligation to hold a general meeting within eighteen months from the date of the company's incorporation, in default of which a penalty was prescribed under sub-section (2) of Section 76. Again Section 131 provides that the directors of every company must lay before the company in general meeting a balance-sheet and profit and loss account at the time stated in that section, and the failure to do so is made penal by Section 133 (3). "Therefore", it was observed at page 358, "on the facts

which are not disputed it is clear that the directors have failed to comply with the requirements both of Section 76 (1) and also of Section 131 (1). The Government, instead of prosecuting them for what they have failed to do as required by the law and in respect of which they seem to have no defence whatever, have thought fit to launch a prosecution under Section 134 (4) when the obvious defence which is put forward by the accused is that the stage has not arrived when they can be called upon to send copies of the balance-sheet and the profit and loss accounts, because that stage can only be reached after a general meeting has been called and balance-sheet and profit and loss account have been placed before that meeting."

15. This decision is on all fours with the one we are considering. But as we noted earlier, an impression has gained ground that their Lordships of the Supreme Court in AIR 1961 SC 186, have overruled the decision of the Bombay High Court in AIR 1948 Bom 357. We do not think this is a valid assumption. Their Lordships, after referring to the Bombay decision, pointed out at page 189, "the language of that section is to a certain extent different from the language used in Sections 32 and 131. After examining the language of Section 134 (1), Sarkar, J. (as he then was) speaking for the Court observed: "if the language of Sec. 134 (1) makes any difference as to the principle to be applied in ascertaining whether a breach of it has occurred or not—as to which we say nothing in this case—then that case can be of no assistance to the respondents. If however no such difference can be made, then we think that it was not correctly decided." Perhaps, the last sentence has given rise to the impression that their Lordships have overruled the decision in AIR 1948 Bom 357. But that is not so, because the subsequent observations clearly indicate that while Chagla, C. J., did not question the correctness of the decision in (1911) 1 KB 588, which he was asked to follow, all that he said with regard to that case was that the scheme and the terms of the section on which it turned were different from Sec. 134 of the Companies Act, 1913. While saying "that may or may not be so", Sarkar, J., observed at page 189 "there is however no difference between Sec. 26 of the English Companies Act, 1908, on which Parker's case, 1911-1 KB 588, turned, and which apparently" through some mistake Chagla C. J., cited as S. 36 and S. 32 of the Indian Companies Act of 1913, except that the English Section required the summary to include a statement in the form of a balance-sheet containing certain particulars mentioned, whereas our section does not require that. Section 131 of our Act contains some provision about the laying of the balance-sheet before the general meeting. This provision was inserted in the Act by the Amending Act of 1936.

The fact, that one of the requirements of the English Sec. 26 is not present in Sec. 32

of our Act cannot create any material difference between Section 32 of our Act and Sec 26 of the English Act. If the principle that a person charged with an offence can not rely on his default as an answer to the charge is correct, as we think it is and which we do not find Chigla C J saying it is not, then that principle would clearly apply when a person is charged with a breach of Sec 32 of our Act. The decision of the Supreme Court is only an authority in respect of Ss 131 and 132 of the Old Companies Act and not for Section 131. In so far as Section 32 is concerned the Supreme Court decided (i) that the fact that no general meeting of the company was held was in the circumstances no defence to the charge of not complying with the requirements of Section 32. A person charged with an offence could not rely on his own default, as an answer to the charge and (ii) as in the case of Section 32 and for the same reasons it was no defence to the charge under Sec 131 to say that a general meeting was not called.

16 Subsequent to Supreme Court's decision in *Kailasam J in Neptune Studios Ltd v State* (1964) Mad WN 103 *Anantanarayan J* (as he then was) in *Ambalavana Chethar P S N S and Co (P) Ltd v Registrar of Companies* AIR 1966 Mad 415 and a Bench of the Rajasthan High Court consisting of *J S Ranawat C J* and *P N Shinghal J* in *State v T C Printers (P) Ltd* AIR 1963 Raj 134 and *Amaresh Roy J* in *Dulal Chandra Bhar v State of West Bengal* (1962) 32 Com Cas 1143 = (1963 (1) Cri LJ 521) (Cal) apart from other sections have dealt with prosecutions under Sec 220 of the Act. In all these cases it was assumed that the Supreme Court in AIR 1961 SC 186 applied the principle in (1911) 1 KB 588 to cases under S 134 of the Act which as we have pointed out with great respect is not the case. *Kailasam J* in (1964) Mad WN 103 however did not say that the Supreme Court has in terms overruled the decision in AIR 1948 Bom 357 but nonetheless thought that the Bombay decision cannot be of much guidance. According to him the effect of the Supreme Court's decision is that a person charged with failure to carry out the requirements of the section cannot take advantage of his own default. Applying the principles laid down therein it was held that the appellants cannot be heard to plead their own default in not convening the general meeting for the submission that they are not guilty of an offence under Section 220 (3) of the Act. *Anantanarayanan J* (as he then was) in (1964) Mad WN 103 and *Ranawat C J* and *Shinghal J* in AIR 1963 Raj 134 held that the principles enunciated by the Supreme Court in AIR 1961 SC 186 apply to cases under Section 220.

D P Unival J in *Ramachandra and Sons (P) Ltd v State* (1967) 2 Com LJ 92 (All) did consider the contention that Section 220 was differently worded. In his view that section was not very happily worded in that the opening words of the section indicate

that the balance-sheet and the profit and loss account required to be filed with the Registrar must be such as have been laid before the annual general meeting. But in his view that does not and cannot absolve the company or its directors from performing their statutory duty in filing the balance sheet and the profit and loss account before the Registrar within the stated time. With great respect we are unable to agree with his conclusion particularly when the learned Judge had held that the effect of the opening words would indicate that the balance-sheet and the profit and loss account required to be filed before the Registrar must be such as have been laid before the annual general meeting. Where there are clear words which justify a certain conclusion in our view that conclusion must be reached.

Amaresh Roy J in (1962) 32 Com Cas 1113 = (1963) (1) Cri LJ 521 (Cal) expressed the view at page 1149, that in AIR 1961 SC 186 their Lordships of the Supreme Court stated that the principle enunciated in (1911) 1 KB 588 would apply when a person is charged with breach of the Indian Companies Act. While applying the principle to the case before him which was under Section 220 the learned Judge however did not refer to the passages of *Sarkar J* in the Supreme Court decision in which the learned Judge distinguished the Bombay case. These decisions in terms do not notice the difference in the language and the requirements of S 220 on the one hand and Sections 159 to 162 166 and 210 of the Act on the other.

17 It appears to us on a consideration of the relevant provisions of the Act that the wilful failure to hold a general meeting cannot be pleaded as a defence for default committed in preparing the statements of members of the company as required under Section 32 or for failure to lay before the general meeting the balance sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account. One cannot plead one's own default in defence. The principle of (1911) 1 KB 588 however cannot be held to be applicable to the requirements of S 134 because the actual holding of an annual general meeting is a condition precedent or a sine qua non for the filing of the copies of the balance sheet and profit and loss account which are so laid before an annual general meeting with the Registrar within thirty days from the day when they are so laid. We have already noticed that the language of Section 134 (1) and (2) requires only copies of that balance sheet and profit and loss account or a statement that the balance sheet has not been adopted with full reasons therefor should be filed before the Registrar which have been laid at an annual general meeting which in fact and in reality have been held and not copies of those documents which would have been filed had such a meeting been held if the persons concerned had not wilfully defaulted in calling

the meeting. As already pointed out, the language of the relevant provisions of the present Companies Act (the Act) is somewhat different, and if anything, lends further weight to this conclusion. It is clear that the default in not holding an annual general meeting and preparing statements or returns and filing them before the Registrar, or in not laying of the balance-sheet and the profit and loss account before that meeting as required under Sections 166, 159 to 161 and 210 cannot be pleaded in defence of prosecution.

The contrary view taken in AIR 1963 Andh Pra 389, that the holding of an annual general meeting would be necessary for the prosecution under Sections 166 and 210 of the Act is, in our view, with respect no longer good law, having regard to the decision of the Supreme Court on the analogous provisions of the Old Companies Act. While this is so, the defence that no general meeting was in fact held for the non-filing of the copies of the balance-sheet or profit and loss account or the non-attachment of the statement that the balance-sheet has not been adopted with the explanation therefor before the Registrar within the time specified, will however be open to the persons prosecuted under Section 220 (3) While it is open to the Registrar to prosecute the persons who have committed default under Sections 166, 159 to 162 and 210 by wilfully not holding a meeting and not fulfilling the requirements of these provisions for which no period of limitation is prescribed under the Act, any prosecution under Section 220 would be premature without such a meeting being in fact held.

18. In the view we have taken the criminal revision case is allowed and the prosecution is quashed.

Revision allowed.

1970 CRI. L. J. 323 (Vol. 76, C. N. 73) =
AIR 1970 ASSAM & NAGALAND 38
(V 57 C 7)

M. G. PATHAK, J.

Prem Chand Jain, Petitioner v. State.
Respondent.

Criminal Ref. No 5 of 1968, D/- 3-6-1969, from order of S J. Dhubri, D/- 9-1-1968

Essential Commodities Act (1955), S. 3 — Assam Foodgrains (Licensing and Control) Order, 1961, Cl. 3 — Violation of — Requirements — Cri. Rev. No. 4 of 1967 (Assam) held not good law.

Before a conviction can be reached under the Order, it must be established (i) that the person convicted was engaging himself in any business; (ii) that his business involved the purchase, sale or storage for sale of any foodgrains; (iii) that

the quantities of the foodgrains, involved should be of wholesale quantities, namely, in excess of ten maunds in one transaction of purchase or fifteen maunds of the storage of the foodgrains; and (iv) that this should have been done without a license Cri Rev. 147 of 1964 (Assam) and AIR 1964 SC 1533 Foll. Cri Rev. No 4 of 1967 (Assam) held not good law.

(Para 9)

In the absence of any proof that the accused engaged himself in some business involving purchase, sale or storage for sale of paddy the conviction is not sustainable.

(Para 8)

Cases Referred: Chronological Paras

(1967) Criminal Revn. No 4 of 1967 (Assam) 10

(1964) AIR 1964 SC 1533 (V 51),
Manipur Administration v. M Nila Chandra Singh 7, 10

(1964) Criminal Revn. No 147 of 1964 (Assam) 9

P C. Katak, for Petitioner; S N. Choudhury as Public Prosecutor, for Respondent

ORDER: This is a reference under S 438, Cr P. C made by the learned Sessions Judge, Goalpara with recommendation for setting aside the impugned order and for return of paddy or the sale price thereof to the accused-petitioner

2. The petitioner's shop at Sukchar was searched by the Supply Inspector on 12-11-65 and found a stock of 58 bags of Ahu paddy weighing 34 80 quintals and the paddy was seized. The accused-petitioner could not produce any license for dealing in paddy as required under Clause 3 of the Assam Foodgrains (Licensing & Control) Order, 1961 (hereinafter called the 'Assam Order 1961'). The Supply Inspector submitted an offence report against the petitioner with necessary sanction for prosecution under S 7 of the Essential Commodities Act for violation of the provisions of the said Clause of the Assam Order 1961. The case was tried summarily by the learned Magistrate as provided in Section 12-A of the Essential Commodities Act, 1955

3. The prosecution examined three witnesses in the case including the Supply Inspector. The defence did not deny the fact that 58 bags of paddy were found in his possession by the Supply Inspector. The contention of the accused-petitioner was that prior to the seizure of paddy, on a bazar day, some persons numbering about 22 who brought paddy to Sukchar bazar for sale were unable to dispose of the same and so they left the paddy at his godown to be lifted later on and that the paddy did not belong to the petitioner. In support of his contention the petitioner examined one witness

4. On a consideration of the evidence adduced by the parties, the learned

Magistrate found that the accused stored the paddy for sale in his shop in violation of the provisions of Clause 3 of the Assam Order 1961 and accordingly he convicted the accused under Section 7 of the Essential Commodities Act and sentenced him to rigorous imprisonment for one month and to pay a fine of Rupees 500/ in default to rigorous imprisonment for another month. The seized paddy was also confiscated. As the order of the learned Magistrate was not appealable as provided under sub-section (3) of section 12-A of the aforesaid Act the accused petitioner moved a revision petition under section 435 Cr P C before the Sessions Judge who has referred the case as stated above.

5 The learned Courts below have found that the evidence of the prosecution witnesses in the case proved beyond reasonable doubt that on 12.11.65 the shop of the accused was searched by the Supply Inspector P W 3 and on such search 58 bags of paddy weighing 38.80 quintals of paddy were found in his possession. As stated hereinbefore the accused also admitted possession of the seized paddy.

6 The point that falls for determination in this case is whether mere possession of paddy in question was sufficient to bring home the offence under S 7 of the Essential Commodities Act to the accused. The learned Sessions Judge found that there was no evidence that the accused was ever seen dealing in paddy in his shop. On the other hand the Supply Inspector P W 3 stated that he had no information if the accused dealt in rice or paddy. The accused was charged for violation of Clause 3 of the Assam Order 1961 which runs as follows:

3 Dealings to be licensed. No person shall engage in any business which involves the purchase sale or storage for sale of any foodgrains in wholesale quantities, except under and in accordance with the terms and conditions of a license issued under this Order.

Provided that nothing in this clause in so far as sale or storage for sale of foodgrains is concerned shall apply to a producer.

Explanation.— The expression 'purchase or sale in wholesale quantities' means the purchase or sale in quantities exceeding ten maunds or 373 quintals in any one transaction, and the expression 'storage for sale in wholesale quantities' means storage in quantities exceeding fifteen maunds or 560 quintals. Admittedly the petitioner is not a producer and the quantity of paddy found in his possession exceeds 560 quintals. The petitioner also had no license for dealing in paddy under the said Order. The only point to be considered is whether the petitioner can be said to have

engaged in a business which involves the purchase sale or storage for sale of paddy as contemplated under Clause 3 of the Assam Order 1961. As observed earlier, there is no evidence in the case to the effect that the petitioner was even seen dealing in paddy in his shop and P W 3 stated that he had no information whether the accused dealt in rice or paddy. In order to establish a case under Clause 3 of the said Order the prosecution must show that the accused engaged in business of storage for sale of paddy in wholesale quantities.

7 For the interpretation of Clause 3 of the Order the learned counsel for the petitioner has referred to the case of *Manipur Administration v M Nila Chandra Singh* reported in AIR 1964 SC 1533. In that case the Supreme Court considered the question whether mere possession without any evidence to the effect that the accused engaged in business of storage for sale would be an offence under section 7 of the Essential Commodities Act. In that case the Supreme Court observed as follows:

In dealing with the question as to whether the respondent is guilty under S 7 of the Essential Commodities Act, it is necessary to decide whether he can be said to be a dealer within the meaning of cl. 3 of the Order. A dealer has been defined by cl. 2 (a) and that definition we have already noted. The said definition shows that before a person can be said to be a dealer it must be shown that he carries on business of purchase or sale or storage for sale of any of the commodities specified in the Schedule and that the sale must be in quantity of 100 mds or more at any one time. It would be noticed that the requirement is not that the person should merely sell purchase or store the foodgrains in question but that he must be carrying on the business of such purchase sale or storage and the concept of business in the context must necessarily postulate continuity of transactions. It is not a single casual or solitary transaction of sale purchase or storage that would make a person a dealer. It is only where it is shown that there is a sort of continuity of one or the other of the said transactions that the requirements as to business postulated by the definition would be satisfied. If this element of the definition is ignored it would be rendering the use of the word 'business' redundant and meaningless."

At another place in the same judgment, the Supreme Court observed as follows:

At this stage it would be convenient to refer to the relevant provisions of the Order. Clause 2 (a) defines a dealer as meaning a person engaged in the business of purchase sale or storage for sale, of any one or more of the foodgrains in

quantity of one hundred maunds or more at any one time. Clause 2 (b) defines foodgrains as any one or more of the foodgrains specified in the Order including products of such foodgrains other than husk and bran. It is common ground that paddy is one of the foodgrains specified in Schedule I. Clause 3 with which we are directly concerned in this appeal reads thus.

"(1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority,

(2) For the purpose of this clause, any person who stores any foodgrains in quantity of one hundred maunds or more at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purpose of sale."

In the said case, the Supreme Court was dealing with Manipur Foodgrains Licensing Order, 1958. The provisions of Cl 3 of Assam Order 1961 are similar to those of Clause 3 of the Manipur Foodgrains Control Order, except for the deeming provision in the Manipur Order, which is not to be found in the Assam Order 1961.

8. Since in the instant case there is no evidence that the petitioner engaged in any business involving the purchase, sale or storage for sale of paddy, the charge against the petitioner cannot be said to have been proved in the case in view of the Supreme Court's decision referred to above. Even if the defence case that some villagers coming to the bazar kept the paddy in question with the petitioner is disbelieved as has been done by the learned Magistrate, yet the only thing that may be said to be proved against the petitioner by the prosecution is that the petitioner had been found in possession of the paddy in question. In order to bring home the offence under section 7 of the Essential Commodities Act to the petitioner, the prosecution should have established that the petitioner engaged in some business involving purchase, sale or storage for sale of paddy. The prosecution having failed therein, the conviction and sentence of the petitioner cannot be sustained in law.

9. In this connection, the learned counsel for the petitioner also referred to an unreported judgment of this Court in Criminal Revn. No 147 of 1964 (Assam) In that case Nayudu, C J, following the aforesaid Supreme Court's decision, held that before a conviction could be reached under the Assam Order 1961, it must be established (1) that the person convicted was engaging himself in any business, (2) that this business involved the purchase, sale or storage for sale of any foodgrains; (3) that the quantities of the

foodgrains, involved should be of whole-sale quantities, namely, in excess of ten maunds in one transaction of purchase or fifteen maunds of the storage of the foodgrains; and (4) that this should have been done without a license. I am in respectful agreement with this observation. I hold that the prosecution has not been able to prove the case against the petitioner.

10. The learned counsel for the State referred to another unreported judgment of this Court in Criminal Revn. No 4 of 1967 (Assam). On a perusal of the judgment, I find that the Supreme Court's decision reported in AIR 1964 SC 1533 was not brought to the notice of the Court in that case and as such that decision does not help the prosecution in the instant case.

11. In the result, the conviction and sentence of the petitioner are quashed. The seized paddy or the sale price thereof should be made over to the accused-petitioner. The reference is accepted.

Reference accepted.

1970 CRI. L. J. 325 (Vol. 76, C. N. 74) =

AIR 1970 BOMBAY 79 (V 57 C 11)

VIMADALAL AND KAMAT, JJ.

Harbansingh Sardar Lenasingh and another, Accused, Appellants v. The State, Respondent

Criminal Appeal No. 573 of 1967, D/- 5-12-1968.

(A) Customs Act (1962), S. 104(2) — Without unreasonable delay — Persons detained by Customs authorities for interrogation and produced before the Magistrate within 24 hours of their arrest — Provisions of section are not violated.

S. 104(2) of the Customs Act comes into operation only after a person is "arrested" and not till then. It is analogous to the provisions of Section 60 of the Criminal P. C. Although there is no provision similar to Section 61 of the Criminal P. C. which lays down a maximum period of 24 hours within which an accused person should be put up before a Magistrate, that may have been unnecessary in view of the fact that such a maximum period is now laid down by the Constitution itself in Article 22(2) thereof. Where the accused persons had in fact been put up before the Chief Presidency Magistrate within 24 hours of their arrest, there is no violation of S 104(2) (Paras 4 and 5)

(B) Criminal P. C. (1898), S. 46 — Applicability — Arrest and custody — Distinction — Person under surveillance making statement — Statement is not hit by S. 24, Evidence Act.

Arrest is a mode of formally taking a person in police custody, but a person

GM/HM/C830/69/GGM/P

may be in the custody of the police in other ways. What amounts to arrest is laid down by the legislature in express terms in S 46 of the Code of Criminal Procedure whereas the words 'in custody' which are to be found in certain sections of the Evidence Act only denote surveillance or restriction on the movements of the person concerned which may be complete as for instance in the case of an arrested person or may be partial. The concept of being in custody cannot therefore be equated with the concept of a formal arrest and there is a difference between the two. Where after the statements recorded by the Customs authorities due to the night fall the accused are put up before a Magistrate only next morning it cannot be said that accused were arrested and as such any statement made by them cannot be said to be in violation of S 24 Evidence Act. 1885 All WN 59 (FB) Dist AIR 1960 SC 1125 & AIR 1965 SC 481 & (1900) ILR 25 Bom. 168 Ref. (Para 4)

Cases Referred Chronological Paras

- (1965) AIR 1965 SC 481 (V 52)=66
Bom. LR 482=1965 (1) Cri. LJ
490 Soni Vallabhdas Laladhar v
Soni Narandas 4
(1963) AIR 1963 SC 1094 (V 50)=
1963 (2) Cri. LJ 178 Pyare Lal v
State of Rajasthan 4
(1960) AIR 1960 SC 1125 (V 47)=
1960 Cri. LJ 1504 State of Uttar
Pradesh v Deoman Upadhya 4
(1959) AIR 1959 SC 18 (V 46)=
1959 Cri. LJ 108 Ratan Gond v
State of Bihar 6
(1957) AIR 1957 SC 637 (V 44)=
1957 Cri. LJ 1014 Sarwan Singh
Rattan Singh v State of Punjab 6
(1954) AIR 1954 SC 462 (V 41)=
1954 Cri. LJ 1313 Hem Raj Devi-
lal v State of Aimer 4
(1918) AIR 1918 PC 118 (V 5)=45
Ind App 284 (PC) Banwari Lal
v Mahesh 6
(1900) ILR 25 Bom. 168=2 Bom.
LR 761 Queen Empress v Bas-
vanta 4
(1885) 1885 All WN 59 (FB)
Empress v Madar 4
R Jethmalani v B B Keshwani for
Appellants M B Kadam, Asst Govt
Pleader for Respondent

VIMADALAL J — This is an appeal filed by two accused persons who have been convicted by the Additional Sessions Judge Thana of offences relating to the illegal importation and possession of 6920 Tolas of gold under Section 135 of the Customs Act 1962 as well as under Section 23 of the Foreign Exchange Regulation Act, 1947. It may be mentioned that the accused were also charged under R 126-P of the Defence of India (Amendment) Rules 1963 but were acquitted of that offence.

2 The facts of the prosecution case are that one Jokhi who was at the material time an Assistant Collector of Customs at Bombay, received some information on the night of 21st March 1965 that gold was going to be smuggled into India from a place near the bridge on the Bassein Vajreshwari Road that he therefore, contacted witness Wagh who was then working as Deputy Superintendent under him, and the said Jokhi accompanied by Wagh and two inspectors named Jadhav and Surti and a constable of that department left Vadala at about 10 p.m. and reached Bassein at about 1-30 a.m. that they stopped their car near railway crossing along the Bassein-Vajreshwari Road, and stopped facing Vajreshwari side after putting off the head-lights somewhere near the wicket-gate of the level-crossing about 4 or 4 and half furlongs away from Bassein Station, that at about 2 a.m. they saw a car coming from the Vajreshwari side which came near the bridge and turned a little and put off its lights and went on to the kachcha road leading to the salt pans that the said car turned again and came towards the bridge but halted after going off the road that the said car waited there for about 10 or 15 minutes whereupon the raiding party started their vehicle to go to see what the matter was that in the meantime that car had come on to the main road and the raiding party therefore intercepted the car by placing their own car across the road and that all the persons from the raiding party then got down and went up to that car. The prosecution story is that, apart from the driver who was at the wheel of that car accused Nos 1 and 2 were sitting on the rear side that Wagh and Jokhi questioned them as to why they had come there and in the beginning they did not give any reply but later on accused No 2 stated that there was gold in the dicky of the car and that the raiding party then opened the dicky and found that there were four gunny bags which were wet and soiled and were heavy. The prosecution story further is that Jokhi then sent Wagh to get two panchas from Bassein Town which he did and the dicky was opened and the gunny bags shown to the panchas as also the marks of the tyres on the kachcha road along which that car had proceeded, as already stated above but Jokhi and Wagh ultimately decided that it would not be safe to open the bundles and make a panchnama in a lonely place like the one in which they were and they therefore, decided that they should go to their office in Bombay with the panchas where the property in question should be opened and taken charge of under a panchnama Inspector Surti, Jadhav and Assistant Collector Jokhi sat in the car in which the accused were travelling, and the rest of the raiding party proceed-

ed in their own car and the two cars reached Churchgate at about 9 a.m. The said bundles were then opened in the presence of the panchas and were found to contain 6920 Tolas of gold with foreign markings and the panchnama which was made was concluded at about 2 p.m. on the 22nd of March 1965. The said bundles of gold, together with the car, were then sent to Superintendent Robb who took investigation of the case, he being the officer authorized to record statements under Section 108 of the Customs Act, 1962. He first recorded the statement of the driver of the said car Bapu, and thereafter at about 4 p.m. he started recording the statement of accused No. 2 which he concluded at about 5 p.m. He then proceeded to record the statement of accused No. 1 and finished recording the same at about 6 p.m. Superintendent Robb then placed accused Nos. 1 and 2 under arrest and sent them to the Azad Maidan Police lock-up, and they were put up before the Chief Presidency Magistrate the following morning viz. on the 23rd of March 1965. The Chief Presidency Magistrate having directed that the accused should be put up before the Judicial Magistrate, First Class, at Bassein, as the offence had been committed there, they were produced before that Magistrate and remanded into magisterial custody. The formalities of sanction and other formalities having been gone through, accused Nos. 1 and 2 were thereafter prosecuted and were convicted by the trial Judge, as already stated above, and were sentenced to three years' rigorous imprisonment for the offence under Section 135 of the Customs Act, 1962, and to one year's rigorous imprisonment for the offence under Section 23 of the Foreign Exchange Regulation Act, 1947. It is from the said convictions and sentences that both the accused have filed the present appeal.

3. The conviction of the accused persons is challenged by Mr. Jethmalani on three grounds. (1) that the accused persons not having been taken to a Magistrate till the 23rd of March 1965 in violation of the provisions of Section 104(2) of the Customs Act, 1962, which enjoin that they should be put up before a Magistrate "without unnecessary delay", the confessions which were obtained from them whilst they were in illegal custody must be regarded as having been obtained under compulsion and not to have been made voluntarily, with the result that they would be hit by the provisions of Section 24 of the Evidence Act. (2) that the confessions of the accused persons are, in any event, not true, there being evidence intrinsic in the confessions themselves to show the same, as well as extrinsic evidence to prove their falsity, and (3) that the extra-judicial confessions which were recorded required corroboration, and on the only point in dispute in

the present case, viz., the question as to whether the possession of gold by accused Nos. 1 and 2 was conscious, there was no corroboration in the other evidence led in the case.

I will now proceed to deal with each of these contentions of Mr. Jethmalani.

4. As far as the first contention of Mr. Jethmalani, which was his main contention, is concerned, it may at the very outset be pointed out that Section 104(2) of the Customs Act comes into operation only after a person is "arrested" and not till then. It is analogous to the provisions of Section 60 of the Code of Criminal Procedure. It is true that there is no provision similar to Section 61 of the Code of Criminal Procedure which lays down a maximum period of 24 hours within which an accused person should be put up before a Magistrate, but that may have been unnecessary in view of the fact that such a maximum period is now laid down by the Constitution itself in Article 22(2) thereof. It may be mentioned that the accused persons had in fact been put up before the Chief Presidency Magistrate within 24 hours of their arrest.

Mr. Jethmalani has, however, contended that in so far as the accused persons were not free agents right from the time when the police contacted them at 2 a.m. on the night between the 21st and the 22nd of March 1965, though they may not have been formally arrested, it must be held that they were in custody and under arrest, and the confessions cannot, therefore, be said to have been obtained without the use of some sort of threat within the meaning of Section 24 of the Evidence Act. Reference must be made in that connection to Section 46 of the Code of Criminal Procedure which lays down how an arrest is to be made. It states that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action. It is the contention of Mr. Jethmalani that the facts of the present case show, at any rate, a submission to the custody of the excise officer by the accused persons by action and they must, therefore, be deemed to have been under arrest ever since the time when they were first apprehended at 2 a.m. somewhere near Bassein. In support of that contention Mr. Jethmalani has relied upon an old decision of a Full Bench of the Allahabad High Court in the case of *Empress v. Madar*, 1885 All. W.N. 59 (F.B.), but a careful perusal of that case shows that in the judgment itself the learned Judges have made a distinction between formal arrest, and what they have called "a condition of restraint which, in fact, amounted to the accused

being in the custody of the police since the accused was not a free agent capable of going whither he chose'. It is true that the learned Judges of the Allahabad High Court have excluded the retracted confession before them on the ground that a confession obtained from an accused person who though not actually arrested had, to all intents and purposes been in their custody' for an unexplained period of twelve days' could not be said to be a voluntary one but they have not in terms held that the accused persons before them must be deemed to have been under arrest as such. Mr Jethmalani has also relied upon a decision of the Supreme Court of the United States of America in case of Benjamin McNabb v United States of America in which also the majority of the Court held that the admissions of the petitioners having been improperly received in evidence the convictions could not stand. The Court based their decision on the fact that the petitioners before them had been detained in violation of the provisions of law which required that persons arrested must be immediately taken before a committing officer and that the confessions obtained from them were therefore not voluntary. It may be convenient at this stage to set out the precise position in regard to what happened in the present case after the accused persons were apprehended at 2 a.m. somewhere near Bassein. When it was decided that the panchnama should be made in Bombay and not at the lonely place at which the accused persons had been apprehended the police party the panchas and the accused persons came to Bombay and reached Churchgate at about 9 a.m. as is clear from the evidence of Superintendent Wagh as well as the panchnama (Ex. 12). The panchnama (Ex. 12) was then continued in Bombay and was concluded at as late an hour as 2 p.m. as is shown by what is recorded at the foot of the said panchnama itself and it is not surprising that it should have taken so long having regard to the fact that the quantity of gold in respect of which the panchnama was made was as large a quantity as 6920 Tolas contained in four gunny bags which, in their turn contained seven jackets with innumerable small pockets therein with different markings on the gold which had all to be noted. After the panchnama was concluded at 2 p.m. the investigation was handed over to Senior Superintendent Pobb and taking over charge of the investigation and the gold would itself take some time. Superintendent Robb then recorded the statement of the driver of the car Bapu. After the recording of the statement of Bapu was concluded, he started recording the statement of the 2nd accused at about 4 p.m. and followed this up by the statement of the 1st accus-

ed which he finished recording as late an hour as 6 p.m. It was after he had satisfied himself from the statements of the accused persons and come to the conclusion that there was reason to believe that they were guilty of an offence punishable under Section 135 of the Customs Act that he placed them under arrest in accordance with the provisions of S 104(1) of that Act. It was then too late in the day to put them up before a Magistrate and the accused persons were therefore put up before the Chief Presidency Magistrate the next day as stated in the evidence of Superintendent Robb. In view of this sequence of events it could not possibly be said that there was 'unnecessary delay' in putting up the accused persons before a Magistrate within the terms of Section 104(2) of the Customs Act 1962. The question however still survives as to whether the accused persons could be said to have been in the custody of the excise officers so as to lead the court to the conclusion that the confessions obtained from them were not voluntary and were therefore hit by the provisions of Section 24 of the Evidence Act and should be excluded from consideration as was done by the Allahabad High Court in the case of 1885 All. W.N. 59 (FB) which has already been cited above. Arrest is a mode of formally taking a person in police custody but a person may be in the custody of the police in other ways. What amounts to arrest is laid down by the legislature in express terms in Section 46 of the Code of Criminal Procedure whereas the words in custody which are to be found in certain sections of the Evidence Act only denote surveillance or restriction on the movements of the person concerned which may be complete as for instance in the case of an arrested person or may be partial. The concept of being in custody cannot therefore be equated with the concept of a formal arrest and in my opinion there is a difference between the two. Turning to the facts of the present case the learned Assistant Government Pleader sought to rely on the statement of accused No. 2 in answer to questions put to him under Section 342 of the Criminal Procedure Code in the course of which he has said that when the police party the panchas and the accused persons came to Bombay from somewhere near Bassein on the morning of the 22nd of March 1965 and when they were near Bhandi Bazar accused No. 2 told the driver to allow him to get down but the driver told him that he would go ahead and would come there again and that later on he stopped the car near Churchgate in front of the excise office. In my opinion, that does not however show that the accused persons would have been allowed by the excise officer to get down

from the car, if they had wanted to do so, whatever the driver may have told them. The very fact that three excise officers, including the Assistant Collector, made it a point to accompany the accused persons in their car whilst the rest of the police party and the panchas proceeded in the other car on their way back to Bombay, shows that there was some sort of surveillance or restriction on the movements of the accused persons ever since the time that they were apprehended near Bassein at 2 a.m. on the night of 21st March 1965. In view of the fact that it has been held that customs officers are persons in authority within the terms of Section 24 of the Evidence Act (66 Bom. L.R. 482 at p. 484) = (AIR 1965 SC 481 at p. 483), there can be little doubt that excise officers would also be persons in authority within the terms of that section. It has also been laid down by the Supreme Court that the expression "accused persons" in Section 24 includes a person who subsequently becomes an accused, and that he need not have been accused of an offence when he made the confession in question (AIR 1960 SC 1125 para 7). It must be noted that the expression "in custody" is not to be found in Section 24 of the Evidence Act, and the question as to whether an accused person was in custody at the time of making a confession arises only for the purpose of finding out whether that confession "appears to the court to have been caused by inducement, threat or promise" within the terms of that section. Confessions made during the time that an accused person was in illegal custody, or in the custody of the police, or has been under arrest and custody for a prolonged period of time have, no doubt, been excluded by courts on the ground that they did not appear to have been made voluntarily, but the custody in all those cases was complete custody from which it appeared to the court that the confession could not be voluntary. If the Allahabad High Court intended to lay down anything more in Madar's case, 1885 All W.N. 59 (FB), I do not agree with the same. In my opinion, however, the mere fact that there may be some restriction on the movements of the accused, or the accused person may be under some sort of surveillance at the time when he makes a confession, would not ipso facto vitiate the confession as being involuntary. To draw such a conclusion would, in my opinion, be to make no more than a conjecture. Reference may be made in this connection to an old decision of this Court in the case of Queen Empress v. Basvanta, (1900) ILR 25 Bom 168 in which it has been held that the use of the word "appears" in section 25 of the Evidence Act indicates a lesser degree of probability than would be necessary if

"proof" had been required, but, even so, the court observed (at p. 1172) as follows—

"Still although we think that very probably a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest".

The same view now has been taken by the highest court in the case of Pyare Lal v. State of Rajasthan, AIR 1963 S.C. 1094, para 4, in which, after referring to the use of the word "appears" in Section 24 of the Evidence Act it has been stated as follows:—

"But under S. 24 of the Evidence Act such a stringent rule is waived but a lesser degree of assurance is laid down as the criterion. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words, on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standards of proof has been designedly accepted by the Legislature with a view to exclude forced or induced confessions which sometimes are extorted and put in when there is a lack of direct evidence. It is not possible or advisable to lay down an inflexible standard for guidance of courts, for in the ultimate analysis it is the court which is called upon to exclude a confession by holding in the circumstances of a particular case that the confession was not made voluntarily".

I must, therefore, proceed to consider whether there is anything in the evidence, or the circumstances in the case before us to show that the confessions of the two accused were obtained by any inducement, threat or promise within the terms of Section 24 of the Evidence Act. It may be mentioned that there is no suggestion, and indeed, that has not been argued by Mr. Jethmalani at all, that there was any inducement or promise given to the accused persons at the time of obtaining their confessions which would vitiate the same. Mr. Jethmalani has however contended that the fact that the accused persons were in custody at the time when their confessions were taken amounted to the use of some sort of threat in obtaining their confessions. In this connection, it may be mentioned that the first accused has in his statement under Section 342 of the Code of Criminal Procedure said that his signature to the statement was obtained by threat and by force saying that he would otherwise be beaten, but

that is the first time that he has come out with the story of his statement having been obtained by threat. No such suggestion has been made to Superintendent Robb in the course of cross-examination. Indeed the cross-examination of Superintendent Robb shows that the case that was sought to be made out on behalf of the 1st accused was an entirely different one viz that two statements of his were recorded and that what was being produced was not the original statement of the 1st accused.

That was also the case that was sought to be made out in the cross-examination of Superintendent Robb as far as the 2nd accused was concerned. It may be mentioned that the 2nd accused has in his statement made under Section 342 of the Code of Criminal Procedure taken a totally different line from that which was adopted on his behalf in the course of cross-examination of Superintendent Robb. He has first stated that he did not give a statement at all and that Superintendent Robb may have written anything he pleased but has then proceeded to say that he wrote and signed as Superintendent Robb stated. There is therefore not even a suggestion of a threat contained in that statement which accused No 2 has made under Sec 342 of the Criminal Procedure Code. Even as far as accused No 1 is concerned since no such case was put to Superintendent Robb in the course of cross-examination in my opinion there is nothing in the evidence to lead us to the conclusion that any threat appears to have been used in procuring the confession of the 1st accused and I decline to come to such a conclusion merely on what he has said in his statement. A mere bald assertion of that nature by him cannot be accepted as true without more (AIR 1954 SC 462 para 8). Under the circumstances the first and the main contention of Mr Jethmalani that the confessions in question are involuntary and are therefore hit by the provisions of Section 24 of the Evidence Act and should be excluded from consideration must be rejected.

5 The next contention of Mr Jethmalani that the confessions of the accused persons in this case cannot be true must also be rejected. It is true that the confession of the 1st accused is recorded in a manner which is somewhat incoherent in so far as it states that what they set out to bring from Bassein were spare parts and then abruptly states in the course of the narrative which follows that the accused got down from the car went down the road and contacted the fishermen and ascertained that they had brought gold but the mere fact that the confession is somewhat inartistically recorded cannot lead to the conclusion that it is not true. Mr Jethmalani has also

commented on the fact that according to him there is a discrepancy between the respective versions given by the 1st accused and by the 2nd accused in regard to the circumstances in which they got acquainted with each other. The first accused has in his confession (Ex 17) said that about a month prior to the date of that confession he had been to the New Poshan Talkies on Faulkland Road to see a picture and that he got acquainted with accused No 2 who was sitting by his side and during the course of casual talk he came to know that accused No 2 was a person who could arrange to provide motor cars on hire and that he showed him his house which was in the vicinity of the said cinema theatre. He has stated that thereafter they used to meet each other. The 2nd accused has in his confession (Ex 18) said that the 1st accused was staying in a hotel at Dadar but used to come daily to Opera House to purchase motor parts and at times used to dine in a hotel named Bilam Hotel near Grant Road which was located in the vicinity of the residence of the 2nd accused himself that he (the 2nd accused) used to go for walks towards the Grant Road Hotel daily at night after meals and that he used to talk to the 1st accused who would come to dine in the said hotel, and it was in that way that their acquaintance developed. I do not think there is any inconsistency in the versions which each of the accused persons has given in regard to how he came to know the other. It may well be that they first happened to meet in the New Poshan Talkies and got acquainted with each other but that their acquaintance developed thereafter in the manner stated by the 2nd accused in his statement.

Mr Jethmalani has next relied upon what he states to be the discrepancy in the versions given by the accused persons and the versions given by the excise witnesses in regard to what precisely transpired at the place where the accused were first contacted near Bassein on the night of 21st March 1965. The 1st accused has in his confessional statement (Ex 17) stated that after they reached the bridge near the Bassein railway crossing at about 2 a.m. on the 22nd of March 1965 they asked the driver to dim the lights and hoot the horn that he and the 2nd accused then got down from the car and told the driver to proceed a bit ahead and turn the car and come back where they had got down that the car accordingly went ahead and turned back to the place where they were waiting and that in the meantime he and the 2nd accused had gone down the road and contacted fishermen and ascertained that they had brought the gold. He proceeded to state that he told the driver to get down from the car and to keep the engine running and the four packages containing gold

were then placed in the dicky of the car, and they got in and started, but were intercepted by the excise officers as soon as they started. The 2nd accused has in his statement given almost exactly the same version. Superintendent Wagh has in his evidence no doubt stated that the car in which the accused were travelling halted after going off the road, that they waited for a while to watch the movements of that car, and that for 10 or 15 minutes they did not "mark or notice any movement" and they then started going towards the bridge near which that car was halted. The point which Mr. Jethmalani sought to make was that Superintendent Wagh does not speak in his evidence of having seen the accused persons getting down from the car, or of the gold being loaded into the dicky of the car, as the accused persons have said in their confessions.

In this connection, it must, however, be pointed out that the excise party was about 4 or 4½ furlongs away from the place where the car of the accused had halted and the lights having been put off, it may well be that the excise officers could not see the precise movements of the occupants of the car or the loading of the gold into its dicky in darkness at that hour of the night. Mr. Jethmalani has also commented on the fact that Inspector Surti has not only not mentioned the getting down of the accused persons from their car or loading of the gold into the dicky of the car, but has not even mentioned that they were, for 10 or 15 minutes, watching the movements of the car of the accused. I do not think that the mere omission to state this little detail should affect the credibility of the evidence given by witness Wagh or witness Surti or the truth of the confessions made by the accused persons. In my opinion, there is no substance in the contention of Mr. Jethmalani that there is material, either intrinsic in the confessions themselves or extrinsic in the evidence in this case, to show that the confessions in question are not true.

6. The last contention of Mr. Jethmalani is that there is no corroboration in regard to the only important point in this case viz, as to whether the possession of gold by the accused was conscious possession. As far as the extra-judicial confessions of the accused are concerned, it is true that it is prudent to require corroboration in the case of a retracted confession (AIR 1957 S.C. 637 at p. 643 and AIR 1959 S.C. 18 para 8), the latter of which deals expressly with an extra-judicial confession. There is, in my opinion, however, abundant corroboration of the confessions (Exs. 17 and 18) made by the accused persons which have been recorded by Superintendent Robb under Section 108 of the Customs Act, 1962.

First and foremost, there is the evidence that when the accused persons were confronted by the excise party and were questioned as soon as they were intercepted as to why they had come there, they remained silent for some time, but then accused No 2 admitted that they had gold in the dicky of the car. That the excise party would question the accused persons as to why they had come there is quite natural and, in fact, the 1st accused has expressly admitted as correct the question put to him in regard to the evidence of Superintendent Wagh that he had asked them why they had come there that night and what was in the car, and that they did not initially give any reply. It may, however, be mentioned that the 2nd accused has in his statement denied that Wagh put any question to him, a statement which I decline to believe as it is inconceivable that a raiding party would not confront the persons with whom they had concern with that question at the earliest opportunity. The 1st accused has no doubt said that he did not know whether accused No 2 had admitted that there was gold in the dicky of the car, when he was questioned under Section 342 of the Criminal Procedure Code, but in his confessional statement (Ex 17) he has stated that when the excise party questioned them, they gave the correct answer and said that there was gold in their car as, realising that their game was up, they thought they should give a correct answer. Apart from the express admission made by the 2nd accused at the spot that they were carrying gold which cannot be used against the 1st accused, as far as the 1st accused is concerned, he has admitted that he kept quiet when he was questioned by Superintendent Wagh about his movements and in regard to what was in the car. That by itself, and the absence of a statement expressing his ignorance in regard to the contents of the car or explaining his movements, would show that he knew that there was gold in the car. There are other facts and circumstances proved by the evidence which also show that the accused persons knew that they were carrying gold in their car. In addition to the fact that gold was actually found in the car and the accused persons were also found in the same car, the movements of the car at dead of night lurking from one place to the other, as disclosed by the evidence, are themselves sufficient to show consciousness on the part of those occupants in regard to what it contained. Mr. Jethmalani has, however, strongly commented on the fact that the driver of the car Bapu who, it is admitted in the evidence of panch witness Kane as well as Inspector Surti and Superintendent Robb, was actually present in the course of the trial in the lower court, has not been called.

He has asked the court to draw an inference in the manner stated in Illustration (g) to Section 114 of the Evidence Act by reason of the fact that the said driver has not been examined by the prosecution as a witness. It can certainly not be doubted that the driver Bapu would have been in a position to throw light on the circumstances in which he was engaged and perhaps also the circumstances in which the gold came to be loaded into the car. It is however not obligatory on a court to draw a presumption of adverse inference under Section 114 of the Evidence Act the illustrations to which themselves show that the court must have regard to the facts and circumstances of the case. No question seems to have been raised in the course of the trial whilst the evidence was being led as to why the driver was not being called as a witness by the prosecution. The record shows that a purshis was filed on behalf of the prosecution on 21st March 1966 stating that the prosecution did not propose to lead any further evidence and not only is there nothing else on record to show by way of cross-examination why the driver was not examined but no objection appears to have been raised on behalf of the accused persons when that purshis was filed suggesting that the driver should be called or that he was required by them for cross-examination. In a similar situation the Privy Council in the case of Banwari Lal v Mahesh 45 Ind App 284 at pp 287-288 = (AIR 1918 PC 118 at pp 119-120) declined to draw an adverse inference when no question had been raised at the trial as to the absence of the mother of the plaintiff in a civil suit for the recovery of certain property. The Privy Council observed in that case that if any point had been made about her absence it was quite possible that an explanation might have been offered for not calling her as a witness. In the absence of the prosecution being given an opportunity to explain why the driver Bapu whose statement had admittedly been recorded by Superintendent Robb even before the confessional statements of accused Nos 1 and 2 were recorded by him, was not called in the exercise of my discretion, I decline to draw an adverse inference against the prosecution on that account under S 114 of the Evidence Act as Mr Jethmalani has urged upon the court. In view of the facts and circumstances proved by the evidence to which I have just referred I hold that there is abundant corroboration for the retracted extra-judicial confessions of the accused persons (Exs 17 and 18) in the present case and the trial court was right in relying upon those confessions which taken with the other evidence in the case establish the guilt of accused Nos 1 and 2 beyond reasonable

doubt in regard to the offences of which they have been found guilty.

7 In the result this appeal must be dismissed and the conviction of both the accused as well as the sentences passed upon them by the lower court confirmed. The accused to surrender to bail within two weeks.

8 KAMAT, J I agree and have nothing to add.

Appeal dismissed

1970 CRI L J 332 (Vol 76, C N 75) =

AIR 1970 CALCUTTA 110

(V 57 C 15)

N C TALUKDAR J

Bijoyanand Patnaik Accused Petitioner
v Mrs K A A Brinnand Complainant-
Opposite Party

Criminal Revn Case No 466 of 1968
D/- 8-8 1969

(A) Criminal P C (1898), Ch XV, S 177 — Scope — Offence under S 406 I P C — Where neither entrustment nor conversion has taken place within the territorial jurisdiction of the Court where complaint is lodged, the Court has no jurisdiction to proceed with complaint.

Section 177 of the Criminal P C apparently adopts the Common Law of England that all crimes are local and justiciable only by the local courts within whose jurisdiction they are committed. The venue of enquiry or trial of a case is primarily to be determined by the averments contained in the complaint or charge-sheet and unless the facts there are positively disproved ordinarily the Court where the charge-sheet or complaint is filed has to proceed with it except where action has to be taken under Section 202 of the Criminal Procedure Code. In case of a complaint under Section 406 I P C where neither the entrustment nor conversion has taken place within the territorial jurisdiction of the Court where the complaint is lodged the court has no jurisdiction and the proceedings instituted there are bad in law and without jurisdiction AIR 1937 SC 196 Foll AIR 1955 Cal 498 & AIR 1949 PC 264 & (1898) ILR 25 Cal 20 (PC) & AIR 1917 Cal 137 (FB) & (1855) 7 Cox CC 158 & AIR 1942 Cal 575 & AIR 1925 Cal 613 & AIR 1971 Cal 528 & AIR 1931 Cal 521 & AIR 1922 Cal 46(1) & AIR 1934 Cal 392 & AIR 1921 All 12 (FB) AIR 1952 Mad 158 & AIR 1930 Bom 490 (FB) Rel on

(Para 5)

(B) Criminal P C (1898) S 177 — Objection to jurisdiction — Complaint case — Objection can be taken after framing of charge

IM/JM/E154/69/GGM/P

When the attention of the court is called to an illegality regarding absence of jurisdiction at a very early stage, it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging somewhat difficult burden under Sec 537, Cr. P. C. of making out that such an error has in fact occasioned a failure of justice AIR 1955 SC 196 Foll. (Para 5)

(C) Penal Code (1860), Ss. 120B and 109 — Conspiracy and abetment — Offences are distinct.

Offences created by Sections 109 and 120B I. P. C. are quite distinct. There is no analogy between Section 120B and section 109 I. P. C. There may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Conspiracy to commit an offence is itself an offence and a person can be separately charged with in respect to such conspiracy. AIR 1961 SC 1241 Rel. on. (Para 5)

Cases Referred: Chronological Paras

- {1961} AIR 1961 SC 1241 (V 48)=
1961(2) Cri LJ 302, State of A. P.
v. Kandimalla Subbiah 5
- {1957} AIR 1957 SC 196 (V 44)=
1957 Cri LJ 322, State of M. P.
v. K. P. Ghara 5
- {1955} AIR 1955 SC 196 (V 42)=
1955 SCA 258=1955 Cri LJ 526,
H. N. Rishbud v. State of Delhi 5
- {1955} AIR 1955 Cal 498 (V 42)=
1955 Cri LJ 1257, Debendranath
Sen v. Rajendra Chandra Roy 5
- {1952} AIR 1952 Mad 158 (V 39)=
1952 Cri LJ 308, Arunachala Goun-
dan v. K. S. Akhileshwara Ayyar 5
- {1949} AIR 1949 PC 264 (V 36)=
76 Ind App 158, Yusofalli Mulla
Noorbhoy v. King 5
- {1942} AIR 1942 Cal 575 (V 29)=
44 Cri LJ 132, Daityari Tripathi
v. Subodh Chandra Chowdhary 5
- {1934} AIR 1934 Cal 392 (V 21)=
35 Cri LJ 734, Prokash Chandra
Sircar v. Mohim Chand Haldar 5
- {1931} AIR 1931 Cal 521 (V 18)=
32 Cri LJ 1042, G. N. Pascal v.
Raj Kishore Mathur 5
- {1931} AIR 1931 Cal 528 (V 18)=
Paul De Flonder v. Emperor 5
- {1930} AIR 1930 Bom 490 (V 17)=
32 Cri LJ 331 (FB), In re, Jiwan-
das Savchand 5
- {1925} AIR 1925 Cal 613 (V 12)=
29 Cal WN 432=26 Cri LJ 725,
Gunananda Dhane v. Lala Santi
Prokash Nandy 5
- {1922} AIR 1922 Cal 46 (1) (V 9)=
26 Cal WN 175, Abdul Latiff Yusuf
Abu Mahamed Kassim 5

- (1921) AIR 1921 All 12 (V 8)=
22 Cri LJ 308 (FB), Sheo Shankar
v. Mohan Sarup 5
- (1917) AIR 1917 Cal 137 (V 4)=
ILR 44 Cal 595 (FB), Charu
Chandra Mujumdar v. Emperor 5
- (1898) ILR 25 Cal 20=24 Ind App 137,
Muhammad Yusuf-ud-Din v
Queen Empress 5
- (1855) 7 Cox CC 158, Reg v. Davison
and Gordan 5
- Ajit Kumar Dutt, Milan Kumar Baner-
jee, Amiya Kumar Mukherjee, Birendra
Nath Banerjee, for Petitioner, J. P. Mitter,
Promode Ranjan Roy, for Opposite Party
J. M. Banerjee, for State.

ORDER:— This Rule is for setting aside an order dated the 24th April, 1968 passed by Sri K. J. Sengupta, Chief Presidency Magistrate, Calcutta, holding that a prima facie case was made out against the accused-petitioner, Sri Bijoyanand Patnayak, and framing charges against him under Section 406 I. P. C. on two counts, in case No. C/1023 of 1967 and for quashing the said proceedings.

2. The facts leading on to the present Rule are chequered but can be put in a short compass. The prosecution case brings to light an unfortunate case of a friendship foundering on two airships. The bone of contention between the two parties, both of whom are respectable and were erstwhile friends, is two aircrafts viz VT-CRA & VT-CXR, which originally belonged to M/s. Indamer and Company (P) Limited, Customs House Road, Bombay. The prosecution case inter alia is that Capt. Brinnand (P. W. 4) the husband of the present complainant, Mrs. K. A. A. Brinnand (P. W. 1), purchased the abovementioned two aircrafts on the basis of an agreement of hire-purchase (Ext. 4), entered into on the 26th October, 1954 for a sum of Rs 3,42,300/- payable in instalments. It was agreed that on payment of the abovementioned amount in full, Capt. Brinnand will become the absolute owner of the aircrafts. The final payment was made on the 6th August, 1965 with the sum of Rs 20,000/- which was the amount then due, to M/s. Indamer and Company (P) Ltd through one of its directors, Mr. J. P. Koszarek as per Ext. 6. Capt. Brinnand however having no operating licence or permit standing in his name for operating the aircrafts purchased by him as per the terms of the deed of agreement mentioned above, another agreement was entered into between him and M/s. Indamer and Company (P) Limited on the basis of a letter (Ext. 7), whereby the latter company allowed its chartered permit to be used by Capt. Brinnand on payment of a licence fee of Rs 20,000 per year. The prosecution case further is that in the absence of an operating licence, the

ownership of the two aircrafts also could not be changed from the name of M/s Indamer and Co (P) Limited to Capt Brinnand's name in the certificate of registration kept in the Civil Aviation Department Govt of India. The licence of M/s Indamer and Company (P) Limited in the meanwhile was cancelled by the authorities because of some irregularities in the working of the said company and Capt Brinnand out of his anxious consideration that the two aircraft purchased by him did not remain idle came into contact with Shri Bijoyanand Pattanayak for making arrangement for the operation thereof on the strength of the operating licence or permit for non scheduled flight of the aircrafts standing in the name of the Kalinga Air Lines whereof Sri Pattanayak was the proprietor. An agreement (Ext 11) accordingly was executed on the 1st March 1958 between Sri Pattanayak and Capt Brinnand on certain terms whereby Sri Pattanayak allowed Capt Brinnand to use the operating licence standing in the name of the Kalinga Air Lines without taking any profit as the said licenses were remaining idle. As the two aircrafts stood in the name of M/s Indamer and Company (P) Limited in the register of the Civil Aviation Department Capt Brinnand made arrangements to transfer the same to the Kalinga Air Lines (P) Limited which in the meanwhile had come into existence. M/s Indamer and Co (P) Limited agreed to allow the Kalinga Air Lines (P) Ltd on the basis of an agreement (Ext 12) dated the 1st March 1958 to use six of their aircrafts including VT-CXR. With regard to the aircraft VT-CXR it was agreed that the Kalinga Air Lines (P) Limited would not have to pay anything for its user. On the same date M/s Indamer and Company (P) Limited wrote a letter to M/s Kalinga Air Lines (P) Limited expressing their willingness to sell the Dakota aircraft VT-CRA for Rs 40,000. No consideration however was passed in the alleged sale of the said Dakota aircraft VT-CRA as would be borne out by Lxts 13 and 34 and it was merely a paper transaction. In order to produce the aircraft before the Director of Civil Aviation at New Delhi for the transference of the name of the owner in respect of the same the documents were required for allowing the party to use the operating licence or permit which stood in the name of the Kalinga Air Lines subsequently changed to Kalinga Air Lines (P) Limited. In course of time on the 12th April 1960 Capt Brinnand was authorised to deal with all matters belonging to the Kalinga Air Lines (P) Limited as is evident from a resolution (Ext 15) passed at a meeting of the Board of Directors of the said company. Ext 17 is an agreement dated the

23rd May 1960 between M/s Indamer and Company (P) Limited on the one hand and M/s Kalinga Air Lines (P) Limited represented by Capt Brinnand on the other described as the hirer and it shows that three aircrafts belonging to M/s Indamer and Company (P) Limited were lent to the Kalinga Air Lines (P) Limited for their use and that the hire charges of those three aircrafts being VT DGR VT DGM and VT-DFJ were fixed at a sum of Rs 12,37,500 for three years. This was also described by the prosecution to be a paper transaction. Capt Brinnand worked in the Kalinga Air Lines (P) Limited upto 10th August 1967 and thereafter cut off all connections with the said organisation and called upon Sri Pattanayak to return back his aircrafts VT-CRA and VT-CXR which were entrusted with him. On Sri Pattanayak's refusal to do the same the petitioner filed a petition of complaint before the learned Chief Presidency Magistrate Calcutta on the 17th April 1967 against the two accused persons viz Mr J P Koszarek and Sri Bijoyanand Pattanayak under Section 406 I P C. The complainant was examined by the learned Chief Presidency Magistrate Calcutta on the 17th April 1967 and the case was sent for judicial enquiry by Sri A. Sengupta, Presidency Magistrate 5th Court Calcutta fixing 1-6-67 for report. The learned enquiring Magistrate thereafter recorded evidence and ultimately submitted a report holding that there was a prima facie case under Section 406 I P C against the accused No 2 Sri Bijoyanand Pattanayak. The learned Chief Presidency Magistrate Calcutta thereupon by his order dated the 7th June 1967 issued process against Sri Bijoyanand Pattanayak under Section 406 I P C. 9 witnesses thereafter were examined on behalf of the prosecution to unfold the occurrence and several documents were proved both on behalf of the prosecution and the defence and as a result of the trial the learned Chief Presidency Magistrate by his order dated the 24th April 1968 held that a prima facie case was made out for framing charges against the accused petitioner and he accordingly framed against him charges under S 406 I P C on two counts but he rejected however the prayer made on behalf of the complainant for issuing process against the co accused Mr Koszarek on the ground of a purported conspiracy between the two accused for a criminal breach of trust in respect of the two aircrafts. The said order has been impugned and forms the subject matter of the present Rule.

3 Mr Ajit Kumar Dutt Advocate (with Mr Milan Kumar Banerjee Barrister-at law Mr Amiya Kumar Mukher-

jee, Advocate and Mr. Birendra Nath Banerjee, Advocate) appearing on behalf of the accused-petitioner Sri Bijoyanand Pattanayak in support of the Rule, has made an eight-fold submission. The first contention of Mr. Dutt relates to jurisdiction and goes to the very root of the case. Mr. Dutt submitted that neither entrustment nor conversion having taken place within the territorial jurisdiction of the learned Chief Presidency Magistrate's Court, the present proceedings are bad in law and without jurisdiction and as such should be quashed. The second contention of Mr. Dutt relates to procedure and is that an erroneous view of Section 254 of the Code of Criminal Procedure having been taken, the resultant proceedings are bad and repugnant. The third contention of Mr. Dutt is about the inordinate delay in lodging the present complaint, ten years after the incident and six years after the civil suit. The fourth point urged by Mr. Dutt relates to the merits. Mr. Dutt has submitted in this context that the petition of complaint does not disclose any criminal offence, far less offence under Section 406 I. P. C. No entrustment within the meaning of Section 405 I. P. C. has been alleged in the petition of complaint and there is also no averment regarding the delivery of the aircrafts in Calcutta or of conversion thereof, in the said place. The fifth contention of Mr. Dutt is that the charge of criminal breach of trust is not sustainable on the evidence on record and in this context he referred to the evidence of P. Ws 1 and 4 as also the averments made in the petition of complaint. Mr. Dutt's sixth submission relates to the pendency of the civil suit and its effect upon the present criminal proceedings. He contended that at best the dispute is one of civil nature and should properly be determined in a different forum. Mr. Dutt next contended that the petition of complaint being based upon a suppression of material facts and the processes having been issued on the said basis, the present proceedings are not maintainable in law. The eighth and the last submission of Mr. Dutt is that neither the complainant nor her husband is the competent person to institute the present criminal proceedings inasmuch as, amongst others, the husband, Capt Brinnand is not even the registered owner of the two aircrafts. In this context Mr. Dutt referred to Sections 5 and 33 of the Indian Aircrafts Rules, 1937. Mr. J. P. Mitter, Counsel (with Mr. Promode Ranjan Roy, Advocate) appearing on behalf of the complainant-opposite party, Mrs K. A. A. Brinnand, contended in the first instance that the first point in the nature of a preliminary objection raised by Mr. Dutt as to the jurisdiction is more technical than real and is not

warranted upon ultimate analysis. In view of the averments made in the petition of complaint as also the statements made in the evidence, the proceedings are quite competent and within jurisdiction. Mr. Mitter submitted in this connection that neither the entrustment nor the conversion as alleged, having taken place outside the territorial jurisdiction of the learned Chief Presidency Magistrate's Court, there is no bar in law to the maintainability of the present proceedings in the said court. Mr. Mitter next contended that there is no defect in procedure as alleged or at all and that there has been no non-conformance to the provisions of Section 254 of the Code of Criminal Procedure. The learned Magistrate has not overlooked the statements made by the prosecution witnesses in cross-examination in framing the charges and the same would be evident from the findings arrived at in the judgment itself. Mr. Mitter's third submission relates to the objection raised on behalf of the accused-petitioner to the maintainability of the present proceedings on the ground of inordinate delay. He submitted that the said delay is not for a period of ten years as alleged and that it is due to an attempt to settle the matter in dispute because of the friendship that existed originally between the two parties. In this context, he further urged that there being no limitation to the institution of a criminal proceedings, the delay alleged is not in any way fatal to the same. Mr. Mitter's fourth contention is that the submissions made by Mr. Dutt relating to the merits of the case are premature and that the statements made in the petition of complaint do not disclose a criminal offence while the evidence adduced by the material prosecution witnesses does make out the offence of criminal breach of trust as charged. Mr. Mitter submitted in this context that both entrustment and dishonest conversion have been proved by cogent evidence as having taken place within the jurisdiction of the court of the learned Chief Presidency Magistrate Calcutta. In this context for establishing entrustment, Mr. Mitter referred to Exts 9, 11, 12, 13, 17, 18, 21, 22, 27 and 38 as also to the evidence of P. Ws 4 and 9. As to the sixth submission of Mr. Dutt regarding the effect of the civil suit on the present criminal proceedings, Mr. Mitter submitted that both the accused are not parties thereto and the relief prayed for is also different. In any event, it was contended, that there is no bar in law to such an institution. Mr. Mitter next contended that there has been no suppression of material facts by the complainant either in the petition of complaint or in the evidence, as alleged or at all and that the complainant had been merely trying her utmost to estab--

lish the lawful claim of her husband and that the resultant proceedings are but an aggrieved person's odyssey in quest of his rights Mr Mitter lastly contended that the objection raised by Mr Dutt to the locus standi of the present complainant or her husband to institute the criminal proceedings is clearly unfounded inasmuch as the evidence on record would establish that Capt Brinnand is the owner of the two aircrafts To prove the same Mr Mitter referred to the evidence of P Ws 1 4 and 6 and also exhibits 4 5 5/1 6 7 18 31 and 32 Mr Mitter in this context referred also to the provisions of Sections 19 and 33 of the Sale of Goods Act and certain circumstances wherefrom the knowledge of the accused regarding the ownership of Capt Brinnand might reasonably be inferred Besides meeting the points raised by Mr Dutt as above Mr Mitter also made a broad submission that the quashing of a criminal proceeding is an extraordinary procedure and should not be resorted to in the facts and circumstances obtaining in the present case In this context Mr Mitter further urged that the claims of aggrieved persons may not be scotched on technical grounds at an early stage instead of being determined by a full-fledged trial

4 Mr J M Banerjee Advocate appearing on behalf of the State opposed the Rule and broadly adopted the submissions made on behalf of the complainant opposite party by Mr J P Mitter He also made some further submissions On the question of jurisdiction Mr Banerjee submitted that the evidence on the record establishes the factum of entrustment within the jurisdiction of the court of the learned Chief Presidency Magistrate Calcutta and even if no conversion could be proved within the said jurisdiction it will not render the ultimate proceedings taking place there under Section 406 I P C to be bad and without jurisdiction Mr Banerjee in this context further contended that even if such jurisdiction was not established in the petition of complaint, the objection to the same is merely academic at this stage when the prosecution has led material evidence, both oral and documentary establishing such jurisdiction On the point of delay Mr Banerjee contended that there is no bar in law to the institution of a criminal proceeding because of any purported limitation and even if there was any such delay it is for the learned trying Magistrate to determine the same Mr Banerjee finally contended that no case has been made out on behalf of the defence either under Section 253(1) or under Section 253(2) of the Code of Criminal Procedure and that even if the petition of complaint disclosed no offence

as alleged or at all now that evidence has been taken the said objection is unwarranted and untenable and the dominant consideration should be whether such evidence has made out the charges framed In reply Mr Mitter further contended that the evidence on record establishes the offence of conspiracy between Sri Bejoyanand Pattanayak and Mr J P Koszarek and if the same be taken into consideration the present proceedings will not be bad for absence of jurisdiction and will certainly be maintainable in the court of the learned Chief Presidency Magistrate Calcutta Mr Dutt however, contended in the first place that not only was this point taken either in the court below or even in the arguments advanced in this court before now but also the same is wholly untenable on merits and unwarranted by any procedure enjoined by law The steps of Mr Dutt's reasoning in this context are inter alia that even regarding Mr Koszarek no abetment was alleged in the petition of complaint and also no conspiracy that the element of any conspiracy is non est in the present case and is even ruled out by the materials on the record that Sri B Pattanayak was discharged of the charge under Section 406/114 I P C and has not even been impleaded in the other Rule being Criminal Revision Case No 508 of 1968 pending against Mr Koszarek that there will be apparently legal difficulties because at this stage no trial is possible in this case also on the charge under Section 120B I P C of Mr Koszarek alone or along with Sri Pattanayak that at this stage when no charge was framed against Mr Koszarek he cannot be tried under Section 120B/406 I P C along with Sri Pattanayak in the same case unless and until everything is washed out including the present charges framed and that even if any charge could be deemed to be tenable against Mr Koszarek either under Section 406/114 I P C or under Section 120B/406 I P C he cannot be tried along with Sri Pattanayak in this case excepting in a new trial

5 Having heard the learned counsel appearing on behalf of the respective parties and on going through the evidence oral and documentary which I have been taken through I will take up for determination in the first instance, the point raised on behalf of the accused petitioner relating to jurisdiction, as it goes to the very root of the case Jurisdiction is the very foundation of the case it is the plinth whereupon rests the entire superstructure of the proceedings Any order passed in a case vitiated by the absence of jurisdiction, will be a nullity As their Lordships of the Judicial Committee held in the case of Yusufali

Mulla Noorbhoy v. King, 76 Ind App 158 = (AIR 1949 PC 264) that even an order of acquittal passed in a case without jurisdiction would not be binding even if it is not appealed against and set aside. Sir John Beaumont delivering the judgment of the Judicial Committee observed that "but if the orders were a nullity there was nothing to appeal against". Chapter XV of the Code of Criminal Procedure deals with the jurisdiction of the criminal courts in enquiries and trials. Section 177 of the Code of Criminal Procedure apparently adopts the Common Law of England that all crimes are local and justiciable only by the local courts within whose jurisdiction they are committed. The Lord Chancellor, Lord Halsbury delivering the judgment of the Judicial Committee in the case of Muhammad Yusuf-Ud-Din v. Queen-Empress, (1898) 1LR 25 Cal 20 (PC) observed at page 30 that: "It is important to observe this because crime is in its essential nature local". The General Rule of Lex fori as contained in Section 177 of the Code of Criminal Procedure is modified by the exceptions or alternatives provided for in the following sections under Chapter XV of the Code of Criminal Procedure. In the Full Bench case of Charu Chandra Majumdar v. Emperor reported in 1LR 44 Cal 595 = (AIR 1917 Cal 137) (FB), Sir Asutosh Mukherjee observed at page 621 that "section 177 formulates the general principle that the ordinary place of enquiry and trial is the court within the local limits of whose jurisdiction the offence is committed . . . Sections 179-84 embody provisions in the nature of exceptions or alternatives to Section 177". For properly appreciating the point raised, it will be pertinent to refer to Sec. 181(2) of the Code of Criminal Procedure which is as follows: "The offence may be tried by the court within whose jurisdiction — (i) any part of the property was received by the accused, or (ii) was retained by him, or (iii) the offence was committed." There was at one stage a cloud raised over the interpretation of the abovementioned provision by the conflicting decisions of the different High Courts, as also of other courts but the same has since been lifted by a series of recent decisions and I would refer only to a few of those to avoid repetition. The starting point of one school of thought appears to be the case of Reg v. Davison and Gordon decided by Baron Alderson and Coleridge J. as reported in (1855) 7 Cox C. C 158. Baron Alderson observed therein at pp. 162-163 that "where there is no evidence of fraudulent embezzlement except the non-accounting the venue may be laid in the place where the non-accounting occurred, because the jury may presume that there the fraudulent misap-

propriation was made, but this cannot apply where there is distinct evidence of the misappropriation elsewhere". The aforesaid case was discussed at great length in a Division Bench decision of this court reported in AIR 1942 Cal 575 by Mr. Justice Blagden, who ultimately observed that the learned Baron "was dealing with the Common Law of England which at that date almost wholly regulated English criminal procedure, and our law of procedure is codified" and that "there is no justification for holding that the English law is the law of Bengal." I agree with the said observations of Mr. Justice Blagden and I hold that the abovementioned observations of the Lord Baron were made in a different context while dealing with the statutory offence of embezzlement and that our law of procedure being codified, the English law on the point should not be taken as a precedent for interpreting the relevant Indian law. There are also some cases of the different High Courts in India supporting this other school that the failure to render account at a particular place provides an alternative venue for a trial of the case therein and to avoid repetition a reference may be made to some of these cases. In the case of Gunananda Dhona v. Lala Santi Prokash Nanley, decided by Mr. Justice Suhrawardy and Mr. Justice Mukerji and reported in 29 Cal WN 432 = (AIR 1925 Cal 613) Mr. Justice Mukerji delivering the judgment of the court observed at page 437 that "where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate, may inquire into and try the offence under the provisions of Section 181, sub-section (2), Cr. P. C.". The next case is the case of Paul De Flonder v. Emperor reported in 35 Cal WN 809 = (AIR 1931 Cal 528) decided by Mr. Justice Lort-Williams and Mr. Justice S. K. Ghose. Mr. Justice Lort-Williams delivering the judgment of the court approved of the decision in the case of G. N. Pascal v. Raj Kishore Mathur reported in AIR 1931 Cal 521 and dissented from the decisions reported in 29 Cal WN 432 and in 26 Cal WN 175 = (AIR 1922 Cal 46(1)) and observed at page 815 of (35 Cal WN) = (at page 531 of AIR) that : "If there is no evidence to show where the misappropriation was committed other than the fact of non-accounting then the venue may be laid in the place where the accused failed to account, because that is where the offence was committed within the meaning of Section 181 (2) — R. v. Davison and Gordon, (1855) 7 Cox C. C. 158.(6)"

The next case on the point is the case of Prokash Chandra Sircar v Mohim Chand Haldar reported in AIR 1934 Cal 392 wherein Mr Justice Mukherji and Mr Justice S K Ghose held that where there is no definite allegation of misappropriation having been committed in any particular place in respect of a sum which forms the subject-matter of a case but the allegation is merely of non-accounting in respect of the sum failure to account may itself be taken as evidence of intention to misappropriate and the offence of misappropriation is deemed to have been committed at the place at which the accused ought to have rendered the accounts. In the case of Sheo Shankar v Mohan Sarup reported in AIR 1921 All 12 (FB) the Full Bench of the Allahabad High Court held that where the duty to account was at a certain place and the misappropriation is made at another place the offence can be tried at the place where account was to be given. In a more recent decision in the case of S Aruna chala Goundan v K S Akhileshwara Ayyar reported in AIR 1952 Mad 158 Mr Justice Pamaswami held that where the charge is of non-accounting and there is no specific allegation of misappropriation in any particular place the venue of the trial will be the place where the accounting has got to be done and has not been done. The view taken in the abovementioned group of cases has been negatived in another group of cases and the position in law as held in the latter group of cases is now well settled. A reference in this context may be made to the case of In re Jivandas Savchand reported in AIR 1930 Bom 490 (FB) wherein Chief Justice Beaumont after considering the various decisions of the different High Courts observed at page 495 that the jurisdiction to try an offence of criminal misappropriation or criminal breach of trust is governed by Section 181 sub-section (2) and not by Section 179.

But where the offence is completed at one place the further liability to render accounts at another place and failure in rendering such false accounts at the second place does not confer jurisdiction under Section 179 upon the Magistrate at the latter place since the offence is already completed at the former place. A reference again may be made to the case of Daityari Tripatty v Subodh Chandra Chowdhury reported in AIR 1942 Cal 575. Mr Justice Blagden delivering the judgment of the court after considering different decisions by the various High Courts including the Full Bench decision of the Bombay High Court reported in AIR 1930 Bom 490 (FB) observed at page 577 that 'neither failure to account for breach of contract however dishonest is actually and in itself the offence which S 405 Penal Code defines but merely evidence

of that offence'. In a latter decision of this Court in the case of Debendranath Sen v Rajendra Chandra Roy reported in AIR 1955 Cal 438 Mr Justice S R Dasgupta (as his Lordship then was) and Mr Justice Mullick approved of the decisions by the Bombay Full Bench as also by Mr Justice Lodge and Mr Justice Blagden of the Calcutta High Court. Mr Justice S R Dasgupta, delivering the judgment of the court observed at pages 498-499 that on consideration of the said provisions of the criminal procedure it appears to us that the offence of criminal misappropriation or criminal breach of trust can be inquired into or tried by a court within the local limits of whose jurisdiction any part of the property was received or retained or the offence was committed. I respectfully agree with the said observations and I hold that an offence of criminal breach of trust is not triable at a place where neither the factum of entrustment nor the positive act of conversion had taken place because an offence of criminal breach of trust always consists in an act and not in an omission. A further reference in this connection may be made to the decision of the Supreme Court in the case of State of Madhya Pradesh v K. P. Ghiara reported in AIR 1957 SC 196. It was observed therein by Mr Justice Govinda Menon, delivering the judgment of the court that 'the venue of enquiry or trial of a case like the present is primarily to be determined by the averments contained in the complaint or charge sheet and unless the facts there are positively disproved ordinarily the court where the charge-sheet or complaint is filed has to proceed with it except where action has to be taken under Section 202 of the Criminal Procedure Code'. I respectfully agree with the same and I have taken into my view the averments made in the petition of complaint and the evidence for the purpose of the said consideration. I will now proceed to consider the further contention raised by Mr J. P. Mitter in reply that in any event in view of the evidence on the record a charge of conspiracy to commit the offence of criminal breach of trust has been made out between the present petitioner and the co-accused, Mr J. P. Koszarek and as such because of the said charge of conspiracy the jurisdiction for trying the case will be before the learned Chief Presidency Magistrate Calcutta. I find however on ultimate analysis that the said contention is not tenable and the reasons for the same can be catalogued hereunder. In the first instance it will appear from the petition of complaint that the charge against the petitioner Sri B. Pattanayak is only under the substantive offence of Sec 406 I P C and no conspiracy is

alleged so far as he is concerned. The allegation of conspiracy in paragraph 9 is to be read along with that made in paragraph 11 of the said complaint and the same amounts to, at the highest, a conspiracy regarding abetment. In this context, it would be pertinent to refer to the expression 'conspiracy' as it occurs in Section 107 of the Indian Penal Code, defining the abetment of a thing, for a proper interpretation. Offences created by Sections 109 and 120B I P. C. are quite distinct. As was held by Mr. Justice Mudholkar delivering the judgment of the court in the case of the State of Andhra Pradesh v. Kandimalla Subbiah, reported in AIR 1961 SC 1241 that there is no analogy between Section 120B and Section 109 I P. C. There may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Conspiracy to commit an offence is itself an offence and a person can be separately charged with in respect to such conspiracy. I respectfully agree with the said observations and I hold that an offence created by Sections 109 and 120B I P. C. are quite distinct and accordingly the statements made in the petition of complaint do not make out a case of a conspiracy under Section 120B I P. C. The next point that cannot be overlooked is that even after the judicial enquiry and the evidence adduced therein, the learned enquiring Magistrate did not recommend any process against Mr. Koszarek under Section 406/114 I P. C. and the complainant also did not come up against the same so far as Mr. Koszarek is concerned or even against Sri B. Pattanayak because he was not summoned under Section 120B I P. C. It is pertinent again to refer to the application dated the 4th November, 1967, filed on behalf of the complainant after the principal witnesses were examined, praying that Mr. Koszarek may be summoned under Section 120B/406 I P. C. and the order that was passed therein rejecting it. The Court was not moved against the said order of rejection nor was any prayer made under Section 227 of the Code of Criminal Procedure for adding a charge against Sri Pattanayak under Section 120B read with Section 406 I P. C. The sanction that was prayed for is under Section 196A of the Code of Criminal Procedure but no application is there for adding a charge against Sri Pattanayak. On the 27-3-1968 again, when a second application in that behalf was filed praying for a process against Mr. Koszarek for being tried along with Sri Pattanayak, and an order was passed thereupon, there is significantly no prayer made for adding such a charge under Section 227 of the Code of Criminal Procedure. It is material again to note that

on the 24th April, 1968, when the application for a process against Mr. Koszarek was rejected, the complainant moved against a part of the said order viz., the refusal to summon Mr. Koszarek and did not move against any refusal to add a charge against Sri Pattanayak under S. 120B/406, I P. C. In the other Rule again, against Mr. Koszarek and others, Sri Pattanayak was not made a party. In short, at no stage was any prayer made against Sri Pattanayak under Section 120B, I P. C. or any prayer for the addition of such a charge under Section 227 Cr P. C. I find also no offence of conspiracy in the evidence, either oral or documentary and the learned Chief Presidency Magistrate, Calcutta is right in holding that it is non est. P. W. 1 does not refer to any allegation of conspiracy and P. W. 4 follows suit. The documents proved again do not make out any conspiracy. The facts referred to therein are in course of usual business and do not constitute any overt acts, germane to the issue of a conspiracy. Ext. 'K' was sworn at Bombay and the Kalunga Air Lines besides having its head office at Cuttack, has, amongst others, an office at Bombay. I hold therefore that this ancillary contention of Mr. Mitter is not only belated but is also unwarranted and untenable on merits and that on the ground of a purported conspiracy between Mr. Koszarek and Sri Pattanayak, the court of the learned Chief Presidency Magistrate, Calcutta cannot be held to have the requisite jurisdiction. On a perusal therefore of the petition of complaint and the averments made therein as also on an appraisal of the evidence on record, and on a consideration of the submissions made by the learned counsel appearing on behalf of the respective parties, I ultimately hold that the venue of the trial of the instant case is not the Court of the learned Chief Presidency Magistrate, Calcutta and accordingly the proceedings pending there are vitiated by the absence of any jurisdiction. The stage also at which this objection to jurisdiction has been taken, is the proper stage. A reference in this context may be made to the observations of Mr. Justice Jagannadhas, delivering the judgment of the Court, in the case of H. N. Rishbud v. State of Delhi, reported in 1955 SCA 258 at p. 269 = (AIR 1955 SC 196 at p. 204) that "when the attention of the court is called to such an illegality at a very early stage, it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under Section 537, Cr. P. C., of making out that such an error has in fact occasioned a failure of justice." The first

contention raised by Mr Dutt relating to jurisdiction accordingly succeeds

6 The only other point that abates determination is the ancillary ground viz the concept of liberal consideration or a broad approach to issues involved as pinpointed by Mr J P Mitter. The learned counsel has contended that the spirit of law enjoins some remedy for the claims of unsophisticated persons bona fide aggrieved and the same should not be brushed aside on hypertechnical grounds. The complainant in a criminal case according to Mr Mitter is as much a part of the proceedings as the accused is and his interests should not be equated at a lower level. The said submission is true to a degree but cannot overstep the bounds of the principles laid down by law enjoining a benefit of doubt to be given to the accused and not to the prosecution apart from the presumptions of innocence and the standard of proof required. The point however need not be weighed in golden scales as it ultimately does not arise out of the facts and circumstances of the present case. The point involved here is not of a liberal consideration but one of a proper construction of the law relating to jurisdiction which transgressed must render the proceedings into a nullity. I have given my anxious consideration to the submissions of Mr Mitter but I am unable to overlook the nonconformance made to the mandatory provisions of law relating to jurisdiction vitiating the entire proceedings. Mr Mitter has ultimately pressed his case on the grounds of justice. There appears to be however no chemistry of justice when in the context of the Judicial Reforms in England Bentham posed the question 'Does justice require less precision than chemistry?' It could only be answered on the footing that the precision attainable in the one case is of a nature which the other does not admit. Justice may not be as precise as chemistry but nonetheless it must be in accordance with law and as has been observed by Francis Bacon "Judges ought to remember that their office is *ius dicere* and *ius dare* to interpret law not to make law or give law. Applying the said yardstick to the facts of this case and in conformance to the provisions of the law relating to jurisdiction as incorporated in Section 181(2) of the Code of Criminal Procedure I hold ultimately that the present proceedings under Section 406 I P C are vitiated by the absence of jurisdiction.

7 In view of the findings arrived at on the first point it is not necessary for me to enter any further into the merits of the case and determine the other points raised and I accordingly refrain from doing so. I however make it quite clear that I make no observations as to the merits

of the case relating to the charge under Section 406 I P C. Before I part with the case I must also observe that both Mr Ajit Kumar Dutt and Mr J P Mitter the learned Counsel appearing on behalf of the respective parties placed their cases very ably and assisted this court to come to a proper decision.

8 In the result I make the Rule absolute and I quash the impugned order dated the 24th April 1968 passed by Sri K J Sengupta Chief Presidency Magistrate Calcutta as also the relative proceedings being case No C/1023 of 1967, pending before the learned Magistrate as without jurisdiction.

Rule made absolute.

1970 CRI L J 340 (Vol 76, C N 76) =

AIR 1970 CALCUTTA 120

(V 57 C 17)

BAGCHI J

Corporation of Calcutta Appellant v
Calcutta Wholesale Consumers Co-operative
Society Ltd and others Respondents

Criminal Appeal No 215 of 1968 D/
5-6-1969

(A) Prevention of Food Adulteration Act (1934) S 20(1) — Complaint was held to be neither by the Corporation nor person authorised by local authority — (Municipalities — Calcutta Municipal Act (33 of 1951), Ss 585 and 30 — Complaint to Magistrate about an offence — Complaint to be signed by the Commissioner — Rubber stamp impression of signature not enough) — (Criminal P C (1898) Ss 190(1)(a) and 200(a) — Complaint not properly authorised — Magistrate cannot take cognizance of)

In a case the complaint to a Magistrate for an offence under S 16(1)(a)(i) read with S 7 of the Prevention of Food Adulteration Act was filed by one Dr R. Chandra Food Inspector under the direction and with the consent of the Health Officer Corporation of Calcutta. The cause title read 'Complainant Corporation of Calcutta through Dr R Chandra Food Inspector Dr Chandra was a Food Inspector appointed under S 9 of the Act for the whole of the City of Calcutta and in the body of the complaint he described himself as the 'Complainant above named. The petition of complaint contained at the bottom signatures of District Health Officer I and Health Officer with words 'Approved and 'consented. There was also a facsimile impression of signature of the Commissioner.

Held that the complaint if it should be treated as one by the Corporation it was not according to law and if it should be treated as one by the Food Inspector

GM/IM/D24/69/TVN/P

then it should be held as one without authorisation. Hence, in either case, the Magistrate could not have taken cognizance of the complaint. (Para 3)

If the Calcutta Corporation is the complainant, then under S. 585 of the Calcutta Municipal Act read with S. 30 of the Act it is the Commissioner who alone for and on behalf of the Calcutta Corporation can present a petition of complaint for violation of any law under the Calcutta Municipal Act and the rules, regulations and bye-laws made thereunder. The Commissioner is required to subscribe his own signature on a petition of complaint presented before a Municipal Magistrate for and on behalf of the Calcutta Corporation asking the Magistrate to take cognizance of an offence against the violator of the law under the Calcutta Municipal Act and the rules and regulations framed thereunder. Facsimile rubber stamp impression of the signature of the Commissioner on a petition of complaint is not a valid petition of complaint upon which the Magistrate can take cognizance under Section 200(a) read with Section 190(1)(a) of Criminal P. C. Therefore, this complaint was not a complaint according to law and upon that complaint the learned Magistrate had no jurisdiction to take cognizance.

(Para 3)

If it is a complaint by Dr. Chandra who is a Food Inspector appointed by the State Government for the entire area of Calcutta Corporation, he was not authorised either by the Calcutta Corporation, or by the State Government to present the petition of complaint. Again, Dr. Chandra did not subscribe his signature at the bottom of the petition of complaint, but he described himself as the "complainant abovenamed" meaning Dr. Chandra, the complainant. The Health Officer is not 'local authority' to authorise him. So, the petition of complaint filed by Dr. Chandra was an unauthorised petition and was not in conformity with the provisions of S. 20(1) of the Prevention of Food Adulteration Act, 1954 (1968) 73 Cal WN 786, Foll.

(Para 3)

(B) Prevention of Food Adulteration Act (1954), Ss. 2, 13 and 23 — 'Matar dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be 'food grain' — Accused acquitted for non-performance of additional tests under A. 18.06(i) and (ii) — Decision, held, could not be assailed — Absence of evidence about it being 'food grain', held, immaterial. AIR 1965 Ker 123 (FB), Foll.

(Paras 5 & 6)

(C) Evidence Act (1872), Ss. 3, 5 and 101 — Appreciation of evidence — Criminal Trial—Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground

of defence — (Criminal P. C. (1898), Section 367) — (Prevention of Food Adulteration Act (1954), S. 16(1) and (7) — 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'food grain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held, immaterial).

(Para 6)

Cases Referred: Chronological Paras

(1968) Cri Ref. No 1 of 1967, D/- 23-12-1968=73 Cal WN 786, Corporation of Calcutta v. Biva Bati Basu 3

(1965) AIR 1965 Ker 123 (V 52)= 1965-1 Cri LJ 446 (FB), P. Govinda Pillai v. G. N. Padmanabha Pillai 5

Sunil Kumar Basu, for Appellant; Dilip Kumar Dutt, for Respondents.

JUDGMENT:— This is an appeal on taking special leave under Section 417(3) of the Code of Criminal Procedure at the instance of the Calcutta Corporation against the order of the acquittal passed by the Municipal Magistrate, Calcutta acquitting the respondent of an offence punishable under Section 16(1)(a) (i) read with Section 7 of the Food Adulteration Act, 1954. The accused respondent No 1 is the Calcutta Wholesale Consumers Co-operative Society Ltd (Retail Section) which is the main accused. Timir Haran Sen Gupta, Executive Officer and Deputy Registrar of the organisation is the accused no 2 and Niswanath Bhattacharjee, Sales-in-charge and seller of the organisation is the accused no. 3. From the records it appears that the complainant Corporation of Calcutta presented through Dr. R. Chandra, Food Inspector, a petition against the accused respondents before the Court of the Third Presidency Magistrate of the First Class specially empowered to take cognizance under Sec. 190 (1) (a) of the Code of Criminal Procedure (Cause Title of the petition of complaint). A Presidency Magistrate is not a Magistrate of the First Class. He is a Magistrate of no class, but he is a Magistrate sui juris as Presidency Magistrate. Under the fifth column in the petition of complaint the relevant portion runs as follows —

"The humble petition of Dr R Chandra Food Inspector, appointed by the State Government under S 9 of the P. F. A. Act for the whole of Calcutta, complainant above-named"

The relevant allegation in paragraph (1) of the complaint is as follows—

"That on 15-9-1965 the complainant inspected the shop of accused No 1 of which accused No 2 is Executive & Deputy Registrar and accused No. 3 is sales-in-charge and seller situated at 21 Chittaranjan Avenue and found an article of food namely Matar Dal stored, exposed for sale. Sample was purchased from accused no. 3 of the said food bear-

ing F I serial No 005348 after due observance of all the legal formalities and one part of the said sample was made over to the accused No 3 another part was sent to the Public Analyst being Lab Regd No 896 and the remaining part is with the complainant for future reference. The Public Analyst opined that the said food is adulterated and unfit for human consumption as per report of analysis in the Scheduled form being Report No S/65/106 a true copy of the same is attached herewith. The original will be produced during the trial.

Paragraph (2) reads as follows—

That your petitioner duly submitted the record of his inspection of the present case to the Health Officer Corporation of Calcutta and under his direction and with his consent the present complaint is filed in court.

In the circumstances the complainant prays that your honour will be pleased to issue summons against the accused persons named above for offence under Section 16(1)(a)(i) of the P F A Act 1954 read with Section 7 of the said Act and to try the said accused persons in accordance with law.

The accused persons were summoned by the learned Magistrate. Evidence was gone into. The learned Magistrate upon considering the report of the analyst observed as follows—

It appears from the Analyst's report (Ex. 6) that the tests as prescribed in standard A 1806(i) & (ii) under Appendix B of P F A Rules for foodgrains meant for human consumption have not been performed by the Public Analyst in the present case. Matar dal is obviously a food grain and these tests shall apply in its case. Hence the analysis of the sample is incomplete and as such the Public Analyst's opinion is unacceptable.

In this view of the matter the accused persons are found not guilty under Section 16(1)(a)(i) of P F A Act 1954 and accordingly acquitted and set at liberty forthwith.

2 Before I go into the merits of the appeal I should point out that the petition of complaint was filed by the Food Inspector as complainant under the direction and with the consent of the Health Officer of the Calcutta Corporation. Section 20(1) of the Prevention of Food Adulteration Act 1954 reads as follows—

No prosecution for an offence under this Act shall be instituted except by or with the written consent of the State Government or a local authority or a person authorised in this behalf by the State Government or a local authority.

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in Section 12 if he produces in court a copy of the report

of the public analyst along with the complaint.

3 It is clear from the petition of complaint that the complainant is the Food Inspector but the cause title of the petition of complaint shows that it is the Calcutta Corporation. The Food Inspector was not authorised by the Calcutta Corporation, a local authority but was authorised by the Health Officer of the Calcutta Corporation. Under Section 20(1) of the Prevention of Food Adulteration Act 1954 any person authorised by a local authority may file a petition of complaint for prosecution of an offence under the Act. In the present case the petition of complaint was filed by Dr R Chandra the Food Inspector under the direction and with the consent of the Health Officer of the Calcutta Corporation. The Health Officer of the Calcutta Corporation is not a local authority. The complainant Dr R. Chandra is the Food Inspector appointed by the State Government under Section 9 of the Prevention of Food Adulteration Act for the whole of Calcutta and he describes himself in paragraph 5 of the petition of complaint as 'complainant abovenamed' but the cause title of the petition of complaint reads 'Complainant Corporation of Calcutta through Dr R. Chandra Food Inspector'. The petition of complaint therefore bristles with rigorous statements. Who is the complainant? Calcutta Corporation. Dr R. Chandra Food Inspector or the two signatories and one having his facsimile rubber stamp impression at the bottom of the reverse page of the petition of complaint. The petition of complaint contains on the reverse side at the bottom the following—

APPROVED	CONSENTED
Illegible	Illegible
D H O No 1	Health Officer
Then a facsimile impression — Illegible	

Commissioner"

Now if the Calcutta Corporation is the complainant then under Section 585 of the Calcutta Municipal Act read with Section 30 of the Act it is the Commissioner who alone for and on behalf of the Calcutta Corporation can present a petition of complaint for violation of any law under the Calcutta Municipal Act and the rules regulations and bye-laws made thereunder. In a Division Bench judgment (unreported) Criminal Reference No 1 of 1967 under Section 432 Cr P C, Corporation of Calcutta v Biva Bati Basu judgment delivered on December 23 1968 (Cal) it has been held that the Commissioner is required to subscribe his own signature on a petition of complaint presented before a Municipal Magistrate for and on behalf of the Calcutta Corporation asking the Magistrate to take cognizance of an offence against the vio-

lator of the law under the Calcutta Municipal Act and the rules and regulations framed thereunder. Facsimile rubber stamp impression of the signature of the Commissioner on petition of complaint is not a valid petition of complaint upon which the Magistrate can take cognizance under Section 200(a) read with Section 190(1)(a) of the Code of Criminal Procedure. The Health Officer is a consenting party and D. H. O I is the approving party and the Commissioner is a party without any statement as to what part he had taken while his facsimile rubber stamp impression was set forth above the typed word "Commissioner" on the petition of complaint. If the facsimile rubber stamp impression of the Commissioner was affixed purporting to be a complainant on behalf of the Calcutta Corporation then this complaint was not a complaint according to law and upon that complaint the learned Magistrate had no jurisdiction to take cognizance. Again, if it is a complaint by Dr. Chandra who is a Food Inspector appointed by the State Government for the entire area of Calcutta Corporation, he was not authorised either by the Calcutta Corporation or by the State Government to present the petition of complaint. The beauty of the thing is that Dr. R. Chandra did not subscribe his signature at the bottom of the petition of complaint, but he described himself in paragraph 5 of the petition of complaint as the "complainant above-named", meaning Dr. Chandra, the complainant. So, the petition of complaint filed by Dr. Chandra was an unauthorised petition and was not in conformity with the provisions of Section 20(1) of the Prevention of Food Adulteration Act, 1954.

4. Mr. Bose, learned counsel for the appellant, at the close of his argument placed before me a true copy of the resolution of the Calcutta Corporation. But that resolution in the facts of the present case, does not help Mr. Bose. The complainant is Dr. Chandra. He filed the petition of complaint under the direction and with the consent of the Health Officer, but the resolution says that it is the Health Officer who is to file a petition of complaint. He cannot authorise or consent to the filing of the petition of complaint by the Food Inspector. Therefore, the resolution cannot cure the most glaring illegality in the petition of complaint as presented before the learned Magistrate. The learned Magistrate, therefore, in view of Section 20 (1) of the Prevention of Food Adulteration Act, 1954 had no jurisdiction to take cognizance of the offence upon the petition of complaint that was filed by the complainant Dr. R. Chandra, Food Inspector appointed by the State Government of the entire area of the Calcutta Corporation.

5. Mr. Bose contended that there was no evidence that matar dal was a "food grain" and that matar dal was a pulse and that the analyst's report relating to matar dal as a pulse should have been accepted by the learned Magistrate when matar dal, a pulse, could not be a "food grain". Mr. Bose further submitted that there was no evidence that matar dal was a "food grain". He, however, placed a decision before me of the Full Bench of the Kerala High Court in the case *P. Govinda Pillai v V. G. N. Padamanabha Pillai*, 1965 (1) Cr LJ 446=(AIR 1965 Ker 123) and relied upon paragraph 5 of the decision. In the course of his argument Mr. Bose finding that paragraph 5 of the said judgment would not support his contention submitted that he would not rely on that paragraph. That paragraph 5 is very much illuminating. There the question was whether Khasari dal was an article of food. In that case no evidence was adduced to prove that Khasari dal was a pulse and as such an article of food. Their Lordships of the Full Bench observed that no evidence was required to establish that Khasari dal was a pulse and that it was an article of food but their Lordships referring to *Modi*, observed that Khasari dal was a variety of pulse. So, Mr. Bose's contention that without evidence the learned Magistrate was not to have held that matar dal was a "food grain" is clearly negated by the observations of their Lordships of the Full Bench in paragraph 5 of the report. That is why Mr. Bose at one time of his argument submitted that he was not relying on paragraph 5 of the report, but paragraph 5 of the report lays down what I have already observed. Here the learned Magistrate who is presumed to have the common knowledge of human affairs and of the world considered matar dal a food grain, and therefore, held that the analyst ought to have tested the sample of matar dal according to the standard laid down in the rules, being no. A 18.06 standard in the rules made under the Prevention of Food Adulteration Act, 1954 and that such test having had not been made by the analyst, matar dal, a food grain, could not be held to be adulterated since there was no evidence of the analyst that he carried out the test laid down by the standard A 18.06(i) and (ii). Mr. Bose submitted for the appellant that the learned Magistrate's finding that matar dal was a "food grain" was not only based on no evidence but was inherently unacceptable since matar dal was "pulse" and that the standard of test regarding pulse had been made by the analyst and that no exception to the analyst's test regarding pulse could be taken by the accused. Mr. Bose submitted drawing my attention to the meaning of the word "grain" in Oxford Dictionary

that grain means a full grain, but here the question is whether pulse is a 'food grain'. If unbroken pulse is pulse then a broken pulse grain is also pulse. If a broken pulse is pulse then a broken pulse being an article of food is a "food grain". Food grain is a generic term and pulse is a species of such "food grain". The analyst was to have carried two tests following two standards standard for testing pulse and standard for testing food grain. If he would have done so there could have been no room for taking any exception. But in my view pulse as a broken matar dal falls within the generic expression 'food grain'. Therefore the additional test as under A 1806(i) and (ii) should have been carried out by the analyst. This having not been done the learned Magistrate was justified in holding that the prosecution failed to establish its case beyond reasonable doubt against the opposite parties.

6 Mr Bose submitted that it was not the case in the defence of the accused that matar dal was a food grain, and therefore the learned Magistrate was not justified to hold that matar dal was a food grain. I am sorry I cannot accept the rationality of this argument. The accused is to plead nothing in defence. If the materials on the record justify a finding in favour of the accused no matter whether the accused made a defence of a specified type or not the court would be justified in finding the accused not guilty even though he did not take specific ground of defence at the trial. The learned Magistrate as I have already observed had not considered other evidence. So Mr Bose wanted me to go through the entire evidence and to come to a finding that the learned Magistrate was wrong in acquitting the accused respondent. The moot question is whether matar dal is a "food grain". The learned Magistrate found that it is a 'food grain' and I find that it is a 'food grain' and because it is a food grain, the analyst ought to have carried out the tests as under A.1806(i) (ii) of the rules. He having had not done so and the prosecution in the petition of complaint relied only on the analyst's report so there could be no room for doubt that the prosecution failed to establish its own case on the materials appearing in the analyst's report beyond reasonable doubt. Accordingly I find that the learned Magistrate rightly acquitted the accused respondent of the offences charged.

7 The appeal is accordingly dismissed and the order of acquittal passed by the learned Magistrate is upheld. I should observe that the learned Magistrate had no jurisdiction to entertain the petition of complaint.

Appeal dismissed

1970 Cr L J 344 (Vol 76, C N 77) =

AIR 1970 KLRAL 50 (V 57 C 11)

P T RAMAN NAYAR

AND M MADHAVAN NAIR JJ

C V Madhava Mannadiar Petitioner v District Collector and Addl District Magistrate Palghat and others Respondents

O P No 4024 of 1968 D/ 31 10 1968

Public Safety — Preventive Detention Act (1950) S 3 (2) (b) — Expression 'specially empowered' under — Meaning of — State Government can specially empower not only particular individual Additional District Magistrate but also entire class of such Magistrates under the section — Criminal P C (1898) S 39 — Madras General Clauses Act (1 of 1891), S 15 AIR 1951 Mad 1159 & AIR 1956 Sau 73 Dissented from

The words 'specially empowered' in a statute do not necessarily imply a special selection of a particular person for the conferment of the power. Special empowerment with reference to a particular power can be of a class of persons AIR 1910 Mad 1159 and AIR 1956 Sau. 37 Dissented from (Case law discussed)

(Paras 9 10)

The words 'specially empowered' in S 3 (2) (b) mean specially empowered with reference to the power conferred and this is emphasized by the words in this behalf that follow. The legislative intent is clear. Ordinarily the power is to be exercised by District Magistrate (or by the officers mentioned in clauses (c) and (d) of the sub-section) but Additional District Magistrates also can be trusted with the power and if the exigencies of the situation demand that the State Government may specially empower Additional District Magistrates (all or any as it chooses) to exercise the power. And this of course it might do (since the word 'specially' referring as it does to the power rather than to the person empowered cannot in the least be regarded as express provision to the contrary within the meaning of section 15 of the General Clauses Act) either by name or by virtue of office. The power has to be specially conferred on Additional District Magistrate if they are to exercise it—it is not one of their ordinary powers—and once it is so conferred, whether on particular individual Additional District Magistrate or on all Additional District Magistrates as a class they would all be specially empowered in this behalf within the meaning of the section.

(Para 6)

It is misleading to go to S 39 of the Criminal P C for the purpose of ascertaining whether a special empowerment implies the selection of a particular specified person for the conferment of the

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power. That would depend on what the statute concerned requires, in other words, on what expressions like, "specially empowered" mean in the context in which they are used, although, where the expression is followed by expressions like, "in this behalf" that would be a clear indication that it is the purpose and not the person that has to be special. Even what S 39, says is that a special empowerment in other words, the conferment of the special powers can be on persons specially by name or in virtue of their office or on classes of officials generally by their official titles.

(Para 7)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 1532 (V 54)=
1967 Cri LJ 1396, S. L. Choithram
Parasram v. State of Gujarat 9
(1963) 1963 (2) Cri LJ 226 = 40 Mys
LJ 930, State of Mysore v. Kash-
ambi 10
(1956) AIR 1956 Sau 73 (V 43)=
1956 Cri LJ 1231, Polubha v.
Tapu Ruda 10
(1953) AIR 1953 Assam 35 (V 40)=
1953 Cri LJ 395 (FB), State v.
Judhabir 10
(1953) AIR 1953 Trav-Co 402 (V 40)=
1953 Cri LJ 1613, K. N. Vijayan
v. State 10
(1948) AIR 1948 Bom 156 (V 35)=
49 Cri LJ 165, Emperor v. Savala-
ram 9
(1933) AIR 1933 All 676 (V 20) =
35 Cri LJ 218, Sunder Lal v.
Emperor 10
(1915) AIR 1915 Mad 1159 (V 2)=
16 Cri LJ 268, Md. Kasim v
Emperor 10

K. Chandrasekharan and T. Chandra-
sekhar Menon, for Petitioner, Advocate
General, for Respondents

RAMAN NAYAR, J.: The point that falls to be determined in this application for a writ of habeas corpus questioning the detention of the petitioner under Section 3, sub-section (1) (a) (iii), of the Preventive Detention Act, 1950 (the Act, for short) is whether the 1st respondent, described as the District Collector and Additional District Magistrate, Palghat who ordered the detention (by means of Ext P-1 dated 30-9-1968) had the authority to do so. For the rest, the ground for the detention as disclosed by the memorandum, Ext P-2, of the same date, duly served on the petitioner as required by S 7 of the Act, namely, that the petitioner was habitually engaging himself in the unlawful transport of paddy from the district of Palghat to the adjoining areas of the Madras State, and that he was thus hindering the procurement of paddy in the district the purpose of equitable distribution under the scheme of rationing thereby prejudicing the maintenance

of supplies essential to the community, is obviously a good and sufficient ground for the detention. If the petitioner's grievance is that he has not been furnished with sufficient particulars to enable him to make his defence, then he should ask for further particulars. And, if his grievance is that there are no materials justifying the conclusion on which the ground is based, then he should urge that before the Advisory Board constituted under Section 8 of the Act by means of a representation made under Section 7, not before us.

2. Ext. P-1 was made by Shri G. Gopalakrishna Pillai, the District Collector of Palghat, in his capacity as Additional District Magistrate, Palghat. That, in June 1967, Shri G. Gopalakrishna Pillai was duly appointed by the State Government under section 12 of the Criminal Procedure Code to be a Magistrate of the first class in the district of Palghat, and, under section 10 (2), to be Additional District Magistrate of the district with all the powers of a District Magistrate is not disputed. What is disputed is that he has been "specially empowered" within the meaning of clause (b) of sub-section (2) of section 3 of the Act.

3. On the 21st October 1967, the State Government made the following order which was notified in a Gazette Extraordinary of the same date:

"Under clause (b) of sub-section (2) of S 3 of the Preventive Detention Act, 1950 (Central Act 4 of 1950), the Government of Kerala hereby specially empower the Additional District Magistrates in the State (District Collectors) to exercise the powers under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of the said section."

We are told that all District Collectors in the State as also their personal Assistants have been appointed Additional District Magistrates under section 10 of the Code, and that the meaning of the above notification is that such of these Additional District Magistrates as are District Collectors (but not the rest) are specially empowered to exercise the power under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 3 of the Act. That that is the meaning of the notification (although, perhaps, it could have been more artistically expressed) admits of little doubt, but it is contended that the words, "specially empower" notwithstanding this is in truth a general empowerment of all Additional District Magistrates who are District Collectors and not the special empowerment required by clause (b) of sub-section (2) of section 3 of the Act.

4. This sub-section runs as follows:

"(2) Any of the following officers, namely.

(a) district magistrates

(b) additional district magistrates specially empowered in this behalf by the State Government

(c) the Commissioner of Police for Bombay Calcutta Madras or Hyderabad

(d) Collectors in the territories which immediately before the 1st November 1956 were comprised in the State of Hyderabad

may if satisfied as provided in sub-clauses (ii) and (iii) of clause (a) of sub-section (1) exercise the power conferred by the said sub-section.

The question as we have already indicated is whether in view of the notification of the 21st October 1967 Shri G Gopala Krishna Pillai who is undisputedly an Additional District Magistrate and a District Collector can be regarded as having been specially empowered in this behalf within the meaning of clause (b) of the sub-section.

5 We think he can. The word 'specially' in the clause in question qualifies the word 'empowered' and doubtless the expression 'specially empowered' qualifies the expression 'additional district magistrates'. But it does not necessarily follow that a particular Additional District Magistrate must be specified (either by name or by office) in order that there might be a special empowerment. That will depend on whether in the context 'specially empowered' means 'empowered with specific reference to the particular magistrate on whom the power is conferred (which would involve the selection of a particular magistrate from among the class of magistrates mentioned) or empowered with specific reference to the power that is conferred namely, so far as we are here concerned the power under sub-clause (iii) of clause (a) of the sub-section. If it is the latter the notification of the 21st October 1967 must pass muster as a special empowerment within the meaning of the sub-section if it is the former it cannot.

6 We consider that in the context the words 'specially empowered' means 'specially empowered with reference to the power conferred and thus we think is emphasized by the words 'in this behalf' that follow. The legislative intent seems to be clear. Ordinarily the power is to be exercised by District Magistrates (or by the officers mentioned in clauses (c) and (d) of the sub-section) but Additional District Magistrate also can be trusted with the power and if the exigencies of the situation demand that the State Government may specially empower Additional District Magistrates (all or any as it chooses) to exercise the power. And this of course it might do (since the word 'specially' referring as it does to the power rather than to the person em-

powered cannot in the least be regarded as express provision to the contrary within the meaning of Section 15 of the General Clauses Act) either by name or by virtue of office. The power has to be specially conferred on Additional District Magistrates if they are to exercise it — it is not one of their ordinary powers — and once it is so conferred whether on particular individual Additional District Magistrate or on all Additional District Magistrates as a class — 'additional district magistrates specially empowered' not an 'additional district magistrate specially empowered' is what the section says — they would all be 'specially empowered in this behalf within the meaning of the section.

7 With great respect we think it misleading to go as some decisions have done to section 39 of the Criminal Procedure Code for the purpose of ascertaining whether a special empowerment implies the selection of a particular specified person for the conferment of the power. That would depend on what the statute concerned requires in other words on what expressions like 'specially empowered' mean in the context in which they are used although as we have already indicated where the expression is followed by expressions like 'in this behalf' that would be a clear indication that it is the purpose and not the person that has to be special. What section 39 of the Code does is to prescribe the mode of conferring powers thereunder. Such powers it says may be conferred on persons specially by name or in virtue of their office or on classes of officials generally by their official titles. With reference to the persons empowered an empowerment by name or in virtue of office would be a special empowerment (the reference by office being as good a specification of the person empowered as a reference by name) while an empowerment of classes of officials by their official titles would be a general empowerment. But this does not help us to find out whether a particular statute uses the words 'specially empowered' with reference to the persons on whom the power is to be conferred or with reference to the power to be conferred. Indeed it seems to us that the Code itself uses the words 'specially empowered' in this behalf as synonymous with 'empowered in this behalf' both meaning that there must be an empowerment with specific reference to the power conferred — compare sections 103 110 144 164 167 186 190 260 and 562 on the one hand with sections 143 174 206 407 425 and 524 on the other. The former set of sections it would appear no more require the specification of the particular person on whom the power is conferred than the latter. Section 39 it seems to

us, clearly shows that a special empowerment within the meaning of the former set of sections, in other words, the conferment of the special powers under these sections, can be on persons specially by name or in virtue of their office or on classes of officials generally by their official titles

8. Powers may be conferred generally on a particular person. For example, there can be an empowerment by which a particular named District Magistrate is given all the powers that can under any law be conferred on a District Magistrate. That would be a special empowerment so far as the person is concerned but a general empowerment so far as the powers conferred are concerned. Or, a particular power conferrable on District Magistrates. That would be a general empowerment may be given to all District Magistrates so far as the person on whom the power is conferred is concerned, but a special empowerment so far as the power conferred is concerned. Or again, a particular power may be conferred on a particular named District Magistrate. That would be a special conferment both with regard to the person and with regard to the power conferred. Whether a particular conferment satisfies the requirements of the statute concerned will depend entirely on what the statute requires. It may require a special conferment both with regard to the power and the person, or it might require it only with regard to the person; or only with regard to the power. In the case on hand we consider that what the statute requires is a special conferment of the power in question and that that requirement is satisfied by the notification of the 21st October 1967, because it specifically refers to the power conferred, namely, the power under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of Section 3 of the Act. Had the notification, on the other hand, purported to confer on all Additional District Magistrates, or even on a particular named Additional District Magistrate, all the powers that may under any law be conferred on Additional District Magistrates, that would not be, "specially empowering in this behalf" within the meaning of clause (b) of sub-section (2) of Section 3 of the Act, even though the chosen Additional District Magistrate might be said to have been specially selected, and, in that sense specially empowered.

9. That the words, "specially empowered" do not necessarily imply a special selection of a particular person for the conferment of the power seems to be clear from the decision of the Supreme Court in *S. L. Choithram Parasram v. State of Gujarat*, AIR 1967 SC 1532. There it was held that a notification of

the 22nd January, 1955 by the State Government specially empowering (among others) the Deputy Superintendent of Police, Porbandar to perform certain functions under the Bombay Prevention of Gambling Act, 1887 made the person holding that office in June 1964 a "Deputy Superintendent of Police specially empowered by the State Government in this behalf" within the meaning of section 6 (1) (i) of that Act. That means that any person occupying the position of Deputy Superintendent of Police, Porbandar, irrespective of his individual merits, would be a person "specially empowered in this behalf" within the meaning of the section. No such consideration as that only specially selected persons, on whom the power in question could be safely conferred, would be posted as Deputy Superintendent of Police, Porbandar was as much as urged before their Lordships, although such a consideration seems to have influenced the decision in *Emperor v. Savalaram*, AIR 1948 Bom 156 which their Lordships approved. If the empowerment of the Deputy Superintendent of Police, Porbandar is a special empowerment satisfying the requirements of the statute, then we should think that a notification enumerating all the Deputy Superintendents of Police in the State and empowering all of them to exercise the power in question would also be a special empowerment within the meaning of the statute. And, if that be so, why should not a notification empowering all the Deputy Superintendents of Police in the State without enumerating them be a sufficient empowerment? That, however, was a question that did not arise in the case before them, and their Lordships expressly refrained from expressing any opinion thereon.

10. For the reasons stated above we are in respectful agreement with the view taken in *Sundar Lal v. Emperor*, AIR 1933 All 676, *K. N. Vriyan v. State*, AIR 1953 Trav-Co 402, *State v. Judhabir*, AIR 1953 Assam 35 (FB) and *State of Mysore v. Kashambi*, 1963 (2) Cri LJ 226 (Mys) that special empowerment with reference to a particular power can be of a class of persons although it might, perhaps, be said that some of these cases equate an empowerment of a class of officials as a whole by their official titles, which would be a general empowerment so far as the persons empowered are concerned within the meaning of Section 39 of the Code, with an empowerment of a person *ex-officio* which would be a special empowerment. And, with equally great respect, we are unable to subscribe to the view taken in *Md Kasim v. Emperor*, AIR 1915 Mad 1159 and in *Folubha v. Tapu Ruda*, AIR 1956 Sau 73 that it can only be of particular specified persons.

11 It is pointed out with reference to numerous notifications under the Code and under various special and local laws that the invariable practice in this State has been to effect a special empowerment with specific reference by name to the person empowered and that the instant notification is the only exception. But that that has been the practice does not mean that that is essential under the law, although we might observe that that is doubtless the safer and therefore the wiser course. Why the State Government should have thought fit to depart from this safer and wiser course in this particular instance — and that in a matter of such importance — we do not know unless it be that the submission by the learned Advocate General that having now given thought to the matter the Government has issued revised notifications specially empowering by name all Additional District Magistrates who are District Collectors furnishes a clue.

12 As we have already said the statute does not require an Additional District Magistrate to be specially selected for the conferment of the power. It seems to proceed on the basis that Additional District Magistrates also may be entrusted with the power but that ordinarily it should not be necessary to do so. Ordinarily it should be sufficient if the District Magistrates are given the power. But if having regard to the prevailing conditions the State Government thinks that necessary Additional District Magistrates also may be given the power, the power being specially conferred on them. If this implies a selection apart from the selection necessarily involved in appointing a person to hold the office of Additional District Magistrate by itself a responsible office then we should think that even that is satisfied in this case. For it is not all Additional District Magistrates that have been specially empowered. Only such of them as hold the very responsible position of District Collector have been empowered. And if the State Government thinks that all persons selected by them for the very responsible position of District Collectors can be safely entrusted with the power in question can it be blamed? Has there not been a selection of the particular Additional District Magistrates on whom the power is to be conferred?

13 In this connection we may point out that the statute was enacted before the separation of the judiciary from the executive when, throughout the country District Collectors (Deputy Commissioners as they are called in some States) were also District Magistrates while Additional District Magistrates were officers subordinate in rank to the District Collectors. But the District Collectors of this State

are officers of the same rank as the District Magistrates referred to in clause (a) of sub-section (2) of section 3 of the Act — their Personal Assistants would be of the rank of the Additional District Magistrates referred to in clause (b). They are certainly not inferior in rank to the Collectors of the territories comprised in the former State of Hyderabad on whom clause (b) of sub-section (2) of section 3 of the Act directly confers the power in question.

14 In the result we dismiss this petition but make no order as to costs.

Petition dismissed.

1970 CRI L J 348 (Vol 76, C N 78) =

AIR 1970 PATNA 89 (V 57 C 10)

B D SINGH J

Hajari Shafi and others Petitioners v Ramasis Thakur and others Opposite Parties

Criminal Pevn No 382 of 1968 D/ 25 11-1968 against order of Sub Divnl. Magistrate Sitamarhi D/ 13 9 1967

(A) Limitation Act (1963) Art 131 — Revision against order of Magistrate — Party filing revision application before Sessions Judge in spite of established rule of filing revision direct to High Court — Party alleging that they followed that procedure under wrong legal advice — Condonation of delay — Held that since substantial question of law was involved in the case the delay would be condoned. (Para 2)

(B) Criminal P C (1898) Section 350 — Judgment written by predecessor — Succeeding Magistrate cannot sign and deliver judgment

Under Section 350 after its amendment a Magistrate may act upon the evidence already recorded by his predecessor but that is also his option. If he so likes he may order a de novo enquiry and he may take fresh evidence. But it does not empower him to sign the judgment written by his predecessor and to deliver the same. Even if he chooses to rely on the evidence recorded by his predecessor he will have to write his own judgment and then he will have to sign and deliver it in accordance with law. Thus an order passed by the S D O directing the succeeding Magistrate to sign date and deliver the judgment written out by his predecessor is contrary to the provisions of law AIR 1948 Pat 414 Foll (Para 9) Cases Referred Chronological Paras (1948) AIR 1948 Pat 414 (V 30) = 49 Cri LJ 704 Jagannath Singh v Francis Pharia 9 11

JM/JM/E82/69/MVJ/M

Mrs. D. Lall, Rameshwar Choudhary and Mathura Nath Rai, for Petitioners; L. M. Sharma, Bhupendra Narayan Sinha and Shrajshwar Pd. Sinha, for Opposite Parties

ORDER:— This revision was filed by Hajari Shafi and 112 others. They were first party in the court below under Section 145 of Criminal Procedure Code. It has been filed against the order dated 13th of September, 1967 of the Sub-divisional Officer, Sitamarhi, directing Sri Jaideo Das, Magistrate, 1st class, to sign, date and deliver the judgment already written by Sri Balram Singh, the predecessor in office who heard the case because he was transferred to some other place.

2. Before I take up the consideration of this revision it will be necessary to dispose of the application of the petitioners dated 7-3-1968 in which they have prayed for condonation of delay in filing the revision before this Court. According to provisions under Article 131 of the Limitation Act, 1963, the period for filing revision against the order is 90 days whereas in the instant case the petitioners have filed the petition much beyond the period of limitation prescribed. In the past, the practice was that in such cases reference petition used to be filed before Sessions Judge and that used to take long time. Therefore, now it has been decided by a Bench of this Court that instead of going to Sessions Judge, in order to save time revision should be filed direct to this Court. In spite of that the petitioners in this case filed the application before Sessions Judge for reference against the impugned order. In the ground for condonation of the delay they have alleged that due to wrong advice given by the lawyers they filed the application before the Sessions Judge, Muzaffarpur. There are some decisions of this Court which do not favour condonation of delay in such cases, as sufficient opportunities now have been given to the members of the public to know about limitation prescribed by the said Act. But in this case since a substantial question of law is involved I feel inclined to condone the delay and to hear the application on merits and I order accordingly.

3. It appears that in 1963 a proceeding under S. 144 of the Code of Criminal Procedure (hereinafter referred to as the Code) was drawn up by the Sub-Divisional Officer against both the parties due to apprehension of breach of the peace in respect of about 300 bighas of land in village Birpur of police station Sursand in the district of Muzaffarpur.

4. On 12-12-1963 the said proceeding was converted into one under Section 145 of the Code. On 13-9-1966, the conduct of the proceeding was ended and 13th of October, 1966 was fixed for final order.

5. Sri Baliram Singh, who was the trying Magistrate, gave various adjournments and ultimately fixed 20-4-1967 for delivering the judgment in the said proceeding. A day earlier that is on 19-4-1967, the petitioners filed an application before the Sub-Divisional Officer under Section 528, Clause (2) of the Code to recall the case from the court of Sri Baliram Singh and to hear the case on merit and to deliver the judgment.

6. On the same day, i.e. on 19-4-1967 Sri R. N. Tewary, 3rd Officer who was acting as Sub-Divisional Officer in the absence of the Sub-Divisional Officer recalled the case and ordered the application under Section 528 of the Code to be put up before Sub-Divisional Officer for final order.

7. On 20-4-1967, the petitioners again filed a petition before Sri Baliram Singh that he should not sign the judgment as the record has already been called from his file. Sri Baliram Singh, however, made a note in the order-sheet that the judgment of 42 pages has already been written by him but he will not deliver the same as the record has been called from his file. Subsequently Shri Baliram Singh was transferred.

8. On 13-9-1967, the petitioner's application under Section 528 of the Code was heard by the Sub-Divisional Officer and he directed Shri Jaideo Das, who succeeded to the office of Sri Baliram Singh, to date, sign and deliver the judgment which was written by Sri Baliram Singh, the then trying Magistrate. Against this order this revision has been filed.

9. Mrs. Lall, learned counsel appearing on behalf of the petitioners, has contended that under Section 350 of the Code the succeeding Magistrate cannot date, sign and deliver the judgment which was written by Sri Baliram Singh, the trying Magistrate. Section 350 of the Code reads as follows—

"(1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself.

* * * * *

She has contended that after the amendment under Section 350 it is true that a Magistrate may act upon the evidence already recorded by his predecessor, but that is also, his option. If he so likes he may order a de novo enquiry, and he may take fresh evidence. But it does not empower him to sign the judgment written by his predecessor and to deliver the

same. Even if he chooses to rely on the evidence recorded by his predecessor he will have to write his own judgment and then he will have to sign and deliver it in accordance with law. She has further contended that the proceeding under Section 145 of the Code amounts to inquiry, as defined under Section 4(1)(k) of the Code. She has drawn my attention also to section 145(4) of the Code the relevant portion of which reads as follows —

The Magistrate shall then without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute peruse the statements, documents and affidavits if any so put in, hear the parties and conclude the inquiry as far as may be practicable within a period of two months from the date of the appearance of the parties before him and if possible decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject.

Provided that the Magistrate may if he so thinks fit summon and examine any person whose affidavit has been put in as to the facts contained therein.

According to her this provision clearly directs the Magistrate to peruse the statements, documents and affidavits if any hear the parties and then conclude the enquiry. Even according to this provision the Magistrate has to hear the parties afresh. Therefore she has submitted that the impugned order passed by the S D O directing the succeeding Magistrate Shri Jaideo Das to sign date and deliver the judgment written out by his predecessor is contrary to the provisions of law. In order to fortify her contention she has relied on a decision of this Court in *Jagarnath Singh v Francis Kharia*, AIR 1948 Pat 414. That case also related to a proceeding under Sec 145 of the Code. In that case also Section 350 of the Code came up for consideration. Meredith J (as he then was) observed in paragraph 3 —

The matter is then postponed for one reason or another and the judgment is not finally delivered until June — nearly six months after the conclusion of the hearing — and finally the judgment is written by a Magistrate who has heard no arguments in the case. A Magistrate may no doubt act in suitable cases on evidence recorded by his predecessor but I fail to understand how he can act upon arguments made before his predecessor which he has never heard.

10 On the other hand Mr Brajeshwar Prasad Sinha appearing on behalf of the opposite party has contended that the impugned order is valid and legal. He has urged that an order under Section 145 of the Code is not a judgment

and therefore the provisions contained under Section 367 of the Code are not applicable. He has further urged that Shri B Sinha who had written out the judgment in the said proceeding has clearly written in the order sheet as follows —

Adesh Aj tayar hai aur abhilekh ke saath 42 prista me adesh sanlangna hai. Chunke 528 ka adesh patra par abhilekh nanga gaya hai atah anumandal padadhi kari ke pas abhilekh bhej de. Mai adesh nahin sunaunga.

Therefore he has submitted that the judgment was ready on that date and although he did not sign the judgment it will amount to his judgment and the succeeding Magistrate can sign the same and deliver it. No prejudice will be caused to the petitioners.

11 In my opinion in view of the above decision of this Court reported in AIR 1948 Pat 414 (supra) his contention cannot be accepted. In my view the contentions of learned counsel appearing on behalf of the petitioners are well founded. The order of the S D O cannot be sustained.

12 In the result I set aside the order and allow this application. I further direct that the proceeding should be disposed of either by the permanent S D O or by Shri Jaideo Das Magistrate as soon as possible in accordance with law.

Application allowed.

1970 CRI L J 350 (Vol 76, C N 79) =

AIR 1970 PATNA 95 (V 57 C 12)

R J BAHADUR AND P K BANERJI JJ

Doman Mahton, Petitioner v Surajdeo Prasad Opposite Party

Criminal Misc No 501 of 1968 D/6-12-1968

(A) Evidence Act (1872) Ss 145-155 — Statement of a witness made in previous case — Use of it in subsequent case to contradict him or impeach his character — Before so using it, the party should be allowed to draw the witness's attention to his previous statements. (Paras 6-7)

(B) Criminal Procedure Code (1898) S 162 — Statements made in an investigation of a case other than that which results in a trial in which those statements are sought to be used — Section does not apply. (Para 6)

Dinesh Charan, for Petitioner Narayan Singh for Opposite Party

ORDER — This application is by an accused person in a criminal case before a Munsif Magistrate Monghyr where the question arose as to whether the attention of a witness could be drawn in cross

JM/JM/D360/69/MNT/D

examination to the previous statement made by him in another case.

2. The facts are these. At 9.15 A. M., on 27-4-1965, the petitioner, who is a Low Tension Fuseman of Bihar State Electricity Board at Lakhisarai, filed a case of assault, at Police Station Lakhisarai, against the opposite party, who was arrested and later on released on bail on the same day by the police. The said case was registered as G. R. Case No. 668 of 1965. The opposite party was a Member of the Lakhisarai Notified Area Committee (hereinafter referred to as 'the Area Committee'). The Police examined one Jamadar of the Area Committee named Ramgovind Prasad. After investigation, the Police submitted charge sheet, and the trial is now pending in the Court of the Munsif Magistrate at Monghyr.

3. It appears that in respect of the above incident, the opposite party also filed a complaint for various offences, such as Sections 323, 352, 504, 379 and 109 of the Penal Code, before the Sub-divisional Officer, Monghyr, on 29-4-1965. Cognizance was taken and the trial is also proceeding before the said Munsif Magistrate at Monghyr, namely, Shri Raghuraj Singh, and it is registered as Case No. 239C of 1965.

4. When the trial of the complaint case filed by the opposite party, Surajdeo Prasad, was taken up by the Munsif Magistrate, a number of witnesses were examined and cross-examined; and when Ramgovind Prasad was examined, and was being cross-examined after charge, the cross-examining lawyer on behalf of the petitioner, wanted to draw the attention of the witness (P. W. 5) to certain statements made by him before the Police in the earlier case, namely, No. 668 of 1965, to contradict his statement given in court in the present trial, but the same was disallowed by the Court. The learned Munsif Magistrate in his order dated 23-1-1968, has observed that under Section 162 of the Code of Criminal Procedure, the statement of a witness made before the Police could be brought into evidence in the same case, and as, no statement of this witness had been taken in this case, nor did the Police make investigation in this case, the defence lawyer was directed not to draw the attention of the witness in this case to the statement made by him before the Police in the counter-case. The present application is directed against the said order.

5. We have heard learned Counsel for the parties, and the sole question that arises for consideration is whether the statement of Ramgovind Prasad, who has been examined as prosecution witness No. 5 in this case, which he had made in the course of the investigation in the earlier counter-case, could be used, and whether he could be confronted with the

statements then made. Mr. Dinesh Charan, appearing in support of the petition, has urged that the learned Munsif Magistrate was in error, and has drawn our attention to note 12 to Section 162 in Chitaley's Code of Criminal Procedure, 6th Edition, volume I, which may be reproduced here.—

"At any inquiry or trial in respect of any offence under investigation at the time when such statement was made"

A is alleged to have murdered X. In the course of the investigation by the Police into the case of murder, B makes a statement to the Police Officer. Can B's statement be used in a subsequent inquiry or trial unconnected with the murder case? Before the amendment of 1923 there was a conflict of opinion on the point, some decisions holding that it could not be used and others holding that it could be used. The section as amended in 1923 made it clear that statements made during the course of investigation could be used in a subsequent case which was not under investigation when the witness made the statement. Although this section was again amended in 1955 the legal position in this regard remains unchanged because even after the amendment the wording of the section continues to be the same as under the old section so far as this part of it is concerned."

6. There can be no doubt that the provisions of section 162 of the Code of Criminal Procedure do not apply to statements made in an investigation other than that which results in a trial in which those statements are sought to be used. The object is obvious, as will appear from the provisions of Section 145 of the Evidence Act which reads thus—

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Further, if it is intended to impeach the credit of a witness, as is provided under Sec. 155 of the Evidence Act, then the credit of a witness may be impeached by the adverse party, or, with the consent of the Court, by the party who calls him, by various ways, one of which is as provided by sub-section (3) of Section 155 of the Evidence Act; namely, by proof of former statements inconsistent with any part of his evidence, which is liable to be contradicted. Impeaching the credit of a witness, either under Section 145 of the Evidence Act (written statements), or under Section 155 thereof (oral statements), can be done by drawing his at-

tention to those statements whether written or oral. Further those parts of the statement before the Police which are intended to be used in cross examination, to contradict the witness must be proved and brought on the record. This can ordinarily be done by the admission of the witness that he had made the statement or by examination of the Police Officer who recorded it.

7 For these reasons we are satisfied that the learned Munsif Magistrate was in error in not permitting the petitioner to draw the attention of the witness for the purpose of cross examination, to his earlier statements made before the Police which was reduced into writing or submitted by the witness in writing before the Police in the counter case. Accordingly the order of the learned Munsif Magistrate dated 23-1-1968 in this respect is set aside and the cross examination of Ramgovind Praad (P W 5) on the statements said to be made by him at the time of the investigation into the counter case must proceed. The application is, therefore allowed.

Application allowed

(B) Evidence Act (1872), S 5 — Appreciation of evidence — Interested witnesses — Testimony not final

In a case where injuries have been caused on both sides and a precise counter version is being pleaded on behalf of the accused, it is but natural that the testimony of their eye witnesses should be partial to the version which they have chosen to give. All the eye witnesses, therefore, come clearly within the ambit of the term interested testimony and their testimony cannot possibly be final. (Para 19)

(C) Penal Code (1860) S 103 — Complainants party armed with deadly weapons entering upon land occupied by accused and constructing permanent water course on it without any right — Party of accused resisting them — Fight between the parties resulting in death of two persons on complainants side and injuries to persons on both sides — Held that accused had right of private defence of property and had not exceeded it — Being protected by the right there was no offence committed by them. (Para 23)

Cases Referred	Chronological	Paras
(1963) AIR 1963 SC 612 (V 50) =		
1963 (1) Cri LJ 495 Jai Dev v		
State of Punjab		17
(1961) 1961 BLJR 824 Mozam Ansari v State		16
(1959) AIR 1959 Pat 22 (V 46) =		
1959 Cri LJ 71, Barisa Mudi v		
State		16
(1945) AIR 1945 Pat 283 (V 32) =		
46 Cri LJ 672, Summa Behra v		
Emperor		16
(1942) AIR 1942 Pat 96 (V 29) =		
43 Cri LJ 41 Hanram Mahatha v		
Emperor		16
(1938) AIR 1938 Pat 518 (V 25) =		
39 Cri LJ 785 Satnarain Das v		
Emperor		16
(1934) AIR 1934 All 829 (2) (V 21) =		
35 Cri LJ 730 Abdul Hadi v		
Emperor		16
(1927) AIR 1927 Lah 705 (V 14) =		
28 Cri LJ 848 Phula Singh v		
Emperor		16
M R Mahajan with P S Jain, for Appellants D D Jam for Advocate General, Punjab for Respondent		

S S SANDHAWALIA J : The six appellants being the sons and grandsons of Mangla Ram were brought to trial on charges under Sections 148 302/149 302/149 307/149 323/149 and 323/149 Indian Penal Code, before the Court of Session at Ferozepur. Brij Lal appellant was charged in a separate case under Section 27 of the Arms Act for the unlawful use of his licenced gun but both the cases were tried together on the appellants request in order to avoid any prejudice to them by separate trials. By a curious process of reasoning the learned Sessions Judge convicted Het Ram and Banwari Lal appellants only under Section 302 read with Section 149, Indian Penal Code for

1970 CRI L J 352 (Vol 78, C N 80) =
AIR 1970 PUNJAB AND HARYANA 85
(V 57 C 14)

GURDEV SINGH AND
S S SANDHAWALIA JJ

Het Ram Lallu Singh and others Appellants v State Respondent
Criminal Appeal No 766 of 1963 and Murder Ref No 47 of 1963 D/ 8-5-1969 from order of S J Ferozepur D/ 8-7-1963

(A) Penal Code (1860) Ss 97, 99 — Right of private defence — Persons constructing permanent water course on land of another without his consent — They commit criminal trespass and mischief — Occupier of land has right of private defence of property — He need not resort to public authorities

The law of private defence does not require that a person suddenly called upon to face an assault must run away and thus protect himself. Where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available the individual citizen is entitled to protect himself and his property.

It is therefore wrong to hold that the occupiers of the land on which criminal trespass and mischief is committed in their presence by constructing a permanent water course on their land without their consent were not entitled to the right of private defence because they were bound to resort to public authorities. AIR 1963 SC 612 and AIR 1945 Pat 283 and AIR 1959 Pat 22 and 1961 BLJR 824 Rel on (Paras 16 17 18)

FM/FM/C441/69/DRR/B

the murders of Shiv Lal and Gopi Ram deceased respectively and sentenced them to death but held the other four appellants guilty under Section 326 read with Section 149, Indian Penal Code. He imposed a sentence of 4 years' rigorous imprisonment under Section 326 read with S. 149, Indian Penal Code, on three counts on Lalu Ram, Brij Lal and Kanshi Ram appellants whilst Balram appellant due to his tender age and on the finding that he acted under the influence of his father was sentenced to one year's rigorous imprisonment on these counts. Separate convictions and sentences were also recorded under S. 323/149, Indian Penal Code, and Section 148. All these sentences were, however, directed to run concurrently. Brij Lal appellant was, however, acquitted of the charge under Section 27 of the Arms Act. All the convicts appeal and the death sentences of Het Ram and Banwari Lal appellants are also before us for confirmation of the same.

2. The appellants Lalu Ram and Kanshi Ram are brothers. Brij Lal and Banwari Lal are the sons of Kanshi Ram whilst Het Ram and Balram are the sons of Lalu Ram. Shiv Lal and Gopi Ram deceased, both of whom were killed in the incident, were also brothers and the three injured P. Ws. namely, Balwant Ram Jagdish Lal and Devi Lal are sons of Shiv Lal, deceased. The motive for the commission of the offence is the rather common place one pertaining to the alignment of an irrigation watercourse. The two feuding families of the appellants and the deceased are not land owners in their own right but are tenants of agricultural land. Kanshi Ram appellant held the land of Tek Chand, Lambardar in his cultivating possession whilst his brother Lalu Ram appellant was the tenant of some land owned by Rai Sahib Kundan Lal in village Dhaban Kokarian. Gopi Ram and Shiv Lal, the two deceased brothers had been for long in cultivating possession of some other land of Tek Chand, Lambardar. Before the consolidation of holdings in the said village which took place approximately two years prior to the occurrence the watercourse irrigating the land of the complainant family used to run through the land of R. S. Kundan Lal which was in cultivating possession of the appellants. After the consolidation the said watercourse was discontinued and a new watercourse was provided which, however, did not satisfactorily command the fields of the complainants as it ran at a lower level. Shiv Lal deceased is said to have made an application to the Canal Department and another watercourse was provided by the authorities and the same continued to be in use for a period of nearly two years. The prosecution alleges that Tek Chand the landlord of the complainants wanted to evict them from the said land and to give that tenancy to the appellants' family which was not agreed to by the complainants. It is alleged, however, that in

order to harass them and to pressurise them for vacating the same, the appellants demolished the watercourse, thus obstructing the irrigation of the land of the deceased. It is thus the case of the prosecution (which is stoutly controverted on behalf of the defence) that the matter was reported to the Panchayat in which the appellants and the complainants' families were represented and it was decided in the said Panchayat that the original watercourse as it existed before the consolidation of holdings, should be restored and be reconstructed by the complainants. We have adverted in detail to these matters as a plea of private defence of property and person has been taken on behalf of the appellants and it is thus necessary to have the events leading to the incident in a clear perspective.

3. The occurrence took place on Diwali day that is the 1st of November, 1967, at about 3 P. M. Gopi Ram and Shiv Lal deceased along with Balwant Ram, Jagdish Lal and Devi Lal P. Ws had on the said day gone at about 2.30 P. M. to reconstruct the old watercourse and were doing so when at about 3 P. M. all the six appellants came there armed. Het Ram and Banwari Lal appellants were armed with saulas. Kanshi Ram appellant had a kassia, Balram a kulhari, Lalu Ram a dang whilst Brij Lal appellant was carrying his licenced gun. A challenge is said to have been thrown by the appellants declaring that they would not allow the complainants to construct the watercourse and will further eject them from the land whereupon the deceased and the P. Ws suspended the work of constructing the watercourse nevertheless Brij Lal appellant is said to have fired two shots in succession accompanied by a threat that anyone who would withdraw from the spot would be shot to death. The deceased and the P. Ws out of fear are said to have then withdrawn to the path going to village Sardarpur which is closeby, but the appellants are said to have followed them up and opened an attack on them which was both sudden and simultaneous. Het Ram appellant is said to have struck two fatal blows to Shiv Lal with a spear in his chest and back whilst Kanshi Ram and Balram also inflicted injuries on him with their respective weapons. Banwari Lal appellant similarly is said to have struck the fatal spear blow to Gopi Ram on his chest and left arm-pit whilst Kanshi Ram appellant dealt a blow on his head with his kassia. Jagdish Lal P. W who attempted to intervene with a spade, which he was carrying, was also assaulted with a spear by Het Ram whilst Kanshi Ram appellant hit him with a kassia and Balram with a kulhari. Injuries were then caused by the appellants with their weapons to the three prosecution witnesses, namely, Balwant Ram, Devi Lal and Jagdish Lal, out of whom Jagdish Lal and Devi Lal who had spades retaliated with their weapons against Brij Lal and Lau Ram appellants. Shiv Lal and Gopi Ram died at the

spot and thereafter the appellants are said to have withdrawn from the place of occurrence with their respective weapons towards their homesteads which are not very distant from there. After the incident Balwant Ram accompanied by Sohan Lal was proceeding to the police station when he met Sub-Inspector Iqbal Singh at the Bus Stand Dotarianwali and made a statement Exhibit P 17 which forms the basis of the first information report recorded at police station Abohar regarding the incident. The Investigating Officer forthwith reached the spot and collected the bloodstained earth therefrom prepared the relevant inquest reports as well as the inquest plan and completed the other details of the investigation thereat.

4 On the 9th of November, 1967 Head Constable Ram Bhagwan had interrogated Het Ram Banwari Lal Balram and Kanshi Ram appellants and in pursuance of their respective disclosure statements they led to the recovery of the respective bloodstained weapons said to have been wielded by them at the time of the commission of the offence and these two spears a kulhar and a kassia were subsequently found on chemical analysis to be stained with human blood and the earth collected from the spot was also similarly found to have the presence of blood of human origin. The licensed gun of Brij Lal was also taken into possession vide memo Exhibit P 33. There was however no recovery of the dang said to have been wielded by Lalu Ram appellant.

5 Dr H C Ohri performed the autopsy on the dead body of Gopi Ram on the 2nd November 1967 at 2.30 P M and found five injuries on his person of which two were stab wounds and the other three were incised wounds. Death was opined to be the result of injury No 1 which had ruptured the heart and consequent shock and haemorrhage therefrom. The time that elapsed between death and injury was opined to be immediate and between death and post mortem about one day.

6 Lady Dr Adarsh Yakhmi on the 2nd of November 1967, at 3 P M had conducted the post mortem on the dead body of Shiv Lal deceased and found three incised wounds and a stab wound on its person. On internal examination the costal cartilage and the pleurae was found cut and similarly the left lung was perforated and the left ventricle of the heart was also cut. The wounds in the heart were communicating with each other. Death was opined to be the result of the stab wound being injury No 4 which was sufficient to cause death in the ordinary course of nature. The probable time between injury and death was immediate and between death and post mortem about one day. This witness in cross examination stated that under injury No 4 the wound on the back was the wound of entry of the spear and the wound in the chest on the front is the wound of

exit of the spear and both these injuries were the result of the same blow.

7 On the 1st of November 1967, at 5.30 P M Dr H C Ohri had examined Jagdish Lal son of Shiv Lal and found 9 injuries on his person of which injuries Nos 1, 8 and 9 were opined to be the result of blunt weapon whilst others were inflicted with a sharpened weapon. On the 2nd of November 1967 Dr H C Ohri had also examined Dev Raj son of Shiv Lal (subsequently mentioned as Devi Lal son of Shiv Lal in the prosecution evidence) and found one reddish contusion and one abrasion on his person. On the 3rd of November 1967, at 6.45 P M Dr Mrs Shakuntala Bawa had examined Balwant Ram son of Shiv Lal and found one contusion 3 x 2" on the middle and outer part of the left thigh and it was opined to be the result of a blunt weapon and its duration was about three days. The above medical testimony brings on record the injuries suffered by the two deceased persons and the three prosecution witnesses in the case. On the side of the appellants Lal Chand was seriously injured and was medically examined by Dr H C Ohri on the 1st of November 1967 at 8.50 P M. He was accompanied by his brother Kanshi Ram appellant and the following injuries were found on his person:

1 Incised wound 3 x 1½ bone deep on the left side of top of head running from side to side 6" above the left ear cutting the underlying bone. He was semi-conscious. Pupils were sluggish. He was vomiting Substance resembling grey matter of the brain was flowing. The injury was blood covered and shirt was profusely blood covered.

2 Incised wound ½" x ¼" skin deep on the front of top of head in the middle 2" from the hair margin.

Injury No 1 was grievous and the duration of the two injuries was mentioned within 12 hours. The injured had developed aphasia (loss of speech) as a result of head injury and was not fit to be moved. In cross examination it was further stated that the injury on the head of Lal Chand could be caused with a weapon like gandasa and the said injury was dangerous to life as the brain matter was also flowing out of the wound. Apart from aphasia it also caused a weakness of one side of the body. The other appellant Brij Lal who was injured was examined on the 8th of November 1967 at 6.45 P M by Dr S Saini and a granulating wound 5 cm x 1 cm x 1/6 cm on the back of left chest 8 cm above the lower rib margin was found on his person. The duration was opined to be 7 to 10 days but in view of the time that had elapsed the kind of weapon used for the infliction of the injury could not be determined. It was in cross examination when this witness opined that in case the injury would have been an incised wound it could have been caused by a sharpened weapon like gandasa.

8. The eye-witness account in the present case rests solely on the evidence of the three brothers P. W. 5 Balwant Ram, P. W. 6 Jagdish Lal and P. W. 12 Devi Lal being the sons of the deceased Shiv Lal. P. W. 13 Sohan Lal and P. W. 15 Kanshi Ram who are real brothers have deposed regarding the lodging of the first information report by Balwant Ram and the recoveries at the instance of some of the appellants respectively P. W. 17 Iqbal Singh S. H. O. and P. W. 18 Ram Bhagwan, Head Constable, are the two Investigating Officers. One Court witness Madan Lal, Canal Patwari, was examined. He was a prosecution witness but the Public Prosecutor did not wish to examine him and he was examined as a Court witness on the request of the defence under Section 540 of the Criminal Procedure Code.

9. In their statements under Section 342, Criminal Procedure Code, three of the appellants, namely, Kanshi Ram, Banwari Lal and Balram pleaded false implication and denied their presence at the spot. Kanshi Ram appellant further pleaded that he was nearly blind and being in his seventies was too old to have participated in the fight. A positive version, however, has been set up by Het Ram, Lalu and Brij Lal appellants. This appears in the reply of Het Ram appellant in the commitment Court in the following terms:

"It is incorrect. My father had gone alone to protest to Shiv Lal and Gopi Ram against digging of the khal by taking copy of an order, which he had already obtained. The opposite party started shouting at Lalu Ram and abused him. Shiv Lal and Gopi Ram were armed with gandasis and apprehending an attack on him, I rushed to rescue him with a saia. By the time, I arrived, Gopi Ram dealt a blow on Lalu Ram's head. I dealt him a blow in order to save my father. Then Shiv Lal aimed another blow on his head which brought him reeling to the ground. I consequently struck him also with my saia and just as I and Brij Lal were trying to attend on Lalu Ram, Gopi Ram dealt a gandasi blow on the back of Brij Lal and so I dealt a blow at Gopi Ram." This plea was reiterated by Lalu appellant who further added that the complainants were communists and had been advised to dig the watercourse by force Brij Lal appellant whilst admitting his presence at the spot denied the fact that he had gone there armed with a gun and suggested the prosecution story to be implausible as he would have used the gun against the complainants if he was so armed. No defence evidence was, however, adduced in support of the pleas taken on behalf of the appellants.

10. In view of the above plea taken up on behalf of the appellants, three crucial questions arise for determination in the present case. Firstly, whether the complainants had any legal justification for digging and constructing a watercourse through the lands in the cultivating possession of the

appellants. Secondly, if the act of the complainants was not so justified, would the appellants have a right of private defence against it? Thirdly, the subsidiary question arises whether the injuries were inflicted on the land of the appellants or upon the adjoining path leading to village Sardarpur.

11. Ere we go to the area of controversy betwixt the parties if deserves notice that certain facts are admitted or stand conclusively proved on the record. Of these it is apparent that prior to the consolidation of holdings in the village, which took place nearly two years before the present incident, a watercourse existed through the lands of the appellants which had served the lands of the complainants for irrigation. After the consolidation this watercourse was admittedly discontinued and became non-existent and in its place a new watercourse considerably to the south passing through the land of Bogha Ram was constructed and remained flowing for nearly two years. Apart from the faint suggestion that is now made that the landlord of the complainants wanted to evict them and substitute the appellants in their place, there exists no hostility or any serious enmity or any cause for hostility between the party of the complainants and the appellants.

12. It is in the light of the above facts that the prosecution evidence regarding the justification of the complainants for building a watercourse in the lands of the appellants has first to be appraised. At the very outset it is noticeable that the present prosecution suggestion that Tek Chand landlord of the complainants wanted to evict them and give the lands to the appellants does not find specific mention in the first information report and is not stated to be the motivating cause of any hostility. On this aspect, apart from the bald statement of Balwant Ram P. W., there is not a hint of any evidence regarding the same. Even his own brothers, Jagdish Lal and Devi Lal, are blissfully unaware of any such fact. Almost similarly there exists no credible evidence that the existing watercourse serving the lands of the complainants was ever demolished by the appellants. Neither the date, time, nor the person in whose presence it was so done has been remotely suggested in the prosecution evidence. As a matter of fact, far from there being a corroborative evidence on this score, the evidence of CW 1 Madan Lal, the Canal Patwari of the Circle Dhaban Kokarian, who is an official witness and had deposed from the record, is clearly contrary to this aspect of the prosecution case. This witness had deposed that the watercourse prepared subsequent to consolidation of holdings was still in existence and had never been demolished. Nor has the prosecution brought any evidence regarding its allegation that such demolition was brought before a Panchayat and a resolution regarding the reconstruction of the watercourse through the lands of the appellants was passed. Balwant

Ram P W stated that Soni Ram Dhan Lal Ram Sohan Lal and Kanshi Ram apart from others, were the persons who had constituted the said Panchayat. Surprisingly, none of these persons or any other has come forward to support such a version. Nor any documentary record or any other evidence apart from the statement of Balwant Ram P W appears in this context. There is not the faintest suggestion regarding this Panchayat in the first information report and the maker of this statement Balwant Ram has been falsified by confrontations therein in cross examination. A further weakening of this version arises from the fact that Devi Lal a brother of Balwant Ram PW, shifted considerably from the stand taken by the former regarding the demolition and the reporting to the Panchayat. Devi Lal PW made no mention of any demolition or the reporting thereof or the constitution of a Panchayat on this score. He rather attempted to build an altogether new case on the basis that the appellants had themselves agreed that a watercourse be constructed through their lands. Apart from the evidence the probability is also wholly against the prosecution story in this regard. It appears utterly unreasonable and unexplained that whilst in the forenoon the appellants had willingly agreed to the construction of a watercourse through their lands but by the afternoon they had become almost murderously hostile to any such act. It is thus that, an overall consideration of this aspect of the prosecution case leaves one in no manner of doubt that this is a belated and puerile attempt on the part of the prosecution witnesses Balwant Ram Jagdish Lal and Devi Lal to concoct some justification for their illegal act in going upon the lands of the appellants and digging a channel therein. The conclusion is thus inescapable that the prosecution version that they were digging the watercourse through the appellants' lands with either the express consent of the appellants or on the basis of the authority of a Panchayat resolution is nothing but a blatant falsehood.

13 On the above finding it follows that the complainants had gone upon the lands in the physical possession of the appellants and attempted to construct a watercourse therein without any legal justification. Once it is so found that they were doing so without any authority or the consent of the appellants it stands to reason that they were doing so by force and in such an eventuality must have gone to the spot armed to meet any opposition which they must necessarily have anticipated. The trial Court had itself come to the finding that the act of the complainants was wholly unjustified in the following words—

"And unilateral decision of the members of the Panchayat could not bind the accused who could act in the exercise of a private defence of property, if such a right was available to them. Then it is improbable that the accused had consented to the construction of the watercourse by the deceased

because a little later when the construction of the watercourse is said to have started, they came out, armed variously, to obstruct it. Therefore it cannot be said that the deceased had any right to construct the watercourse in the fields of the accused." Having arrived at the above finding, nevertheless the trial Court denied the right of private defence to the appellants on two grounds firstly that the lands through which the watercourse was being dug at the time of the occurrence bore no crop and secondly that the appellants were bound in such a situation to have recourse to public authority. Both these findings in our view can not possibly be sustained.

14 The prosecution evidence makes it wholly evident that the complainants had without authority started the construction of the watercourse on the said day passing through the lands of Lalu Ram and Kanshi Ram appellants and had completed considerable parts thereof prior to the incident. That this watercourse had been built through the lands of the appellants which bore cotton crops appears clearly. In the words of Balwant Ram PW who had stated thus

"On the other side of the path through which we had constructed the watercourse that day there were the fields of Kanshi Ram accused. It was through those fields that we had constructed the watercourse from the path to our fields. There were cotton crops in the fields of Kanshi Ram where the watercourse had been constructed. That land was in the tenancy of Kanshi Ram which was owned by Tek Chand Lambardar. We did not take permission of Tek Chand for constructing the watercourse."

Nothing could be more explicit. This is further borne out from the site plans which clearly show that the land of Kanshi Ram appellant is situated on the western side of the path and there was cotton crop therein. That this land may not be diametrically opposite to that of Lalu Ram appellant is hardly of any consequence. The trial Court was alive to the clear statement of Balwant Ram PW and the site plans but chose to brush it away in the following terms—

"There appears to be some confusion in the mind of this witness obviously because of his comparative youth."

We fail to see how if the conviction of the appellants can be sustained on the evidence of Balwant Ram despite his supposedly tender years this crucial statement in favour of the defence can be ruled out on the ground of his comparative youth.

15 A reference to the ocular evidence as well as the documentary evidence in the shape of site plans further shows that at the place where the complainants were engaged in digging there was cotton crop of the appellants in the close proximity thereof. The complainants were as yet continuing in their attempt to complete the water channel to join it up with the existing watercourse. It is thus evident that in this process they had

already destroyed the cotton crops of the appellants and also by continuing to do so, gave reasonable apprehension to them that in the completion of the channel further damage to the crops may ensue. We are thus clearly of the view that the act of the complainants fell clearly within the ambit of both the offences of criminal trespass and mischief.

16. Even assuming for a moment entirely for the sake of argument that there had been no actual or apprehended destruction of the cotton crop, the act of the appellants would still fall within the two offences above-mentioned. The learned trial Court was of the view that even though it may be so the appellants were bound to resort to the public authorities and as such were not entitled to a right of private defence. We regret that we cannot possibly agree with this view of the law. The proposition that a person in physical possession of land and in whose presence criminal trespass and mischief is being committed by force (and without any semblance of a right a permanent water-course is being constructed thereon) is nevertheless obliged to retreat therefrom and resort to the fitful relief he might secure from a police station ten miles away, is to our mind wholly untenable. The right of private defence of property cannot be whittled down to something so inconsequential. The trial Court had placed reliance for its view on two authorities of the Patna High Court and one of the Lahore High Court. In our view these three cases are inapplicable and clearly distinguishable on the facts of the present case. In *Hariram Mahatha v. Emperor*, AIR 1942 Pat 96 on which reliance had been placed, the facts were entirely different. There existed a bona fide dispute about the land in question and the finding was that the complainants had a good title to the same and were acting lawfully on going upon the land. It was further held that there was neither theft nor mischief and the act of the appellants was not to prevent these offences but to enforce their own right with force in execution whereof they had made a designedly violent attack on the complainants' party. Further the finding was that the complainants had gone to the field which at the relevant time was unoccupied. In these circumstances the plea of private defence was negatively.

In *Satnarain Das v. Emperor*, AIR 1938 Pat 518 on the facts it was found that both the parties had gone to the land fully armed in full expectation of an armed conflict and determined to have a trial of strength. It was in this context that it was laid down that the right of private defence would not be attracted. In *Phula Singh v. Emperor*, AIR 1927 Lah 705 which is a Single Bench authority, the complainants had already ploughed and sown the land in dispute with *chari*. It was subsequently that an attempt was made of forcible eviction therefrom. On considering the argument that the right of

private defence would arise, the learned Judge observed that while there was something to be said for that proposition but on the facts of the case it was opined that the appellant should have resorted to the authorities for redress. In our view the observations in this judgment are no warrant for the view that in case of criminal trespass and mischief in the presence of the occupier in possession thereof, the latter is disentitled to the right of private defence. The provisions of Section 97 of the Indian Penal Code, clearly envisage the right of private defence against any act which falls within the definition of the offences of mischief or criminal trespass or which is even an attempt to commit such an offence. Section 105 of the Penal Code further lays down that this right of private defence of property commences when a reasonable apprehension of danger to the property commences and continues as long as the offender continues in the commission of criminal trespass or mischief. The words of the statute are themselves explicit and are fully supported by authorities. In *Abdul Hadi v. Emperor*, AIR 1934 All 829 (2) the complainants were excavating upon a portion of the land so as to make it fit for some purpose in manufacturing sugar. It was held that such digging on the land which was in possession of the appellants would constitute the offences of criminal trespass and also of mischief which would entitle them to a right of private defence. The applicability of Section 99 was expressly considered and negatived in such a circumstance with these observations.

"It could not have been the intention of the framers of Sections 97 and 99 to compel a person having the right of private defence of property to acquiesce in criminal trespass or mischief, and not exercise his right of private defence at all. In most cases if recourse is had to public authorities the mischief complained of will have been committed before the Public authorities come to his rescue."

In *Summa Behera v. Emperor*, AIR 1945 Pat 283 Sinha and Das JJ had held that a person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which amounts to an offence under the Indian Penal Code and it would be lawful for such a person who has seen an invasion of his right, to go to the spot and object. It was also observed as follows.

"It is not the law that the rightful owner in peaceful possession of a piece of property must run away, if there is an actual invasion of his right and an attempt on his person." This view was reiterated again in *Barisa Mudi v. State*, AIR 1959 Pat 22, wherein K. Sahai J. on a difference of opinion between C. P. Sinha J. and K. Ahmad J. whilst agreeing with Sinha J. held that the right of private defence in similar circumstances was attracted and had not been exceeded. In

Mozam Ansari v State 1981 BLJR 824 after a consideration of the earlier authorities Ramratna Singh J summed up the law in the following terms —

"The law applicable to such cases is well settled. It is not the law that the rightful owner in peaceful possession of property must run away if there is an actual invasion of his right and an attempt on his person. The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose if he sees an actual invasion of his rights which invasion amounts to an offence under the Penal Code and when there is no time to get police help. It is lawful for a person who has seen an invasion of his rights to go to the spot and object. It is also lawful for such persons if the opposite party is armed to take suitable weapons for his defence (see AIR 1945 Pat 233). The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence.

17. Lastly their Lordships of the Supreme Court whilst considering the ambit and the scope of the right of private defence in *Jai Dev v State of Punjab* AIR 1963 SC 612 have observed as follows.

"This however does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available the individual citizen is entitled to protect himself and his property" and further

"So long as the threat lasts and the right of private defence can be legitimately exercised it would not be fair to require as Mayne has observed that he should modulate his defence step by step according to the attack, before there is reason to believe the attack is over. The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force."

18. In view of the above enunciation of the law we are clearly of the opinion that the learned trial Judge was wrong in holding that the appellants were disentitled to the right of private defence because they were bound to resort to the public authorities. In our view they were clearly protected by the

right of private defence of property on the facts of the present case.

19. Whilst considering the last question whether the injuries were caused to the complainants at the spot where they were digging the land of the appellants or upon the adjoining path leading to Sardarpura it is necessary to examine critically the prosecution version of the incident and the nature of the evidence adduced in support thereof. Regarding the assault the sole testimony is that of the three brothers who are the sons of the deceased Shiv Lal. In the present case where injuries have been caused on both sides and a precise counter version is being pleaded on behalf of the appellants it is but natural that the testimony of these witnesses should be partial to the version which they have chosen to give. All the three eye witnesses therefore come clearly within the ambit of words termed as interested testimony and unfortunately in the case no independent ocular testimony is available to lend assurance to the story put forward by them. In such a situation where the spot of occurrence varies only by a few paces in the two versions given the testimony of such interested witnesses cannot possibly be final.

20. Whilst considering the evidence of the three eye witnesses on the point of motive we have already held it to be false on that point and deliberately modulated to negative the plea raised by the appellants. All these three eye witnesses stand further falsified by the medical testimony. Dr Adarsh Yakhmi P W 4 had clearly opined that injury No 4 on the person of Shiv Lal was the result of a single blow and the wound on the back was the wound of the entry and the wound in the chest was the wound of the exit. The deceased had no other injury in that region the other three being on the head. All the eye witnesses however have deliberately prevaricated in saying that two distinct blows were given to Shiv Lal one on the back and the other on the chest. This deliberate and designed attempt to exaggerate and in a clumsy way to modulate their account according to the two injuries which were noticed at the time of the inquest report on this part of the body of Shiv Lal shows to what length these witnesses can go falsely in support of their story. Subsequent autopsy and the opinion of the medical witness has given the lie direct to this version.

21. On two other material aspects the version of the prosecution is also patently unsatisfactory. The version that the injuries on Lalu Ram and Brij Lal appellants were given by Bulwant Ram and Devi Lal P Ws with their kassis cannot stand the test of a close examination. It is noticeable that in the first information report neither the weapons nor the prosecution witnesses who had inflicted these injuries were specified at all. No bloodstained spades were either found on the spot or were produced before the police. The appellants are said to be armed with

long handled weapons like two spears, a kassia and dang and it appears improbable to our mind that against such weaponry the two prosecution witnesses with such clumsy instruments like spades were able to retaliate and cause a grievous and a simple injury on Lalu Ram and also one on Brij Lal. On the broader aspect it further appears wholly improbable as suggested that after both Gopi Lal and Shiv Ram had been fatally stabbed and Jagdish Lal P. W. who was unarmed was incapacitated with injuries, the two boys Balwant Ram and Devi Lal with spades only could hit back at the six determined and heavily armed assailants. It appears that the number of assailants is being exaggerated as well as it is further being suppressed that the injuries on the appellants Brij Lal and Lalu Ram were apparently inflicted first and then in retaliation the fatal injuries were caused by the appellants. Equally unlikely is the prosecution story that Brij Lal appellant was armed with his licensed gun who twice fired with the same. No empty cartridge was recovered from the spot and this was most likely because the gun used is a single barrel gun. The prosecution had sent the gun of Brij Lal to the Ballistic Expert for the opinion whether it had been fired in the incident but it chose to withhold the evidence of B. R. Sharma, Director of Forensic Science Laboratory, Chandigarh, who was given up as an unnecessary witness. No circumstantial or expert evidence, therefore, has been brought on record to show that this licensed gun was ever used in the incident. The learned trial Court also seems to have doubted this part of the prosecution story and has acquitted Brij Lal, appellant, on the charge under Section 27 of the Arms Act. It is otherwise wholly improbable that whilst being armed with a gun, this appellant suffered an injury on his back allegedly with a spade and also at no stage used the same against either the deceased or the prosecution witnesses. We are constrained to hold that this part of the prosecution story regarding the gun held by Brij Lal is a fabrication.

22. On the finding that Brij Lal, appellant, was not armed with a gun, the prosecution version that they had at the relevant time retreated from the spot to the path of village Sardarpura is seriously jeopardised. On this point, the prosecution evidence first was that Brij Lal had fired the gun and directed that if anybody moved from the spot, he would be shot at which held the complainants to the spot. This is subsequently sought to be changed to the version that on seeing the gun-fire the complainants retreated out of fear from the spot on to the path. Once it is held that Brij Lal was not armed with a gun and the same was not fired, the version of retreat on to the path becomes implausible. It is noticeable that the version of retreating on to the path of village Sardarpura does not find any mention whatsoever in the version given in the first information report by Balwant Ram P. W. Devi Lal P. W. had to

concede in cross-examination that before the committing Court he had stated that all of them had kept standing by the watercourse and did not move on hearing the threat from Brij Lal. Unable to get away from this crucial admission, he at the trial wanted to show that he had stated so by mistake before the committing Court. This evidence also clearly shows that the story of withdrawal to the pathway is an afterthought. Equally noticeable is the fact that in the visual plan P. 30 made by the Investigating Officer, the place of assault is shown at point 'H' which is squarely in the field of the appellants and clearly away from the path. Nor is there any reliable evidence regarding the recovery of the bloodstained earth from the path leading to Sardarpura. P. W. 13 Sohan Lal had to concede that he is a relation of the deceased persons. No reason has been given as to why independent witnesses like Soni Ram Sarpanch and another Sohan Lal a former Sarpanch, who were at the spot, were not joined in the recovery and attestation of the bloodstained earth from the spot. The interestedness of Sohan Lal P. W. is also otherwise patent from the fact that he had accompanied Balwant Ram in the very first instance for lodging the report against the appellants. For these reasons we are of the view that the prosecution has been wholly unable to bring any credible evidence regarding its version that the complainants had withdrawn from the land of the appellants and that they were chased to the path and injured there. In fact all indications and possible inferences from the evidence point to the contrary.

23. On the above finding, therefore it follows that the deceased and the prosecution witnesses had gone upon the land of the appellants without any right whatsoever. In such a situation they would perforce go armed as they knew that the habitat of the appellants was not far distant and they could certainly expect opposition for their act. The medical witness has opined that the injuries on Lalu Ram and Brij Lal appellants could be the result of gandas blows as has been pleaded by the defence. We are disinclined to accept the prosecution story that the injuries on these two appellants were caused by the spade or that they were caused after the infliction of fatal injuries on Shiv Lal and Gopi Ram. The probabilities in fact clearly are that the injuries on these two appellants were inflicted first. In this context if the appellants were resisted in their lawful right to evict the complainants from the land and the offenders were armed with dangerous weapons, the appellants would clearly be within their rights to use adequate force in retaliation. The injuries on Lalu Ram was a near fatal injury as the medical witness had opined that substance resembling grey matter of the brain was flowing from there. The infliction of such an injury and even an apprehension thereof clearly gave the appellants the right of private defence of person as well. In such a situation, as observ-

ed by the Supreme Court a person cannot modulate his defence step by step and the blows which he inflicts are not to be weighed in the proverbial "golden scales". The appellants could clearly apprehend an assault likely to cause death or grievous hurt which was in fact caused and thus were within their rights to inflict fatal injuries. In our opinion they had not exceeded that right. Their act being protected no offence has been brought home against them and the conviction cannot be sustained. We would therefore allow this appeal and acquit all the appellants of the charges levelled against them. In consequence the reference for the confirmation of death sentences of Het Ram and Banwari Lal is declined.

24 GURDEV SINGH J I agree
Appeal allowed

1970 CRI L J 350 (Vol 76, C N 81) =
AIR 1970 MANIPUR 23 (V 57 C 7)

R S BINDRA J C

Chingangbam Ibomcha Singh Petitioner v Okram Tombi Singh, Respondent

Criminal Revn Case No 19 of 1967
D/- 9-7 1969 against Judgment of Ist Class Magistrate D/- 4-9 1967

(A) Criminal P C (1898) Ss 435 439 — Revision petition should be filed in the Court of Sessions Judge in first instance, rather than directly in High Court — Revision petition admitted and pending in High Court for 20 months — Arguments on merits heard — Petition should not be thrown out on this technical objection — (Advantages of the practice shown)

(Para 4 5)

(B) Evidence Act (1872) S 13—Complaint under Ss 426 447 and 506 I P C — Rent note executed by tenant of complainant in respect of land in question and copy of judgment of Nyaya Panchayat in rent recovery case filed by complainant — Documents are not irrelevant but are admissible to prove the offences

(Para 6)

(C) Tenancy Laws — Manipur Land Revenue and Land Reforms Act (1960), Ss 119 126 — Scope — Tenant surrendering land — Landlord entering into possession—Such possession can be availed of for purposes of S 426 or 447 I P C — (Penal Code (1860) Ss 426 447) — (Criminal P C (1898) S 200)

It is not inconceivable that after the tenant surrenders the possession voluntarily the landlord occupies the land despite the knowledge that S 126 (1) interdicts such a step. His entry into possession of the land in such circumstances will at the best prompt the Gov-

ernment into adopting measures to evict him for the purpose of securing the ends mentioned in Section 126 (3). However the physical act of his possession over the land cannot be ignored either by the Court or by anybody else. Where the tenant surrenders possession to the landlord and the competent authorities mentioned in S 126 either do not come to know of that development or fail to take steps mentioned in S 126 (3) the landlord can enter into possession of the land after the tenant has abandoned his tenancy and such possession of the landlord can be availed of for the purposes of either S 426 or Section 447 of Penal Code. Thus landlord is competent to file complaint under Sections 447 and 426 I P C. (Para 7)

(D) Penal Code (1860) S 506 — Charge under — Intention which weighs with accused in entering upon land in possession of another has no relevancy to charge under S 506 — Complaint under S 506 cannot be thrown out on ground that dominant intention of accused in entering upon land was in his capacity as its owner. (Para 8)

Cases Preferred Chronological Paras
(1965) AIR 1965 Pat 509 (V 52)

Ishari Ram v Ganga Bhagat 8

T N Bhattacharjee for Petitioner T
Bhubon Singh for Respondent

ORDER This revision petition filed by the complainant Ch Ibomcha Singh is directed against the order dated 4th of September 1967 by which Shri C Upendra Singh Magistrate First Class Manipur discharged the accused O Tombi Singh. The prayer made is for the reversal of that order and for remand of the case to the trial Court for proceeding with it in accordance with the provisions of law.

2 In the complaint lodged by C Ibomcha Singh it was alleged that he had purchased the land in dispute per registered sale deed dated 31-1-1961 from its owner Yumnam Ibohah Singh and that the latter had delivered the possession to him on the same day. The land was then made over by the complainant to O Achou Singh for cultivation as tenant and the latter continued to cultivate it until the year 1966. Thereafter the complainant engaged Ch Ibomtombi Singh as the tenant for cultivation of the land and this Ibomtombi Singh after ploughing the land sowed paddy seeds therein on 23-6-1967. However on the morning of 24-6-1967 when Ibomtombi Singh was working on the land the accused O Tombi Singh entered upon the land and over-ploughed the same forcibly. Ch Ibomtombi Singh protested against the high handedness committed by the accused but the accused scared him into silence by brandishing a dao and threa-

tening to behead him therewith. The owner Ibomacha Singh lodged a complaint against Tombi Singh on 28-6-1967 under sections 426, 447 and 506 I P. C. After recording the preliminary evidence, the Court summoned the accused under those three sections of the Indian Penal Code. The accused defended himself and the Court ultimately discharged him on the finding that the complainant had failed to establish a prima facie case. Having felt aggrieved with that order of discharge, the complainant has come up in revision to this Court.

3. Before proceeding to examine the points canvassed before me by the complainant's counsel Shri Bhattacharjee, I may mention that the defence set up by the accused was that he had purchased the land by a registered sale deed dated 7-3-1967 from the owner Y. Ibohah Singh, that on that very day he was placed into possession of the land by the vendor himself, and that since then he had been in continuous occupation of the land. He denied that the complainant was the owner of the land, or that he had ever leased it out to O. Achou Singh, or that he had subsequently leased it to Ch. Ibombombi Singh, or that he (accused) had either committed criminal trespass on the land, or committed any mischief by overploughing the field, or that he had threatened Ch. Ibombombi Singh on 24-6-1967.

4. Shri T. Bhubon Singh, representing the accused, raised the preliminary point that the complainant had gone wrong in filing the revision petition directly in this Court instead of first approaching the Court of the Sessions Judge. He, therefore, urged that the revision petition should be thrown out on that score alone. Shri Bhattacharjee, the counsel for the complainant, submitted, on the other hand, that this Court has concurrent jurisdiction with the Sessions Judge to entertain revision petitions and as such the objection raised by Shri Bhubon Singh is without any merit. Shri Bhattacharjee also emphasised that the revision petition having been admitted by my learned predecessor it would be unjust to reject it more than 20 months after its admission on the sole ground that as a matter of practice the revision should have first been instituted in the Court of Sessions Judge.

The views of the various High Courts in India on the point at issue are not unanimous though there appears to be consensus that in fairness to the High Court the revision petition should be filed in the Court of Sessions Judge in the first instance. That practice has two distinct advantages. Firstly, the time of the High Court being more precious it is only reasonable that the case should be disposed of by a subordinate Court where

it has jurisdiction in the matter and thereby lessen the pressure of work on the High Court. Secondly, the High Court will have the benefit of the opinion of the Sessions Judge if the matter eventually comes before it after having been dealt with by the Sessions Judge. Therefore, it is highly desirable that the aggrieved party should first file the revision petition in the Court of Sessions Judge and not come directly to the High Court. I hope this salutary practice shall be adopted in this territory by the litigants and the bar members alike. I make it clear that in future I would be most reluctant to admit the revision petition directly in this Court, unless, of course, there are special reasons for departing from the practice mentioned.

5. In the present case, however, I have decided not to throw out the revision petition on the basis of objection raised by Shri Bhubon Singh. The reasons that have weighed with me in adopting that course are that the revision petition had been admitted by my learned predecessor and so it would be improper for me to interfere with the discretion exercised by him, that the revision petition has been pending in this Court for more than 20 months now and so if it were presented in the Court of Sessions Judge it shall be rejected summarily as barred by limitation, and that I have already heard full arguments respecting the merits of the petition and so it would be only fair that I should dispose of it on merits rather than throw it out on the technical objection raised by the respondent's counsel. The course that I have adopted is not very unusual. There is abundant authority for the proposition that once a revision petition has been admitted it should be disposed of on merits.

6. Now coming to the merits of the case. The trial Court refused to attach importance to the documents Exts P/1 and P/3 placed on the record by the complainant to prove the facts that he had after purchase of the land leased the same to Achou Singh and that subsequently Achou Singh was proceeded against by him for recovery of the arrears of rent. In the view of the trial Court these two documents had no relevancy to the charges because the accused was not a party to either of the two documents. I think the trial Court was clearly in error in holding the two documents as irrelevant. Section 13 of the Indian Evidence Act enacts that where the question is as to the existence of any right or custom, the following facts are relevant:

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or

demed or which was inconsistent with its existence

(b) particular instances in which the right or custom was claimed recognized or exercised or in which its exercise was disputed asserted or departed from

That in face of this statutory provision the documents Exts P/1 and P/3 are admissible for proving the charges for mulated against the respondent can admit of no doubt I may point out that Ext P/3 is the rent note which Achou Singh had executed in favour of the complainant Iboriacha Singh while Ext P/1 is the copy of the judgment given by Nyaya Panchayat of Imphal West in the case filed by the complainant against Achou Singh for recovery of the arrears of rent respecting the land in dispute By executing the document Ext P/3 Achou Singh had admitted the right of the complainant to lease out the land in dispute and per Ext P/1 the Panchayat had recognized that the complainant was the landlord of Achou Singh respecting that land Therefore I fail to see how the trial Court ignored these two valuable pieces of evidence which lent corroboration to the assertion of the complainant that he had leased out the land in dispute on 17-3-1963 and had been in possession of it for a long time before the date of occurrence out of which the present case has arisen.

7 The trial Court pressed into service the provisions of sections 119 and 126 of the Manipur Land Revenue and Land Reforms Act 1960 hereinafter referred to as the Act in support of the view that the complainant could not have entered in a possession of the land in dispute after his tenant Achou Singh had vacated the same Section 119 provides in substance that a tenant cannot be evicted from the land held by him except under the order of competent authority made on some one of the grounds mentioned therein Subsection (1) of S 126 enacts that after the commencement of the Act no tenant shall surrender any land held by him as such and no land owner shall enter upon the land surrendered by the tenant without the previous permission in writing of the competent authority According to the opinion of the trial Court it was not legally open to the complainant to enter upon the land after Achou Singh had relinquished possession over it and that in consequence his possession over the land through the tenant Ch Ibotombi Singh on 23rd or 24th of June 1967 cannot be countenanced in law Here too it is not possible to agree with the trial Court

It is not inconceivable that after the tenant surrenders the possession voluntarily the landlord occupies the land despite the knowledge that the provisions of sub-section (1) of section 126 of the

Act interdict such a step His entry into possession of the land in such circumstances would at the best prompt the Government into adopting measures to evict him for the purpose of securing the ends mentioned in sub-section (3) of Section 126 However the physical act of his possession over the land cannot be ignored either by the Court or by any body else Sub section (2) of Section 126 provides that permission to the landlord to occupy the land as contemplated by sub section (1) shall not be given unless the conditions stated in sub-section (2) are satisfied and sub-section (3) enacts that where permission is refused and the tenant gives a declaration in writing relinquishing his rights in the land the competent authority shall in accordance with the rules made in this behalf lease out the land to some other person who shall acquire all the rights of the tenant who relinquished his rights

All these eventualities arise only if the matter comes to the notice of the competent authorities However it is not difficult to visualise a case where the tenant surrenders possession to the landlord and the competent authorities mentioned in section 126 either do not come to know of that development or fail to take steps mentioned in sub-section (3) of S 126 In that context the trial Court was not justified in concluding that in the face of section 126 of the Act the complainant could not have entered into possession of the land after Achou Singh had abandoned his tenancy or that such possession of the landlord cannot be availed of for the purposes of either section 426 or section 447 of Indian Penal Code

8 While discussing the facts relevant to the charge under section 506 I P C the trial Court held on the authority of AIR 1965 Pat 509 Ishari Ram v Ganga Bhagat that it is the dominant intention of the accused in entering upon possession of the land which would be decisive in determining whether the offence under section 506 I P C had been made out This view of the Court is manifestly erroneous The intention which weighs with the accused in entering upon the land in possession of another has no relevancy to the charge under section 506 I P C In the Patra case one of the charges levelled against the accused was under section 448 I P C and it is in connection with that charge that the question of dominant intention was brought into discussion Therefore the trial Court was wholly unjustified in discharging the accused for the offence under section 506 I P C on the score that his dominant intention in entering upon the land was that in his capacity as its owner he had the right to do so

9 A perusal of the judgment under revision gives the impression that in the

opinion of the trial Court the complainant had not examined any independent witness in proof of various charges formulated against the accused. However, the court was unable to point out what interest P. W. 2 Bira Singh had in the complainant or what grudge he bore to the accused. This witness, it is proved, has a paddy field close to the land in dispute. Therefore, he was a natural witness of the occurrence.

10. I restrain myself from examining in detail the evidence led by the complainant with a view to assess its value. It is for the reason that any expression of opinion made by this Court is bound to influence the mind of the trial Court. However, I have no misgiving in my mind that the trial Court was wrong in discharging the accused at the stage at which he did. The Court was clearly wrong, as shown above, in refusing to attach any value to the documents Exts P/1 and P/3, in utilising the provisions of section 126 of the Act to support the finding that the complainant could not have entered into possession of the land in June 1967, in discharging the accused of the offence under section 506 I P. C. on the ground that the dominant intention which actuated the accused in entering upon the land was his title thereto on the basis of sale deed dated 7-3-1967, and in holding that none of the witnesses examined by the complainant was independent.

I may point out that after Y. Ibohal Singh had sold the land to the complainant per registered deed dated 31-1-1961 he could not have executed another sale deed respecting the same land in favour of the accused on 7-3-1967. Shri Bhatta-charjee, the counsel for the complainant, may not therefore be wrong in contending that the sale deed dated 7-3-1967 had been prepared mischievously to arm the accused with a weapon with which to dispossess the complainant from the land in dispute.

11. For the reasons stated above, I allow the revision petition and on quashing the discharge order remand the case to the trial Court with the direction that it should proceed with it further in accordance with the provisions of law.

12. Announced.

Petition allowed;
and case remanded.

1970 CRI. L. J. 363 (Vol. 76, C. N. 82) =
AIR 1970 SUPREME COURT 219
(V 57 C 47)

(From Gujarat)

V. BHARGAVA AND K. S. HEGDE, JJ.

Kanbi Nanji Virji and others, Appellants v. State of Gujarat, Respondent.

Criminal Appeal No. 20 of 1967, D/- 6-10-1969.

(A) Criminal P. C. (1898), Sec. 423 — Appreciation of evidence by appellate court — Evidence of prosecution witness — Truth and falsehood not separable — Entire evidence has to be rejected — Decision of Guj. H. C., Reversed.

Having come to the conclusion that right from the beginning a prosecution witness was giving a distorted version of the incident, the appellate Court is not right in holding that any portion of evidence deposed by such prosecution witness can be relied upon merely because that some portion of his testimony in Court accords with the version given by him to another prosecution witness. It is true that oftentimes the Courts have to separate the truth from falsehood. But where the two are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety. Decision of Guj. H. C., Reversed.

(Para 7)

(B) Penal Code (1860), Ss. 149 and 34 and 323 and 304 — Free fight between two groups of persons — Injuries sustained by persons of both group in course of such fight — Death of two persons — Only persons found to have inflicted injuries can be convicted for the injuries caused by them.

Where there was a melee at the time of the incident and the two groups indulged in a free fight resulting in injuries to persons of both groups and death of two, if the Court comes to the conclusion that the injuries sustained by the persons were in the course of a free fight, then only those persons who are proved to have caused injuries or death can be held guilty for the offence individually committed by them. (Para 8)

(C) Penal Code (1860), Ss. 34 and 304 Part I — Bona fide assertion of right of way through uncultivated portion of private land by villagers — Does not amount to common intention to commit a criminal act — Conviction under Ss. 304 Part I/34, held, illegal — Decision of Guj. High Court, Reversed.

A bona fide assertion of right of way through the uncultivated portion of private land by the villagers when the road is submerged during rainy season cannot in the absence of any other evidence be considered as a common intention to commit a criminal act within the meaning of Section 34. From the fact that one villager had a spade in his hand and the other two had sticks in their hands it is not safe to draw the inference that they intended to commit any offence.

(Para 11)

Even assuming that the common intention of the accused persons was to force their way through the uncultivated portion of private land by using force if necessary their conviction under 1st part of Section 304 I P C was not legal in the absence of finding that they intended to cause any injury to any person. Decision of Guj High Court Reversed.

(Para 12)

The following Judgment of the Court was delivered by

HEGDE J — This is an appeal by special leave. In the trial court as many as eight persons were charged under Sections 147, 148, 201/149, 302/149 and 447/149 I P C. They were also charged alternatively under Sections 323/34, 302/34, 307/34, 447/34 and 201/34 I P C. The learned trial judge acquitted A 6 to A 8 of all the charges for which they were tried. He convicted accused 1 and 3 under the second part of Section 304 I P C and sentenced each of them to suffer rigorous imprisonment for two years for the said offence. He convicted accused 2, 4 and 5 under Section 323 I P C and sentenced each of them to suffer imprisonment for 6 months for the same. Both the State as well as the convicted persons went up in appeal against the judgment of the trial court to the High Court of Gujarat. The State was aggrieved by the acquittal of the accused under the murder charge. The High Court accepted the appeal of A 1 and A 3 and acquitted them. It also accepted the appeal of the State in part and convicted Accused 2, 4 and 5 under the 1st Part of Section 304/34 I P C. For that offence each one of them was sentenced to suffer rigorous imprisonment for five years.

2. The incident giving rise to this case occurred at about noon on September 22, 1964 in Survey No. 265 on the outskirts of the village Ghanad of Lakhtar taluka in Surendranagar District. According to the prosecution case deceased Sabalsingh and P W 5 were the owners

of the said Survey No. 265. The field in question lies by the side of the road running North to South from Ghanad village to Nana Ankewalia. Survey No. 265 is about a mile from the village site of Ghanad. Across the road mentioned earlier, some of the villagers of Ghanad own lands. To reach those lands as well as to reach Nana Ankewalia the villagers had to go by the road referred to earlier. But that road used to be submerged during rainy season and during that time the villagers used to pass through the uncultivated portion of Survey No. 265 known as Mocham land.

3. The prosecution evidence discloses that on September 21, 1964 i.e. a day before the occurrence when Accused 4 and 5 who have fields on the eastern side of the road were passing through the Mocham land they were obstructed by deceased Sabalsingh. He warned them not to go by that way thereafter though as a matter of concession it is said he allowed them to go over the land on that day. On the day of the occurrence it is said that A 4 and A 5 again tried to go by that way. At that stage Sabalsingh and his brother P W 5 obstructed them. On being so obstructed A 4 returned to the village and thereafter A 1 to A 5 came there armed with spades and sticks. When they tried to pass through the Mocham land they were obstructed by deceased Sabalsingh, deceased Bhupatgar and P Ws 5 and 6. On being so obstructed the deceased as well as P Ws 5 and 6 were attacked by A 1 to A 5 as a result of which Sabalsingh and Bhupatgar died and P Ws 5 and 6 seriously injured.

4. The defence version as given by A 1 is that at about noon on the day of occurrence A 4 came to him and told him that five to six Darbars and Bavas (evidently referring to the deceased persons and P Ws 5 and 6) had assaulted his brother on the previous day and had restrained him from passing through the Mocham and again on that day those Darbars and Bavas had assaulted him and obstructed him from going to his lands. He also told him that he had given that complaint to the Sarpanch and that he had come to tell him thereafter. He further says that after receiving that information he went to the Panchayat office. At that time he saw village people running to Nana Ankewalia road. He thought that there may be a fight and so he went along the Ankewalia road. At the scene of the occurrence he found two

groups of persons facing each other. Very soon thereafter Sabalsingh inflicted knife blows on the chest and abdomen of A-2, his brother who on receiving those blows fell down and thereafter Sabalsingh inflicted knife blows on him (A-1); then he also fell down unconscious. He pleads that he does not know what happened subsequently.

5. The High Court has substantially accepted the plea of A-1. It has come to the conclusion that he is a responsible person. He had no motive to attack the deceased persons or P. Ws. 5 and 6. He had gone to the scene on a peaceful mission and that he is likely to have been attacked by the prosecution party during the course of the melee. The only witnesses who speak to the occurrence are P. Ws. 5 and 6. Both the trial Court as well as the High Court wholly disbelieved P. W. 6. They have entirely rejected his testimony. So far as P. W. 5 is concerned, he has been disbelieved in material particulars by the High Court but yet relying on some portions of his evidence, accused 2, 4 and 5 have been convicted. The question for our consideration is whether there is reliable evidence to support their conviction.

6. The first question that arises for decision is whether the villagers of Ghanaad or at any rate those villagers who had fields on the eastern side of Ankevalia road had a right of way over the Mocham land. Even according to the prosecution case, the villagers used to pass through the Mocham land whenever the road was submerged. Admittedly on the day of the occurrence, the road was submerged. Therefore prima facie Sabalsingh and P. W. 5 were not justified in obstructing A-4 and A-5 when they tried to go over that land. The High Court was unable to come to any positive conclusion whether the villagers had acquired a prescriptive right of way over that land but it did come to the conclusion that the assertion of that right by the villagers was a bona fide one.

7. As mentioned earlier both the trial Court and the High Court have completely rejected the testimony of P. W. 6. Hence the prosecution case entirely rests on the testimony of P. W. 5. P. W. 5 was not believed by the High Court in several important respects. It came to the conclusion that he was not a truthful witness. It opined that his version as to the incident is a garbled one and that he has suppressed the part played by him and others on his

side. But yet the High Court evidently influenced by the fact that two persons had been killed during the incident undertook a salvaging operation in an attempt to fish out truth out of the mass of false evidence given by him. In doing so it went in search of some corroborative evidence. According to P. W. 5, after the occurrence he ran to the house of Kasalsingh, P. W. 10 and informed him about the occurrence. The High Court thought that to the extent the evidence of P. W. 5 tallies with the information given by him to Kasalsingh the same may be accepted as true. But yet the High Court in many respects disbelieved the testimony of P. W. 5 even when it accorded with the version given by him to P. W. 10. It came to the conclusion that P. W. 5 did not give a full and correct version to P. W. 10. In particular it opined that while informing Kasalsingh about the incident, P. W. 5 deliberately suppressed the part played by the persons on his side. Having come to the conclusion that right from the beginning P. W. 5 was giving a distorted version of the incident, the High Court was not right in holding that any portion of P. W. 5's evidence can be relied upon merely because that some portion of his testimony in court accords with the version given by him to P. W. 10. It is true that oftentimes the courts have to separate the truth from falsehood. But where the two are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety. The High Court overlooked this well accepted principle. If we reject the evidence of P. W. 5, as we think we should, the prosecution case must be held to be unsubstantiated because there is no other evidence to support it. Whatever other evidence was there it has been rejected by the trial court as well as by the High Court as false. In this view it is not necessary to go into the question whether Kasalsingh's evidence comes within the scope of Section 157 of the Evidence Act.

8. The High Court has found, in our opinion, rightly, that there was a melee at the time of the incident and the two groups indulged in a free fight as a result of which four persons were injured on the side of the prosecution and two on the opposite side. A-1 and A-2 had sustained very serious injuries, several of which were incised injuries. At one stage it was thought that A-2 may not survive. His condition was so precarious that it became necessary to immediately

operate upon him. The deceased Sabalsing had sustained two injuries only one out of them was a serious one. The other was a mere abrasion. The head injury proved fatal. Bhupatgar had received several injuries. Similarly P Ws 5 and 6 had also received several injuries. Once we come to the conclusion that the injuries sustained by the persons were in the course of a free fight, as the High Court had come to then only those persons who are proved to have caused injuries can be held guilty for the injuries caused by them.

9 The High Court has come to the conclusion that it is not possible to come to any positive conclusion as to how the incident commenced as there is no reliable evidence about the same. We agree with that finding. In fact the first information sent to the police by Sajubha on the basis of the information given to him by Kunverji Khushal is that there was a Tofan (fight or riot) at the scene of the occurrence. That was also the information given by P W 5 to P W 10. Therefore the evidence of P W 5 that it was a one sided attack appears to be baseless.

10 Dealing with the actual occurrence this is what the High Court observed:

"We are not prepared to accept Parbatsings (P W 5) word regarding the participation of the different accused in the infliction of the injuries on Bhupatgar and Sabalsing and Parbatsing. The reason is that judging by the number of injuries on both the sides something in the nature of a melee must have taken place and it would be difficult to judge who inflicted what blow on what part of the body in the course of such a melee."

Again in another portion of the judgment it observed:

"As to what exactly transpired at the time of the incident and who acted as aggressors and who dealt with the first blow there is no clear evidence available on the record of the case. According to the evidence of Parbatsing to the extent that it is corroborated by Kasalsing the persons on the side of the accused acted as aggressors but we are not prepared to accept Parbatsings version on that aspect of the matter when he is silent about the injuries on accused Nos 1 and 2."

11 After having observed as above strangely enough the High Court still came to the conclusion that Accused 2, 4 and 5 went to the scene of occurrence with the common intention of forcing

their way through the Mocham, by force, if necessary. The evidence on record discloses that as soon as A-4 came back to the village and informed the villagers that Sabalsing and his brother are not allowing them to pass through the Mocham there was a drum beating at the instance of A 2. It is most likely that thereafter the villagers gathered there and all of them went to Mocham with a view to see that their right of way is not obstructed. In our opinion the High Court was not right in relying on the testimony of P W 5 to come to the conclusion that only A 1 to A 5 went to the scene at that time. This finding of the High Court in a way conflicts with its finding as regards the role played by A 1 at the time of the incident. The probabilities are in favour of the version put forward by A 1. There was no basis for the High Court's finding that when A 2, 4 and 5 went to the scene they had the common intention of forcing their way using violence if necessary. At one stage the High Court arrived at a finding that the only common intention that the villagers had was to enforce their right of way. Such a common intention cannot be considered as a common intention to commit a criminal act within the meaning of Section 34 I P C. The inference drawn by the High Court that A 2, A-4 and A 5 had a common intention to force their way through the Mocham, using violence if necessary was evidently drawn solely on the basis of the fact that at the time of the occurrence A 2 had spade with him and A-4 and A-5 had sticks in their hands. From the fact that one villager had a spade in his hand and the other two had sticks in their hands it is not safe to draw the inference that they intended to commit any offence. Again on the material on record it is not possible to draw a firm inference that A 4, A 2 and A 5 had any common intention. It is not proved that they had met together earlier. From the proved facts it is not possible to draw a conclusive inference that they acted in concert, which is the essential requirement of Section 34 I P C. Again for coming to the conclusion that A 2 had a spade and A-4 and A 5 had sticks in their hands we have to largely rely on the testimony of P W 5 a wholly unreliable witness.

12 Even if the High Court is right in its conclusion that the common intention of A 2, A-4 and A 5 was to force their way through Mocham by using force, if necessary, it could not have convicted

them under Section 304, I. P. C. because it is not the finding of the court they intended to cause any injury to any person. The High Court has failed to bear in mind the distinction between Sec. 34 and Section 149 of I. P. C.

13 In the result this appeal is allowed and the appellants are acquitted.

Appeal allowed.

1970 CRI. L. J. 367 (Vol. 76, C. N. 83) =
AIR 1970 SUPREME COURT 267
(V 57 C 55)

(From Patna: 1968 Pat LJR 179)

S. M. SIKRI, G. K. MITTER,
K. S. HEGDE, JJ.

A. K. Jain and others, Appellants v.
Union of India and others, Respondents.

Criminal Appeal No. 189 of 1966, D/-
25-7-1969.

(A) Essential Commodities Act (1955),
Ss. 2 (b) and (c), 3 — Scheme of Cls. (b)
and (c) of Sec. 2 and Sec. 3 — Scheme
intended to bring under control cultivation
and sale of food crops — Sugar-cane
does come within ambit of Act and cultivation
and sale of sugar-cane can be
regulated under Sec. 3 — Sugar-cane
(Control) Order (1955), R. 3 (3) is valid.
AIR 1956 SC 676, Rel. on. (Para 4)

(B) Essential Commodities Act (1955),
Sec. 3 — Order under Sugar-cane (Control)
Order (1955), R. 3 (3) — Regulation
of price of sugar-cane — Provision expressly
contained in Bihar Sugar Factories
Control Act (1937) and also in Sugar-
cane (Control) Order (1955), R. 3 (3) —
Provision of Order prevails over the Act,
the Act being a pre-Constitution Act.
(Para 6)

(C) Constitution of India, Sch. VII, List
III, Entry 33 — Law relating to control
of sugar-cane — Parliament is competent
to enact law by virtue of Entry 33 of
List III — Power conferred on Government
under Sec. 3 of Essential Commodities
Act and Sugar-cane (Control) Order
(1955), cannot be challenged as invalid.
(Para 7)

(D) Criminal P. C. (1898), Sec. 4 (1) (f)
— Complaint regarding offence under
Sec. 7 of Essential Commodities Act —
Offence punishable with three years imprisonment
— Is cognizable offence within
meaning of Sec. 4 (1) (f).
(Para 10)

Cases Referred: Chronological Paras
(1956) AIR 1956 SC 676 (V 43) =
1956 SCR 393, Tikuramji v. State
of U. P. 4

Mr. B. R. L. Iyengar, Senior Advocate
(Mr. U. P. Singh, Advocate with him),
for Appellants; Dr. V. A. Seyid Muham-
mad, Senior Advocate (Mr S. P. Nayar,
Advocate, with him), for Respondent
No. 1.

The following Judgment of the Court
was delivered by

HEGDE, J.:— This appeal against the
decision of the High Court of Patna in
Criminal W. J. C. No. 11 of 1966 was
brought after obtaining special leave from
this Court. The principal question raised
herein is whether the investigation which
is being carried on against the appellants
under sub-rule (3) of Rule 3 of Sugar-
cane (Control) Order, 1955 (to be hereinafter
referred to as the Order) read with
Section 7 of the Essential Commodities
Act 1955 (to be hereinafter referred to as
the Act) is in accordance with law.

2. The appellants are office bearers
of M/s. S. K. G. Sugar Ltd. (Lauriya). A
complaint has been registered against them
under sub-rule (3) of Rule 3 of the Order
read with S. 7 of the Act on the ground that
they have failed to pay to the sellers the price
of the sugar-cane purchased by them, within
the time prescribed. The said complaint
is being investigated. The appellants are
objecting to that investigation on various
grounds. They unsuccessfully sought the
intervention of the High Court of Patna
under Article 226 of the Constitution in
Cr. W. J. C. No. 11 of 1966. Hence this
appeal.

3. Mr. B. R. L. Iyengar appearing for
the appellants challenged the validity of
the investigation in question on various
grounds. We shall now proceed to deal
with each one of those grounds.

4. The 1st contention of Mr. Iyengar
was that sub-r. (3) of R. 3 could not have
been validly issued under S. 3 of the Act.
According to him the said Section 3 cannot
be used for controlling the payment of the
price of food crops; it can only deal with
food-stuffs, food crops are outside its scope.
This contention has been negated by the
High Court. We agree with the High Court
that there is no merit in this contention.
Section 2 (a) of the Act defines "essential
commodity". Sub-clause (v) of that clause
brings food-stuffs within the definition of
essential commodity. Clause (b) of Section 2
provides.

that food crops include sugar cane. The next important provisions in the Act are clauses (b) and (c) of Section 3 (1). Section 3 (1) provides that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production supply and distribution thereof and trade and commerce therein. Sub section (2) of that section says that without prejudice to the generality of the powers conferred by sub section (1) an order made thereunder may provide

(b) for bringing under cultivation any waste or arable land whether appurtenant to a building or not for the growing thereon of food-crops generally or of specified food crops, and for otherwise maintaining or increasing the cultivation of food crops generally, or of specified food crops."

Clause (c) provides for controlling the price at which any essential commodity may be bought or sold. From the scheme of clauses (b) and (c) of Section 2 and Section 3 of the Act it is clear that the Parliament intended to bring under control the cultivation and sale of food crops. In view of these provisions it is idle to contend that sugar cane does not come within the ambit of the Act. The question whether the cultivation and sale of sugar cane can be regulated under Section 3 of the Act came up for the consideration of this Court in *Ch. Tika Ramji v State of U P* 1958 SCR 393=(AIR 1958 SC 676). At pages 432 and 433 (of SCR)=(at p 703 of AIR) of the report it is observed

"Act X of 1955 included within the definition of essential commodity food-stuffs which we have seen above would include sugar as well as sugar cane. This Act was enacted by Parliament in exercise of the concurrent legislative power under Entry 33 of List III as amended by the Constitution Third Amendment Act 1954. Food crops were there defined as including crops of sugar cane and Section 3 (1) gave the Central Government powers to control the production supply and distribution of essential commodities and trade and commerce therein for maintaining or increasing the supplies thereof or for securing their equitable distribution and availability at fair prices. Section 3 (2) (b) empowered the Central Government to provide inter alia for bringing under cultivation any waste or

arable land whether appurtenant to a building or not for growing thereon of food crops generally or specified food crops and Section 3 (2) (c) gave the Central Government power for controlling the price at which any essential commodity may be brought or sold. These provisions would certainly bring within the scope of Central legislation the regulation of the production of sugar cane as also the controlling of the price at which sugar cane may be brought or sold and in addition to the Sugar Control Order, 1955 which was issued by the Central Government on 27th August 1955, it also issued the Sugar cane Control Order 1955 on the same date investing it with the power to fix the price of sugar cane and direct payment thereof as also the power to regulate the movement of sugar cane.

Parliament was well within its powers in legislating in regard to sugar cane and the Central Government was also well within its powers in issuing the Sugar-cane Control Order, 1955 in the manner it did because all this was in exercise of the concurrent power of legislation under Entry 33 of List III."

5 It is needless to say anything more on this question.

6 It was next contended by Mr Iyengar that the regulation of price of sugar-cane is expressly dealt with by the Bihar Sugar Factories Control Act 1937 and therefore we should not impliedly spell out the same power from the provisions of the Order and the Act. Mr Iyengar is not right in contending that the power that is sought to be exercised in the instant case is an implied one. Sub rule (3) of Rule 3 specifically provides that unless there is an agreement in writing to the contrary between the parties the purchaser shall pay to the seller the price of the sugar cane purchased within 14 days from the date of the delivery of the sugar cane. This is a specific mandate. If the Bihar Act provides anything to the contrary the same must be held to have been altered in view of Article 372 of the Constitution which provides that all laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force there in until altered or repealed or amended by a competent legislature or other competent authority. Quite clearly the Bihar Act is a pre Constitution Act and it could have continued to be in force only till it was altered repealed or amended by a competent legislature or other competent

authority. We shall presently see that the authority that altered or amended that law is a competent one.

7. The next contention of the learned Counsel for the appellants was that the Parliament had no competence to enact any law relating to the control of sugarcane as that subject is within the exclusive legislative jurisdiction of the State, the same being a part of agriculture. This contention is again unsustainable in view of Entry 33 of List III of the Constitution which empowers the Parliament to legislate in respect of production, supply and distribution of food-stuffs. It is not disputed that the Parliament had declared by law that it is expedient in public interest that it should exercise control over food-stuffs. That being so it was well within the competence of Parliament to enact the Act and hence the power conferred on the Government under Sec. 3 of the Act cannot be challenged as invalid.

8. There is no substance in the contention that the impugned order contravenes the fundamental right guaranteed to the citizens under Article 19 (1). No fundamental right is conferred on a buyer not to pay the price of the goods purchased by him or to pay the same whenever he pleases.

9. The contention that in view of S. 11 of the Act, no cognizance could have been taken of the offence alleged is premature. This question does not arise in this case. No Court has yet taken cognizance of the case. That stage has still to come.

10. There is no substance in the contention that the complaint made before the police does not disclose a cognizable offence and as such the police could not have taken up the investigation of that complaint. The offence complained of is punishable with three years' imprisonment and as such it falls within the 2nd Sch of the Cr. P. C. and consequently the same is a cognizable offence as defined in Section 4 (1) (f) of the Cr. P. C. Hence it was open to the police to investigate the same.

11. For the reasons mentioned above we are unable to accept any of the contentions advanced on behalf of the appellants. In the result this appeal fails and the same is dismissed.

Appeal dismissed.

1970 CRI. L. J. 369 (Vol. 76, C. N. 84) =
AIR 1970 SUPREME COURT 272
(V 57 C 57)

(From AIR 1968 Orissa 26)

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Khetra Basi Samal and another etc.,
Appellants v. The State of Orissa etc.,
Respondents

Criminal Appeals Nos 160 and 171 of
1967, D/- 14-8-1969.

(A) Criminal P. C. (1898), Sections 417 (3), 417 (1), 239, 439 — Accused charged of offences committed in the course of same transaction — Case instituted against some of the accused upon complaint — Case clubbed under Section 239 along with case instituted against other accused upon police report — Acquittal of all accused — Appeal against acquittal of accused against whom cognizance is taken on police report, maintainable only at the instance of the State and not at the instance of complaint — Remedy of complainant is under Section 439. AIR 1968 Orissa 26, Reversed.

Where, in respect of offences committed by several accused persons in the course of the same transaction two cases — one instituted against some accused initially upon a police report and the other instituted against remaining accused upon a complaint — are clubbed under Section 239 and all accused are acquitted then an appeal against the acquittal of accused, against whom cognizance was taken upon the police report, will not lie at the instance of the complainant under Section 417 (3) but will only be maintainable if preferred by State Government under Section 417 (1). The two cases retain their individuality except for the convenience of the trial. The cases being separate cases of which cognizance was taken separately, the mere clubbing of the two cases together for the purpose of trial will not alter the nature of the cases so as to affect their appealability under Section 417. If appeal is not preferred by the State the complainant may invoke the powers of High Court under Section 439 if proper grounds for revision are present AIR 1968 Ori 26, Reversed. (Para 7)

(B) Criminal P. C. (1898), Section 439 — Acquittal of accused — Revision at the instance of private complainant — Revisional jurisdiction of High Court — High Court cannot re-appraise the evidence and upset the findings of Magistrate.

AN/AN/D936/69/MLD/D

The revisional jurisdiction conferred on the High Court under Section 439 is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under Section 417. This jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. It is not possible to lay down the criteria for determining such exceptional cases which will cover all contingencies. However some cases of this kind which will justify the High Court in interfering with a finding of acquittal in revision may be where the trial court has no jurisdiction to try the case but has still acquitted the accused or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court or where the acquittal is based on a compounding of the offence which is invalid under the law. AIR 1951 SC 196 and AIR 1951 SC 316 and AIR 1962 SC 1788, Rel on

(Paras 10, 11)

So where it is not evident that the trial court shut out any evidence which the prosecution wanted to produce or admitted any inadmissible evidence or overlooked any material evidence but the Magistrate after examining the evidence produced by the prosecution acquitted the accused as according to him there was no proof beyond reasonable doubt that it was the accused who committed the crime then it is not permissible under Section 439 for the High Court to proceed to reappraise the evidence of the witnesses and set aside the order of acquittal on the ground that Magistrate had not taken the trouble of sifting the grain from the chaff nor in such cases retrial can be ordered by High Court

(Para 12)

Cases Referred	Chronological	Paras
(1962) AIR 1962 SC 1788 (V 49) = 1963-3 SCR 412 K Chinnaswamy Reddy v State of A P		11
(1951) AIR 1951 SC 196 (V 38) = 1951 SCR 284 D Stephens v Nosibolla		10

(1951) AIR 1951 SC 316 (V 38) =

1951 SCR 676, Logendranath Jha
v Polailal Biswas 10

Mr S N Anand, Advocate, for Appellants (In Cr As No 160 of 1967) M/s R K. Garg, S C Agarwal and D P Singh, Advocates of M/s Ramamurthy and Co and Miss Sumitra Chakravarty, Mr Uma Dutt Advocates for Appellants (In Cr A No 171 of 1967) M/s V C Mahajan and R N Sachthey Advocates for Respondent (In Cr A No 160 of 1967)

The following Judgment of the Court was delivered by

MITTER, J These two appeals by special leave are from one judgment of the High Court of Orissa hearing an appeal from an order of acquittal of 31 persons accused on charges under Sections 147, 323 and 325 of the Indian Penal Code for being members of an unlawful assembly and having voluntarily caused hurt and inter alia a grievous one by dislocating a tooth by means of a knife like thing of one Jagabandhu Behera the appellant before the High Court

2 The incident is alleged to have happened on October 4, 1963 at about 11 A M in village Anantpur in course of which the accused persons are said to have assaulted Jagabandhu Behera with lathis and sharp instruments. The motive for the crime was said to be enmity arising out of Gram Panchayat election and previous litigation between Jagabandhu Behera and Khetrabasi Samal one of the said 31 persons. The first information report was lodged at 5 p m by one Magun Charan Biswal who however was not examined at the trial. In this report ten persons were stated to have taken part in assaulting and hurting Jagabandhu. More than six weeks thereafter Jagabandhu filed a complaint before a Magistrate in which he named 31 persons including those against whom the first information report had been lodged as his assailants. The complainant stated therein that he had been assaulted so mercilessly as to render him unconscious and he recovered consciousness in Anantapur Dispensary where he was treated by a doctor. From there he was taken to a hospital in Cuttack and was lodged there till November 18 1962.

3 The Magistrate examined the complainant on the same day and directed another Magistrate of the First Class to inquire and report. On January 23, 1963 after getting the report of such inquiry

and hearing the person against whom the complaint was made on their protest petition, the Magistrate held "that there was a *prima facie* case against the accused persons under Sections 147/323 I. P. C. except the first ten accused persons as per the complaint petition since they had already been sent for trial in G. R. No. 1943 of 1962." He took cognizance against accused persons from serial Nos. 11 to 31 as per the complaint petition under Sections 147/323 I. P. C.

4. The G. R. case had already been started on the basis of the first information report. On July 12, 1963 the complainant Jagabandhu Behera filed a petition to club the complaint case along with the analogous G. R. case and after giving a hearing to both parties the Magistrate passed an order on 15th July 1963 to the effect that the two cases were to be clubbed together and provisions of Section 252 Cr. P. C. were to be followed. The proceedings went on for an inordinately long time and ultimately on August 23, 1965 the trying Magistrate delivered a judgment acquitting all the accused. Jagabandhu Behera filed an appeal to the High Court under Section 417 (3) of the Code of Criminal Procedure and the grounds urged in support of such appeal were substantially based on the alleged failure of the Magistrate to take a proper view of the evidence.

5. Before the High Court, a point was taken on behalf of the respondents challenging the maintainability of the appeal as against accused 1 to 10 against whom cognizance was taken on the police report. Among these ten persons are the appellants in the two appeals to this Court. It was urged that as these ten persons had figured as accused in G. R. Case No. 1943 of 1962 an appeal against their acquittal would not lie at the instance of the complainant under Section 417 (3) but would only be maintainable if preferred under Section 417 (1) by the State Government. It was also contended that mere clubbing together of the cases, the G. R. case and the complainant's case, for joint trial would not change the character thereof so as to convert the G. R. case into a complaint case.

6. The High Court overruled this objection mainly on the ground that Section 239 Cr. P. C. allowed the trial of a number of persons whether accused of the same offence or of different offences if these were committed in the course of the same transaction. The High Court then considered the merits of the appeal,

examined the evidence of the prosecution witnesses and took the view that the testimony of prosecution witnesses 1, 2 and 5 who claimed to have witnessed the incident themselves had been discarded by the Magistrate on extraneous considerations. Sifting the evidence for itself the High Court held that seven of the accused i. e., the appellants to this Court were guilty of some of the charges framed against them and passed sentences ranging from three months to six months in different cases after setting aside the acquittal.

7. It was contended before us on behalf of the appellants that the appeal to the High Court was incompetent and in our view this contention must be accepted. There were two separate cases of which cognizance was taken separately. One was started on the basis of a police report while the other was on the complaint of Jagabandhu Behera. As the accused in both the cases were said to have committed the offences in the course of the same transaction, the cases were clubbed together for the purpose of trial and such a course was clearly permissible under Section 239, Cr. P. C. That did not however alter the nature of the cases so as to affect their appealability under Section 417. The two cases retained their individuality except for the convenience of the trial. If the cases had ended in conviction they would have had to be separately recorded. The first ten accused would have had to appeal from their conviction and sentence in the G. R. case and similarly the remaining accused from the complaint case. If the State did not think it proper to direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal in the G. R. case it might have been open to the complainant to invoke the powers of the High Court under Section 439 of the Code if proper grounds for revision were present.

8. Counsel for the respondents argued that this was a case where we should not allow the appeal on the ground that the High Court had gone wrong in exercising its powers under Section 417 (3) of the Code but should send the matter back to the High Court for disposal according to law including the powers under Section 439 of the Code. It was said that Jagabandhu Behera had been beaten up by a number of persons in a public place in broad day light and although there might be infirmities in the evidence adduced on behalf of the prosecution and

contradictory statements made by some of the prosecution witnesses, we should not put an end to the proceedings here but send the matter back to the High Court for proper disposal

9 In our view, the law does not permit such a course to be adopted on the facts of this case. The powers of the High Court under Section 439 Cr P C although wide are subject to certain limitations. Section 439 (4) expressly provides that the section shall not be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

10 This Court has had to examine the jurisdiction of the High Court under this section on several occasions. In *D Stephens v Nosibolla* 1951 SCR 284 = (AIR 1951 SC 196) it was pointed out (see at p 291 (of SCR) = (at p 199 of AIR)) that

"The revisional jurisdiction conferred on the High Court under Section 439 of Code of Criminal Procedure is not to be lightly exercised, when it is invoked by a private complaint against an order of acquittal, against which the Government has a right of appeal under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record."

Again in *Logendranath Jha v Polalail Bisi* as 1951 SCR 676 = (AIR 1951 SC 316) where the High Court had set aside an order of acquittal of the appellants by the Sessions Judge and directed their retrial this Court see at p 681 (of SCR) = (at p 318 of AIR), said

"Though sub section (1) of Section 439 authorises the High Court to exercise, in its discretion any of the powers conferred on a court of appeal by Section 423 sub section (4) specifically excludes the power to convert a finding of acquittal into one of conviction." This does not mean that in dealing with a revision petition by a private party against an order of acquittal the High Court could in the absence of any error on a point of law re appraise the evidence and reverse the findings of facts on which the acquittal was based provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterising the judgment of the trial court as

"perverse and lacking in perspective" the High Court cannot reverse pure findings of fact based on the trial courts' appreciation of the evidence in the case."

11 In *K Chinnaswamy Reddy v State of Andhra Pradesh* 1963 3 SCR 412 at p 418 = (AIR 1962 SC 1788 at p 1791) the court proceeded to define the limits of the jurisdiction of the High Court under Section 439 of the Criminal Procedure Code while setting aside an order of acquittal. It was said

"this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible or where material evidence has been overlooked either by the trial court or by the appeal court or where the acquittal is based on a compounding of the offence which is invalid under the law."

12 It may be that a case not covered by any of the contingencies mentioned above may still arise. But where as here the appeal court (the High Court in this case) has set aside the order of acquittal almost entirely on the ground that the Magistrate should not have disbelieved the three eye witnesses, viz., P Ws 1, 2 and 5 the case clearly falls within the contingencies mentioned in the above decision of this Court. The High Court judgment does not show that the trial court shut out any evidence which the prosecution wanted to produce or admitted any inadmissible evidence or overlooked any material evidence. The Magistrate examined the evidence produced by the prosecution. According to him, there was strong enmity between the two parties of Jagabandhu Behera and Khetra Basi Samal and although the incident was supposed to have taken place in front of a large number of shops and before a large

gathering, only one person from those shops, P. W. 5 who was a chance witness occasionally going to the place for the purpose of carrying on his business in fish, was examined by the prosecution and there was no explanation for not examining the other witnesses named in the complaint petition. P. W. 1, one of the witnesses mentioned in the judgment of the High Court and relied on by it was the complainant's father-in-law and as such a person interested in the success of the prosecution. Relying on the testimony of the doctor who had examined Jagabandhu Behera, the Magistrate found himself unable to accept the evidence of the prosecution witness to the effect that the injury to the tooth was caused by a sharp-cutting instrument in which case other external injuries could not have been avoided. The Magistrate was doubtful as to whether the accused persons had any hand in the commission of the crime and although the assault on Jagabandhu was a brutal one there was, according to the Magistrate, no proof beyond reasonable doubt that it was the accused persons who had committed it. The High Court proceeded to re-appraise the evidence of the witnesses and upset the finding of the Magistrate thereon on the ground that he "had not taken the trouble of sifting the grain from the chaff." Clearly such a course is not permissible under Section 439 of the Criminal Procedure Code. Nor in our opinion the facts and circumstances of this case warrant the ordering of a re-trial by the High Court if it felt disposed to exercise powers under Section 423 Cr. P. C expressly included in Section 439. Sending the case back to the High Court can serve no useful purpose.

13. As the appeal to the High Court was incompetent, we allow the appeals and direct the cancellation of their bail bonds.

Appeals allowed.

1970 CRI. L. J. 373 (Vol. 76, C. N. 85) =
AIR 1970 SUPREME COURT 283
(V 57 C 60)

(From: Bombay)*

S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ

Abdul Razak Murtaza Dafadar, Appellant v. State of Maharashtra, Respondent.
Criminal Appeal No. 245 of 1968, D/- 2-5-1949.

(A) Evidence Act (1872), Secs. 24 and 26 — Accused kept in remand for fifteen days — Then after being kept in jail custody for three days produced before executive Magistrate for recording confession — After preliminary questioning and a warning accused sent back to jail — Confession recorded on next day, held, was voluntary — Accused had spent four days in judicial custody and he was not under influence of investigating agency for at least four days — (Criminal P. C. (1898), Sec. 164.)

The accused was kept in remand for about a fortnight after his arrest. Thereafter he was kept in jail custody for three days and then on fourth day he was produced before the Executive Magistrate for recording confession. The Magistrate made the preliminary questioning of the accused, gave him a warning and sent him back to jail. On the next day the accused was produced before the Magistrate and the confession was recorded. During the trial, the accused in answer to question regarding the confession merely said that he did not make the confession. He did not say that it was made on account of any inducement or coercion on the part of police. On the contention that the confession was not voluntary as the accused was in prolonged police custody for at least a fortnight before making the confession;

Held that the confession of the accused was voluntary. It was clear that he had spent four days in judicial custody and he was not under the influence of the investigating agency for at least four days. Again he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him. Cr. App No 1116 of 1967 and Confirmation Case No 15 of 1967, D/- 17-

* (Cri Appeal No 1116 of 1967 and Confirmation Case No. 15 of 1967, D/ 17-11-1967 — Bom)

11 1967 (Bom), Affirmed, AIR 1956 SC 56 & AIR 1957 SC 637, Disting (Para 9)

(B) Evidence Act (1872), Sec 45 — Dog tracking evidence — Admissibility

(Obiter) The tracker dogs evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight. *Am Jurs 2nd Edn, Vol 29 p 429 para 378 and 1866 N I 160, Ref to (Para 11)*

[Their Lordships however did not express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the accused.]

(Para 12)

Cases Referred Chronological Paras

(1957) AIR 1957 SC 637 (V 44)=

1957 Cri LJ 1014 Sarwan Singh

v State of Punjab

9

(1956) AIR 1956 SC 56 (V 43)=

1956 Cri LJ 152 Nathu v State of U P

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(1866) 1866 N I 160 R v Montgomery

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Mr B D Sharma Advocate, Amicus Curiae for Appellant M/s H R Khanna & S P Nayar Advocates for Respondent

The following Judgment of the Court was delivered by

RAMASWAMI, J — The appellant was convicted under Sections 302, 307, 325 and 427, Indian Penal Code and also under Section 126 of the Indian Railways Act by the Additional Sessions Judge of Sangli in Sessions Case No 9 of 1967. The appellant was sentenced to death under Section 302, Indian Penal Code. No other sentence was awarded for the remaining offences. The appellant preferred an appeal to the Bombay High Court in Criminal Appeal No 1116 of 1967 which was dismissed on the 17th November, 1967 and the sentence of death imposed on the appellant was affirmed. This appeal is brought by special leave from the judgment of the Bombay High Court.

2 The prosecution case arises out of

the derailment of Poona Wasco Express train at about 4.40 in the early morning of October 10 1966. The derailment occurred on the Vaddi bridge which is beyond Miraj Station. As a result of this derailment, five bogies were capsized. Out of these five bogies two went into the stream down below, two were on the slope and one on the track. In this incident ten persons died and a large number of other persons received grievous injuries. The charge against the appellant was that he had removed fish plates, nuts, bolts etc., of the rail joint near Vaddi bridge No 215 on Miraj Mahisal Railway track at Km No 743/9 and 10 between 4.05 a.m. and 4.50 a.m. in the early morning of October 10 1966 with intent or knowledge that he was likely to endanger the safety of the persons travelling in the said train and he caused the Poona Wasco express train No 206 Dn to be capsized at Vaddi and thereby committed murder knowingly causing deaths of 10 persons who were passengers in that train.

3 The appellant Abdul Razak Murtaja Dafedar was working at Miraj railway station as gangman in gang No 13 of which Laxman Madar was the Mukadam or Gangmate and Bapu Sopana was the Keyman. The area under this gang was from Km Nos 741/3 to 747/5 covering a railway track of 4 miles or 6 km. Vaddi bridge falls within this area. Vaddi bridge is at 2½ miles from the railway station of Miraj, towards Belgaum. Mhasal gate is also towards Belgaum at 1½ miles from the railway station on the way to Vaddi bridge. At Mhasal gate is the quarter of Laxman Madar the gangmate. Near the quarter of Laxman is the tool box where the tools of the gang are kept under lock and key.

4 Vaddi bridge is the biggest bridge out of the seven bridges lying between Km Nos 743/9 to 747/5. The height of the bridge is about 30' to 40'. There are six big arches and two small arches on each side of the bridge. The bridge is of masonry stone. The case of the prosecution is that the appellant quarrelled with Laxman who always found fault with him and did not spare him when he was absent from or late in attending duties. On two or three occasions Laxman had altercation with the appellant and Laxman had reported against him and Dastgir, a friend of the appellant. On October 9 1966 an altercation took place between the appellant and Laxman. Lar-

man found the work of levelling and packing done by other gangman except the appellant satisfactory and so Laxman asked the appellant to correct the defect. The appellant got irritated and took exception to the remark of Laxman and rushed towards him with a pick axe saying that he would break his head. Laxman threatened to report the conduct of the appellant to the Permanent Way Inspector and went away towards the tool box. Laxman got a report written by Maruti about the incident and handed over the report to the Assistant Station Master at about 7 or 7.30 p. m. Train No. 204 was due to arrive and the Station Master was in a hurry and so he despatched the complaint by free service way bill slip through his office boy to the under-guard of the incoming train, namely, 204 Dn. According to prosecution case Ramchand Sadre, P. W. 37, saw the appellant going on the track at 3 or 3.15 a. m. P. W. 37 was serving as a Sainik of the Railway Protection Force at Miraj Railway Station. He was on duty at 'G' point from 9 p. m. on October 9, 1966 till 7 a. m. the next day. After the witness saw the appellant going along the track goods train No. 239 arrived at Miraj Railway Station at 4.10 or 4.15 a. m. this goods train had passed the Vaddi bridge at 4.05 a. m. The appellant let the goods train pass and approached the railway bridge at Vaddi with a spanner and removed the fish plates and the keys and jaws of the sleepers of the 18" rail of right hand side of the rail line. When the Poona-Wasco Express Train approached the bridge there was a "thud-thud" sound as if the train was collapsing. The engine driver closed the steam and applied brakes as soon as the engine entered the bridge but before stopping, the engine had covered $\frac{3}{4}$ th length of the bridge. The lights went off, there was screaming and wailing of the people. It was found by the engine driver, guard and others who alighted from the train that the basal wheel of the engine had derailed and the tender of the engine was tilted and to this tender was hanging the first bogie which had vertically fallen down in the stream. The second bogie had completely fallen in the stream. The third bogie had also telescoped like the first bogie resting its one end on the second bogie that had fallen in the stream and the other end at the slope. The fourth bogie had derailed and slanted whereas the front wheels of the fifth bogie had derailed. The

engine driver, guard, and one police constable searched and found the affected joint near which had fallen the removed fish plates, nuts, bolts, keys and jaws scattered in undamaged condition. There was also another fish plate and one nut fallen on embankment in undamaged condition.

5. The engine driver made a complaint to the Police Sub-Inspector Bandgui. Panchanama of the scene of offence was prepared. The things lying at the spot were not touched but were guarded and an area of half a mile was cordoned off. On October 10, 1966 at 7 a. m. all the gangmen including the appellant collected at pole No. 744/4 for daily work but were asked by the police officers to be seated below the bridge as their statements were to be recorded. Laxman and appellant were also detained for interrogation. On the same night at 8.30 p. m. near the spot of the accident the police dog Sheru of C. I. D. Poona was brought. The appellant Laxman and five other persons were made to stand in a row facing the rail line in the presence of panchas. The police dog Sheru was made to smell the affected joint. The leading strap was held by the controller of the dog. The dog after smelling the articles near the affected joint went towards the embankment where one fish plate was lying, smelt it and then went to the row of persons and smelling two persons smelt the appellant also and pounced upon him with its forelegs resting on the chest of the appellant.

6. On October 17, 1966 the appellant offered to produce the spanner from the place where he had hidden it near the railway track. A memorandum of his statement was drawn in the presence of panchas. It is said that the appellant led the panchas and the police officers to the place between pole Nos. 744/6-7 and there dug out the earth and took out the spanner and produced it. On October 29, 1966 the appellant made a confession before the executive magistrate, Ex. 130.

7. The appellant pleaded not guilty to the charges. He alleged that there was no altercation between him and Laxman and that he did not threaten Laxman with pick axe. As regards the confessional statement the appellant said that he did not understand Marathi properly and therefore did not know what was written in the statement. He also denied that he had gone to the spot to recover the spanner in the presence of panchas. As regards the police dog Sheru

the appellant said that after smelling the articles on the spot the dog passed him without pouncing upon him

8 The trial Court based the conviction of the appellant on (1) movement of the appellant on the day of the incident as stated by Ramchand Sardare (sic) P W 37 (2) discovery of the spanner with which the nuts and bolts were removed (3) the confession statement of the appellant made to the Executive Magistrate and (4) the identification of the appellant by the dog Sheru. The High Court accepted the prosecution evidence on all these points and affirmed the conviction of the appellant

9 It was contended on behalf of the appellant in the first place that the confession Ex 130 recorded by Taluka Executive Magistrate P W 51 was not voluntary. It was pointed out that the appellant was arrested on October 10 1966 at 11 p m and was kept in remand till October 18 1966. On October 18 a remand application was made and time was granted for a week. On October 25, 1966 the Magistrate directed that the accused should be detained in District Jail at Sangli. The appellant was produced before the Magistrate on October 28 1966 when there was preliminary questioning and warning given to the appellant. On the next day the appellant was produced before the Magistrate and the confession was made. The argument was stressed on behalf of the appellant that he was in prolonged police custody for at least a fortnight before the confession was made and therefore it must be held that the confession was not voluntary. Reliance was placed on the judgment of this Court in *Nathu v State of U P* AIR 1956 SC 56 in which the appellant was kept in the custody of C I D Inspector on 7th August and the confession was recorded on 21st August. It was held that prolonged custody immediately preceding the making of the confession was sufficient unless it was properly explained to stamp it as involuntary. No attempt was made in that case to explain the prolonged custody. In the absence of such explanation it was held by the Court that the confession was not a voluntary confession. In the present case the appellant was kept in jail custody for three days from October 25 to October 28 1966 and on October 28 the Executive Magistrate made the preliminary questioning of the appellant gave him a warning and sent him back to the District Jail at Sangli. On the next day the

appellant was produced before the Magistrate and the confession was recorded. It is clear that the appellant had spent four days in judicial custody and he was not under the influence of the investigating agency for at least four days. Again he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him. It is manifest that the material facts of the present case are not parallel to those of *Sarwan Singh v State of Punjab*, AIR 1957 SC 637 (sic) (*Nathu v State*, AIR 1956 SC 56) and the ratio of that case has no application to the present case. It was also argued that the wife of the appellant used to go to the police station with her child and it was at her persuasion that the appellant had agreed to make the confession. The suggestion was that the confession was not voluntary but was made on account of some inducement. But no such suggestion was made to the police officers. The only question put to the Deputy Superintendent of Police Chavan was whether the wife of the accused used to go to the police station everyday and the witness denied it. According to Chavan, she went to the police station only on October 13 and 18 that is only on two occasions. No further suggestion was made to Chavan. Apart from this, if any coercion or inducement was used the appellant was the person who should make such a complaint. The appellant in answer to question No 77 regarding the confession merely said that he did not make the confession. He did not say that the confession was made on account of any inducement or coercion on the part of the police. Both the trial Court and the High Court have upon an examination of all the circumstances reached the conclusion that the confession of the appellant was voluntary and we see no reason to take a different view.

10 The next question is regarding the discovery of the spanner. The Deputy Superintendent of Police, Chavan P W 86 was questioning the appellant from the 11th to the 16th October. It was on the 17th that the appellant was prepared to point out where he had kept the spanner. Two panchas were called, one of whom is Narayandas Shedji, P W 46. In his presence the memorandum of what the appellant stated was made. Therein the appellant said "the same spanner while coming back I have kept hidden in the shrub on the corner of railway line between pole Nos 744/6 and 744/7. I will

produce the same personally". The appellant then led the panchas and the police to the spot where he had kept the spanner under the shrubs about 6 inches below the earth which he dug out for taking out the spanner. The panchanama is Ex 112. The spanner was found about 5 furlongs from the bridge towards the residence of the appellant. The evidence of the Deputy Superintendent of Police and the two panchas has been accepted both by the trial Court and the High Court. The discovery of the spanner at the instance of the appellant is an important circumstance which corroborates the confession of the appellant that he had removed the fish plates, nuts, bolts, and the keys and jaws of the sleepers from the railway line on the alleged date.

11. It was lastly urged on behalf of the appellant that the lower Courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions.

"There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases, however, reveals that most Courts in which the question of the admissibility of evidence of trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime. Para 378, Am Juris 2nd edn Vol. 29, p. 429." There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine in-

ferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In *R v. Montgomery*, 1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog's reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument" and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.

12. In the present case it is not, however, necessary for us to express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the appellant. We shall assume

in favour of the appellant that the evidence of P W 72 and of the panchas with regard to the identification of the appellant by the tracker dog is not admissible. Even on that assumption we are of opinion that the rest of the prosecution evidence namely the confession of the appellant Ex 130 and the discovery of the spanner conclusively proves the charges of which the appellant has been convicted.

13 For these reasons we affirm the judgment of the High Court of Bombay dated 16/17, November 1967 in Cri A No 1116 of 1967 and dismiss this appeal.

Appeal dismissed

1970 CRI L J 378 (Vol 76, C N 88)

(ALLAHABAD HIGH COURT)

D D SETH J

Chitawan and others Applicants v Mahboob Ilahi Opposite Parties

Criminal Misc No 1466 of 1968 in Cri Ref No 210 of 1967 D/- 18-12-1968

(A) Criminal P C (1898) Ss 561-A 369 439 — Inherent power of High Court — Exercise of to alter its earlier decision — Scope

The High Court has inherent power under Section 561-A to alter or review its previous judgment and this power is not affected or limited by any provision contained in the Code including Section 369. Section 369 does not take away the inherent powers vested in the High Court under Section 561-A to make such orders as may seem necessary to give effect to any order under the Criminal Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

(Paras 11, 13, 32)

The inherent power cannot be invoked in respect of any matter covered by the specific provisions of the Code. It can also not be invoked if its exercise would be inconsistent with the specific provisions of the Code. Case law discussed.

(Para 27)

(B) Criminal P C (1898) Ss 435 145 — Four persons claiming joint right in certain land — Order under S 145 restraining them from interfering with possession thereof — Revision by one of them — Other parties not even arrayed as opposite parties — No effective or final order being possible revision is not maintainable.

(Para 35)

(C) Criminal P C (1898) Ss 432 145 — Order of trial Court under S 145 — Sessions Judge disagreeing with Magistrate on question of possession of land and

FM/GM/C506/69/BNP/D

making reference — Reference not being on question of law is not sustainable.

(Para 36)

Cases Referred Chronological Paras

- (1967) AIR 1967 SC 286 (V 54) = 1967 All WR (HC) 400 — = 1967 Cri LJ 287 Pampapathy v State of Mysore 26 27
(1966) AIR 1966 All 221 (V 53) = 1966 All LJ 24 (FB) Sangam Lal v Rent Control and Eviction Officer 20 21
(1966) 1966 All WR (HC) 534 = 1966 All Cri R 315 (2) Raj Karan v State 32
(1964) AIR 1964 SC 1372 (V 51) = (1965) 5 SCR 174 Thungabhadra Industries Ltd v Govt of A P 28
(1962) AIR 1962 SC 1208 (V 49) = 1962 (2) Cri LJ 288 Sankatha Singh v State of U P 24 25
(1959) AIR 1959 All 313 (V 46) = 1959 Cri LJ 541 Mahendra Pal v State of U P 14
(1959) AIR 1959 All 315 (V 46) = 1959 Cri LJ 543 (FB) Raj Narain v State 17 19 20 21 24 32
(1958) AIR 1958 SC 376 (V 45) = 1958 Cri LJ 701 T H Hussain v M P Mondkar 18
(1955) AIR 1955 All 712 (V 42) = 1955 Cri LJ 1557 Jagannath Singh v Bidheshi 15 16
(1954) AIR 1954 SC 194 (V 41) = 1954 Cri LJ 475 Surendra Singh v State of U P 22 23 30 31

N C Rajbanshi R B Sahai and S N Sahai for Applicant A G A and T P Asthana for Respondent

ORDER — Criminal Misc Application No 1466 of 1968 has been filed under Section 561-A Criminal Procedure Code by Chitawan and others praying that the application be allowed and Criminal Reference No 210 of 1967 which has been made to this Court by the learned Civil and Sessions Judge Allahabad and which had been accepted by me by my order dated 5th April 1968 be re-heard.

2 On 5th April 1968 after hearing the learned counsel for the parties I had accepted Criminal Reference No 210 of 1967 made to this Court by the learned Civil and Sessions Judge Allahabad and had set aside the order of the learned Sub-Divisional Magistrate Phulpur dated 31st December 1966 releasing the land in dispute in favour of Chitawan and others and ordered the property to be released in favour of Mahboob Ilahi Criminal Misc Application No 1466 of 1968 made under the provisions of S 561-A Criminal Procedure Code was filed in this Court on 15th April 1968.

3 The facts of Criminal Reference No 210 of 1967 were that Mahboob Ilahi and some other persons had filed an application under Section 145 Criminal Pro-

cedure Code, in the Court of the learned Sub-Divisional Magistrate, Phulpur stating they were in possession of the land in dispute along with seven Neem trees and two huts standing thereon and since Chitawan and others were trying to interfere with their possession there was an apprehension of breach of peace. The learned Sub-Divisional Magistrate had called for a report from the police authorities and the Station Officer of Phulpur, on 8th September 1966, reported that there was an apprehension of breach of peace between the parties on account of the dispute regarding the land. On getting the police report the learned Sub-Divisional Magistrate passed a preliminary order under Section 145, Criminal P. C., on 12th September 1966 and the land in dispute was attached on 26th September 1966. The learned Magistrate also directed the parties to file their written statements, affidavits and such other evidence in support of this respective cases as they deemed necessary.

4. Accordingly the parties filed their written statements. On behalf of Mahboob Ilahi affidavits of Mahboob Ilahi, Murli Dhar, Bihari Lal, Abdul Majeed, Bafati and Anurudh Narain Singh were filed and on behalf of Chitawan and others affidavits of Chitawan, Mohammad Abbas, Dost Mohammad and Bai Nath were filed. Mahboob Ilahi and others filed two documents also in support of their case.

5. The learned Sub-Divisional Magistrate, after hearing the parties and, after considering the oral and documentary evidence on record, came to the conclusion that Chitawan and others were in possession of the land in dispute on the date of the preliminary order and two months prior to it. He, therefore, ordered the land to be released in favour of Chitawan and others and forbade Mahboob Ilahi and others from interfering with the possession of Chitawan etc till they were otherwise evicted in due course of law.

6. Against the order of the learned Magistrate Mahboob Ilahi alone preferred a revision which was heard by the learned Civil and Sessions Judge, Allahabad, who made the reference on 1st June 1967 recommending to this Court that the order passed by the learned Sub-Divisional Magistrate releasing the land in dispute in favour of Chitawan and others be set aside and that the land be released in favour of Mahboob Ilahi.

7. As already stated above, the reference came up for hearing before me on 5th April 1968 when, after hearing the learned counsel for the parties and after going through the orders passed by the Courts below and through the record of the case, I accepted the reference and set aside the order passed by the learned Sub-Divisional Magistrate on 31st December 1966 and ordered the land to be released in favour of Mahboob Ilahi.

8. Thereafter the application under Section 561-A, Criminal P. C., was filed praying that my order dated 5th April 1968, accepting the reference, be set aside and the reference be reheard. The grounds on which the application under Section 561-A, Criminal P. C., has been made are that after the order of the learned Sub-Divisional Magistrate releasing the land in dispute in favour of Chitawan and others Mahboob Ilahi alone filed a revision against that order. Abdul Azz, Mohammad Ali and Sami Ullah, who had joined Mahboob Ilahi in filing the application under Section 145, Criminal P. C., did not prefer a revision against the order passed by the learned Sub-Divisional Magistrate on 31st December 1966 releasing the land in dispute in favour of Chitawan and others. They were also not made opposite parties before the revisional Court. According to the applicants of the application under S 561-A, Criminal P. C., Abdul Azz, Mohammad Ali and Sami Ullah were necessary parties and in their absence the revision could not have been decided by the learned Civil and Sessions Judge and no effective and final order could be passed in their absence by the referring Court as the order of the learned Sub-Divisional Magistrate had become final against them and in case the revision of Mahboob Ilahi was allowed the result would have been that two contradictory orders would have been passed by the revisional Court. The next ground mentioned in the application under S 561-A, Criminal P. C., is that the learned Civil and Sessions Judge, as a revisional Court, could not interfere with the findings of fact regarding possession recorded by the learned Sub-Divisional Magistrate, Phulpur, according to Chitawan and others the learned Sub-Divisional Magistrate had recorded a specific finding that they were in possession over the 'charri' and 'Marha' etc situate on the land in dispute on the date of the preliminary order and within two months prior to that which fact was admitted by Mahboob Ilahi and his witnesses. This finding of fact recorded by the learned Sub-Divisional Magistrate, according to Chitawan and others, had not been reversed by the learned Civil and Sessions Judge, and therefore, the learned Civil and Sessions Judge, could not direct the land in dispute to be released in favour of Mahboob Ilahi. The next ground mentioned in the application under S 561-A, Criminal P. C., is that no reference could be made on questions of fact.

9. A preliminary objection was raised by Sri T. P. Asthana, learned counsel representing Mahboob Ilahi, and it was that this Court could not review the order passed on 5th April 1968 as there is no provision for review in the Criminal P. C. and, therefore, the application under Section 561-A, Criminal P. C., is not maintainable. According to Sri T. P. Asthana

once this Court had accepted the reference and had pronounced the judgment that judgment could not be altered

10 In support of his preliminary objection Sri Asthana placed reliance on Section 369 Criminal P C and contended that that section was a complete bar to the order passed by this Court on 5th April 1968 being reviewed Sections 369 Criminal P C reads as follows

Save as otherwise provided by this Code or by any other law for the time being in force or in the case of a High Court by the Letters Patent or other instrument constituting such High Court no Court when it has signed its judgment shall alter or review the same except to correct a clerical error

11 I do not agree with the submission made by Sri Asthana that Section 369 Criminal P C bars this Court from altering or reviewing its previous judgment. The words save as otherwise provided by this Code existing in Section 369 Criminal P C are very significant and show that Section 369 Criminal P C itself provides that the Court cannot alter its previous judgment save as otherwise provided by the Criminal P C. In other words Section 369 Criminal P C does not take away the inherent powers vested in this Court under Section 561 A Criminal P C to make such orders as may be necessary to give effect to any order under the Criminal P C or to prevent abuse of the process of any Court or otherwise to secure the ends of justice

12 Section 561 Criminal P C reads as follows—

Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice

13 Section 561 A Criminal P C is not at all ambiguous and it completely saves the inherent powers of this Court which are not affected or limited by any provision contained in the Criminal P C including Section 369 of the Code. I therefore do not find any force in the contention made by Sri Asthana that S 369 Criminal P C excludes the inherent powers vested in this Court by S 561 A Criminal P C

14 In support of his contention Sri Asthana relied upon Mahendra Pal v State of U P AIR 1959 All 313 in which it was held by a learned single Judge of this Court as follows

The ordinary rule enacted in Sec 369 Criminal P C applies to High Courts also. Even apart from the provisions of that section finality attaches to orders passed by a High Court in appeals and criminal revisions and it is not open to

the same High Court to alter or review the same. Any one feeling aggrieved by the orders can seek his remedy before the Supreme Court alone

An application for review on mere ground that the counsel who argued the revision inadvertently omitted to urge certain points of law is not maintainable

15 Sri Asthana next placed reliance on Jagannath Singh v Bidheshi AIR 1955 All 712 in which a learned single Judge of this Court held as follows—

In normal circumstances the High Court has no power to review its previous decision in a criminal case but where a mandatory provision of law has been contravened resulting in abuse of the process of the Court it is entitled to correct an obvious error

Thus where a reference to the High Court arising out of the proceedings under Section 145 Criminal P C is decided ex parte without hearing the successful party or his counsel there is no contravention of any mandatory provision of law and the High Court is not entitled to review its decision or order. In such a case the absent party was neither an accused person within Section 439 (2) nor had a right to be heard in view of S 440

The facts of Jagannath Singh's case AIR 1955 All 712 are entirely different. In that case in reference arising under Section 145 Criminal P C successful party or his counsel were not heard. In the instant case I heard the counsel for the parties and therefore Jagannath Singh's case AIR 1955 All 712 is distinguishable

17 Sri S N Sahai in support of the application under Section 561 A Criminal P C placed reliance on a Full Bench ruling reported in Rai Narain v State AIR 1959 All 315 in which the Full Bench by majority held that—

The High Court has power to revoke, recall or alter its own earlier decision in a criminal revision and rehear the same

This can be done only in cases falling under one or the other of the three conditions mentioned in S 561 A namely

(i) for the purpose of giving effect to any order passed under the Code of Criminal Procedure

(ii) for the purpose of preventing abuse of the process of any Court

(iii) for otherwise securing the ends of justice

18 In T H Hussain v M P Mondkar AIR 1958 SC 376 it was held by their Lordships of the Supreme Court that

Inherent power conferred on High Court under S 561 A has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. After all procedure whether criminal or civil must serve the higher purpose of justice and it is only

when the ends of justice are put in jeopardy by the conduct of the accused that the inherent power can and should be exercised"

19. One of the learned Judges in the Full Bench case of Raj Narain, AIR 1959 All 315 (FB), held that

"Generally it may be stated that powers under S. 561-A to rehear a case can only be exercised where the facts of the case are shocking to the conscience. Section 561-A thus would not authorise this Court to rehear a case where the applicant or appellant was not heard due to some fault of his or of his counsel"

20. Sri Asthana submitted that the Full Bench case of Raj Narain, AIR 1959 All 315 (FB), was in conflict with the decision of another Full Bench in Sangam Lal v. Rent Control and Eviction Officer, AIR 1966 All 221, in which the Full Bench of this Court held that

"There is power of review both in cases where judgment has been delivered but not signed and cases in which judgment has been delivered, signed and sealed. In the former case, the power to alter or amend or even to change completely is unlimited provided notice is given to the parties and they are heard before the proposed change is made, while in the latter case the power is limited and review is permitted only on very narrow grounds. Hence a judgment which has been orally dictated in open Court can be completely changed before it is signed and sealed provided notice is given to all parties concerned and they are heard before the change is made"

21. In Sangam Lal's case, AIR 1966 All 221, the Full Bench of this Court was dealing with the Rules of this Court contained in Chapter VII, Rules 1 to 4 and were deciding a civil miscellaneous application made in a special appeal. There is thus, in my opinion, no conflict between the Full Bench in Sangam Lal's case, AIR 1966 All 221, and the Full Bench in Raj Narain's case, AIR 1959 All 315

22. In support of his preliminary objection Sri Asthana also relied upon a decision of the Supreme Court in Surendra Singh v. State of Uttar Pradesh, AIR 1954 SC 194, in which it was held as follows:

"A judgment is the final decision of the Court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court. It is a judicial act which must be performed in a judicial way. The decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement. This is the first judicial act touching the judgment which the Court performs after the hearing. Everything else up-till then is done out of Court and is not intended to

be the operative act which sets all the consequences which follow on the judgment in motion. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the Court. That is what constitutes the 'judgment'

Upto the moment the judgment is delivered Judges have the right to change their mind. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. It follows that the Judge who 'delivers' the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the Court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the Court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part.

Where, therefore, of the two Judges of the High Court who hear an appeal in a criminal case, one, purporting to write a joint judgment, prepares a judgment, signs it and sends it to the other Judge but before it is delivered, dies, then the judgment, if delivered by the other Judge, is not a valid judgment"

23. The facts of the instant case are entirely different and I see no relevancy of the decision of the Supreme Court in Surendra Singh's case, AIR 1954 SC 194, to the facts of the instant case.

24. Sri Asthana also contended that the decision of the Full Bench in Raj Narain's case, AIR 1959 All 315, is no longer a good law in view of the decision of the Supreme Court in Sankatha Singh v. State of Uttar Pradesh, AIR 1962 SC 1208, in which their Lordships of the Supreme Court held that:

"An appellate Court has no power to review or restore an appeal which has been disposed of. A Sessions Judge cannot set aside his first order passed in appeal dismissing the appeal, when neither the appellants nor their counsel appeared and cannot order the re-hearing of the appeal. Section 369, read with S 424 of the Code, makes it clear that the appellate Court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error.

Further, assuming that the Sessions Judge can exercise inherent powers, he cannot pass the order of the re-hearing of the appeal in the exercise of such powers when S 369, read with S 424, of the Code, specifically prohibits the altering or reviewing of its order by a Court. Inherent powers cannot be exercised to

do what the Code specifically prohibits the Courts from doing

25 Sankatha Singh's case AIR 1962 SC 1208 in my opinion, is of no help to Sri. Asthana as the head note of that case quoted by me above itself shows

26 Sri Asthana also placed reliance on the following observations made by the Supreme Court in *Pampapathy v State of Mysore* 1967 All WR (HC) 400 = (AIR 1967 SC 286)

The inherent power of the High Court mentioned in S 561-A Cr P C can be exercised only for either of the three purposes specifically mentioned in the section. The inherent power cannot be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that S 561-A can come into operation. No legislative enactment dealing with the procedure can provide for all cases that can possibly arise and it is an established principle that the Courts should have inherent powers apart from the express provision of law which are necessary to their existence and for the proper discharge of the duties imposed upon them by law. This doctrine finds expression in S 561-A which does not confer any new powers on the High Court but merely recognises and preserves the inherent powers previously possessed by it. We are therefore of the opinion that in a proper case the Court has inherent power u/s 561-A Cr P C to cancel the order of suspension of sentence and grant of bail to the appellant made u/s 426 Cr P C and to order that the appellant be re-arrested and committed to jail-custody."

27 As is clear from the above quotation the Supreme Court dealt with the scope of the inherent power vested in the High Court under Section 561-A, Criminal Procedure Code and held that that inherent power cannot be invoked in respect of any matter covered by the specific provisions of the Code. The Supreme Court further held that the inherent power cannot also be invoked if its exercise would be inconsistent with the specific provisions of the Code. The Supreme Court in *Pampapathy's case* 1967 All WR (HC) 400 = (AIR 1967 SC 286) did not hold that this Court under S 561-A Criminal Procedure Code does not possess an inherent power to alter its judgment pronounced in a criminal case in order to secure the ends of justice.

28 Sri Asthana next placed reliance on the following observations made by the Supreme Court in *Thungabhadra Industries Ltd. v Govt of A P* AIR 1964 SC 1372

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it a clear case of error apparent on the face of the record would be made out.

29 These observations were made by the Supreme Court while dealing with the provisions of Order 47 Rule 1 Civil Procedure Code. Thus the observations of the Supreme Court relied upon by Sri Asthana are of no help to him in deciding the application under Section 561-A Criminal Procedure Code.

30 Sri Asthana strongly relied upon the following observations of their Lordships of the Supreme Court in AIR 1954 SC 194 at p 197—

After the judgment has been delivered provision is made for review. One provision is that it can be freely altered or amended or even changed completely without further formality except notice to the parties and a re-hearing on the point of change should that be necessary, provided it has not been signed. Another is that after signature a review properly so-called would lie in civil cases but none in criminal but the review when it lies is only permitted on very narrow grounds.

31 Sri Asthana contended that the Supreme Court in *Surendra Singh's case* AIR 1954 SC 194 has laid down that an order passed in a criminal case cannot be reviewed by this Court. But this contention is not correct. The words a review properly so-called would lie in civil cases but none in criminal but the review when it lies is only permitted on very narrow grounds in *Surendra Singh's case* AIR 1954 SC 194 are very significant. They show that the Supreme Court held that a review 'properly so-called' does lie in a criminal case but it lies 'on very narrow grounds'.

32 Not a single ruling has been cited by Sri Asthana which shows that the decision of the Full Bench in *Raj Narain's case* AIR 1959 All 315 has either been overruled by a larger Bench of this Court or by the Supreme Court. Sitting singly I am bound by the Full Bench decision in *Raj Narain's case* and it must therefore be held that this Court has the inherent power to review its previous judgment in order to secure the ends of justice. I am fortified in my view by a decision of a learned single Judge of this Court in *Raj Karan v State* 1966 All W R (HC) 534 in which it was held as follows.

In order to secure the ends of justice in the special circumstance of a particular case it is possible for the High Court to

review its earlier order and judgment even if the same had been signed and sealed”

33. For the reasons mentioned above I reject the preliminary objection raised by Sri. Asthana and hold that the application under Section 561-A, Criminal Procedure Code, praying that my order dated 5th April 1968, be reviewed and the reference be reheard is maintainable

34. As the application under Section 561-A, Criminal Procedure Code, has been listed along with Criminal Reference No. 210 of 1967 the reference has been re-heard by me and is being re-decided by this order. The facts of the reference have already been mentioned by me above. The application under Section 145, Criminal Procedure Code was originally made by four persons, namely, Mahboob Ilahi, Abdul Aziz, Mohammad Ali and Sami Ullah and the learned Magistrate, by his order dated 31st December 1966, had held Chitawan and others to be in possession over the land in dispute on the date of the preliminary order and within two months prior to it. Against that order only Mahboob Ilahi had preferred a revision which was heard by the learned Civil and Sessions Judge, Allahabad, who had made the reference to this Court. I have perused the application made by Mahboob Ilahi and others under Section 145, Criminal Procedure Code, and the contents of paragraphs 2 and 5 clearly show that those four persons claimed a joint right in the land in dispute and all the four applicants in the application under Section 145, Criminal Procedure Code, had made the following common prayer.

“Lihaja sayalan mustdai hain ki araji majkoor mahddoda zail kurk kar li jaye aur kabja sayalan araji majkoor per wa darakhtan neem majkoorwala per wahal rakha jave”

35. By his order, dated 31st December 1966, the learned Sub-Divisional Magistrate, Phulpur, had forbidden all the four persons, namely, Mahboob Ilahi, Abdul Aziz, Mohammad Ali and Sami Ullah, the applicants of the application under Section 145, Criminal Procedure Code, from interfering with the possession of Chitawan and others till they were otherwise evicted in due course of law. Against that order only Mahboob Ilahi preferred a revision and the other three persons, namely, Abdul Aziz, Mohammad Ali and Sami Ullah, submitted to the order passed by the learned Sub-Divisional Magistrate. Those three persons were not even arrayed as opposite parties in the revision preferred by Mahboob Ilahi and thus the order of the learned Sub-Divisional Magistrate, dated 31st December 1966, became final as far as Abdul Aziz, Mohammad Ali and Sami Ullah were concerned. The learned Civil and Sessions

Judge set aside the order of the learned Magistrate only as far as Mahboob Ilahi was concerned while the order of the learned Magistrate has become final as against Abdul Aziz, Mohammad Ali and Sami Ullah. Thus two contradictory orders cannot be allowed to remain in existence. Abdul Aziz, Mohammad Ali and Sami Ullah, having claimed a joint right along with Mahboob Ilahi in their application under Section 145, Criminal Procedure Code, were necessary and proper parties in the revision filed by Mahboob Ilahi and in their absence the revision filed by Mahboob Ilahi alone could not be decided in his favour as no effective or final order could be passed in favour of Mahboob Ilahi in the absence of the other three persons, namely, Abdul Aziz, Mohammad Ali and Sami Ullah.

36. There is no force in the submission of Sri. Asthana that the revision preferred by Mahboob Ilahi against the order of the learned Magistrate was correct as he was a co-owner of the land in dispute and as such could institute proceedings against a trespasser. The instant case is not a case of ejectment of trespassers but it was an application made for proceedings to be initiated under Section 145, Criminal Procedure Code. All the four persons, who had originally made the application under Section 145, Criminal Procedure Code, were forbidden by the learned Magistrate from interfering with the possession of Chitawan and others. Since only Mahboob Ilahi preferred a revision against the order of the learned Magistrate the order of the learned Magistrate became final against the other three applicants of the application under Section 145, Criminal Procedure Code.

37. The submission of Sri S N Saha that the referring Court could not make a reference on questions of fact also has force. Sri Asthana in this connection, contended that the learned Magistrate had discarded certain documents filed by Mahboob Ilahi as inadmissible in evidence and that, according to him, was a question of law and, therefore, the referring Court was correct in making the reference to this Court. I have carefully gone through the order of the learned Magistrate and have heard the learned counsel for the parties at some length and am of the opinion that all that the learned Magistrate meant was that the documentary evidence filed by Mahboob Ilahi and others was not of reliable nature. The learned Magistrate did not come to the conclusion that the documents filed by Mahboob Ilahi and others were not admissible although the language used by the learned Magistrate in his order was unfortunately not very appropriate. The law is clear that a reference in a criminal case can be made only on a question of law and no cases need be cited in support of that proposition.

38 The learned Magistrate had recorded a specific finding that Chitawan and others were in possession over Charhi and Marha etc within two months prior to the passing of the preliminary order. This fact was admitted by Mahboob Illahi in paragraph 2 of his written statement paper No 19. This is also clear from a perusal of paragraph 2 of the application made by Mahboob Illahi and others under Section 145 Criminal P C. The finding of the learned Magistrate finds further support from the affidavits Bhagwati Murlu Dhar and Behari Lal who had filed affidavits supporting the case of Mahboob Illahi before the learned Magistrate. The report of the Station Officer (paper No 5/1) also shows that Chitawan and others were in possession of the land in dispute within two months prior to the preliminary order and on the date of the preliminary order. The attachment order passed by the learned Magistrate also shows that he had directed the police authorities to attach the Marha Khunta etc belonging to Chitawan and others on the land in dispute. All these facts unfortunately were not brought to my notice when I previously heard Criminal Reference on 5th April 1966. In my opinion, in order to secure the ends of justice it is necessary that the order passed by me on 5th April 1966 accepting the reference made to this Court by the learned Civil and Sessions Judge be set aside and the reference be rejected and the order made by the learned Magistrate be upheld and the land be ordered to be released in favour of Chitawan and others and I hold accordingly.

39 I therefore allow the application under Section 561 A Criminal P C and set aside my order dated 5th April 1966 and reject the reference made by the learned Civil and Sessions Judge and uphold the order passed by the learned Magistrate.

40 Before parting with this case I must observe that Sri T P Asthana has argued this case after a very detailed study of law and after thorough preparation and has been of great assistance to me. He has taken great care in preparing the case and in placing it before me in a very lucid and forceful manner.

Order accordingly

1970 CRI L J 384 (Vol 76, C N 87)

(ALLAHABAD HIGH COURT)

RAJESHWARI PRASAD J

Ram Gopal Applicant v State Opposite Party

Criminal Revn No 661 of 1966 D/ 24 1
1968 against Judgment of II Temp Civil
and S J Bareilly D/- 29 4 1966

JL/LL/E*54/68/NR/M

Penal Code (1860) S 218 — Alterations in entries in village revenue records by Lekhpal in exercise of powers given under law — Alterations though erroneous can not be a ground for prosecution under Section 218

Where the accused a Lekhpal of a village corrected the entries in revenue record by entering the names of two persons as tenants on the basis of his discovery that those persons were actually in occupation of land Held that the alteration though erroneous was made by him in exercise of the powers given to him under Land Revenue Manual and hence could not be a ground for prosecution under Section 218. The aggrieved party could have sought for a remedy elsewhere for the correction of such record.

(Paras 9 and 11)

Cases Referred Chronological Paras

1964 All LJ 1127 = 1964 All WR

(HC) 711 Mahadeo Pandey v

Suraj Bhan Singh

8

S N Mulla and B P Gupta for Applicant P M Gupta Radhey Shyam and N P Mishra A G A for Opposite Party

ORDER — The revisionist has been convicted under Section 218 I P C and sentenced to undergo one year's rigorous imprisonment.

2 His appeal from the order of conviction was dismissed by the II Temporary Civil Sessions Judge Bareilly and the order of conviction so also the sentence awarded by the trial Court were maintained.

3 The revisionist was a Lekhpal of village Udaypur Khas district Bareilly during the period 1368 Fasli and 1369 Fasli. He was charged with having wrongly framed revenue record of 1368 Fasli inasmuch as he entered the name of Devki Nandan alleged to be his son and one Shrimati Ishwara Devi wife of Aram Singh as tenants of plot no 301. According to the prosecution this was done by the revisionist with the intention to cause loss and injury to Durga Prasad who was the recorded tenant or his descendants.

4 The defence taken by the revisionist was that the entries had been made by him on the basis of demarcation Kharsa for the year 1367 Fasli prepared by one Bhup Singh Amin under the provisions of Urban Area Zamindari Abolition and Land Reforms Act. The second defence raised by him was that he made the impugned entries in the Kharsa of the year 1368 Fasli mutabiq mauqa. The implication of that version of the revisionist appears to be that he found the persons whose names he entered in the Kharsa of 1368 Fasli in actual occupation of the land and it was on account of that discovery that he proceeded to enter the names of the aforesaid two persons in that record.

5. The two Courts below found that it was incorrect that Bhup Singh had entered the name of Devki Nandan and Shrimati Ishwara Devi in the Khasra of 1368 Fasli Bhup Singh had only scored out the name of Durga Prasad which had continued to be entered in the revenue records for a fairly long time, but he had not substituted the name of the aforesaid two persons in the place of the name of Durga Prasad. The defence was, therefore, found to be false and I have no manner of doubt that the view of the Courts below is perfectly correct.

6. After disposing of that particular line of defence the Courts below proceeded to convict the revisionist. Unfortunately, the Courts below did not consider the other line of defence adopted by the revisionist, which I have mentioned above, namely, that the correction in the entries was made by the revisionist on the basis of his discovery that the aforesaid two persons were actually in occupation of the land. The Courts below should have considered that defence also before proceeding to convict the revisionist when the revisionist was interrogated as accused, in reply to question no 14 he had clearly disclosed that line of defence. On the earlier occasion when the revision petition was heard by me, I found that the Courts below had rightly dismissed the defence of the revisionist so far as it was based on the entries in the demarcation Khasra. Having found that, I proceeded to maintain the order of conviction and the sentence awarded to the revisionist. It was not urged before me, as it had been urged now, that one of the principal defence raised by the revisionist had not been noticed by the two Courts below and consequently, no decision with regard to that part of the case had been arrived at.

7. An application under Section 561-A Cr P C was thereafter made before me and after hearing the learned counsel for the revisionist, I recalled my order by which I had dismissed the revision petition and now the revision petition is before me for hearing again.

8. In support of this revision petition, it has been urged that the initial error committed by the trial Magistrate and so also the appellate Court is, that the entry of the name of Durga Prasad in the records was treated to be an entry of name of a tenant. It is not in controversy that the name of Durga Prasad was recorded in column No 5 of the Khasra under Ziman 10-A. Having found that the name of Durga Prasad was entered in the records as a tenant, the two Courts below came to the conclusion that in view of the procedure prescribed for the substitution of the name of the tenant in the Khasra, the revisionist must be held to be guilty of the offence with which he was charged. If it had only to be noticed that the entry

of the name of Durga Prasad was not that as a tenant, but as a cultivator under Ziman 10-A, the necessary consequence which could flow from the prescribed procedure could not arise in this case. My attention has been invited to the various paragraphs of the Land Record Manual and finally to a decision of this Court in Mahadeo Pandey v Suraj Bhan Singh, 1964 All LJ 1127, with a view to show, that a person recorded under Ziman 10-A is not a tenant. I am in agreement with that contention and I hold that the name of Durga Prasad under Ziman 10-A did not amount to an entry of the name of tenant, as one knows, under the provisions of the U P Tenancy Act.

9. So far as substitution of names in place of names recorded under Ziman 10 is concerned, under paragraph 84 Cl (v) of the Land Record Manual, it appears to be well within the powers of the Lekhpal to alter the entries in case he finds that the person whose name he proposed to enter was in actual cultivation or occupation of the plots in question. Paragraph 60 of the Land Record Manual which devotes itself to the subject of "preparation of Khasra" enumerates the actions which are to be taken by the Lekhpal with regard to maintenance of record. Para 60 (ii) enjoins that column Nos 1 to 3 shall be written up before the first tour, the names of tenants and sub-tenants and the entries relating to kharif crops, shall be made during the first tour, entries relating to rabi and zaid crops shall be made during the second and third tour respectively; entries relating to right and liabilities of tenants (i.e. nature of tenure, leases and rents) shall be made before the end of the first tour, or in the case of letting for the rabi season, as soon as possible thereafter; all other entries shall be made as early as possible in the year. If a person recorded in Ziman 10 is not really a tenant within the meaning of the Tenancy Law and the Land Records Manual, then the entry of his name is covered by the residuary clause of paragraph 60 column No 2, and entries in respect of such names as has to be made as early as possible.

10. Paragraph 84 of the Land Records Manual after dealing with entries regarding various classes of tenants by its sub-clause (v), prescribes that if the Lekhpal finds that such person does not fall in any of the classes mentioned in Cls (i), (ii), (iii) and (iv) and the person recorded in column No 5 belongs, in Agra to class 10 or 10-A of the khatauni, the lekhpal will substitute for the recorded person the name of the actual occupier in column 5 in red ink. It further goes on to say that if the person recorded in column 5 is a tenant of any class other than these or is a grove-holder or a grantee under Class II in Agra or Class 6 in Avadh the lekhpal shall follow the procedure laid

down in sub-paragraphs (b) to (d) below A perusal of the above provisions of the Land Records Manual would indicate that it is open to the lekhpal so far as entries of names under Ziman 10 or 10-A are concerned to substitute other names in place of the recorded name provided the lekhpal finds that the new entrants were the actual occupier of the land

11 From the materials on the record it is also clear that in the Khasra of 1368 Fashl, initially the revisionist himself had entered the name of Durga Prasad and it was subsequently that that name was scored out by him and the names of the two persons named above were substituted. So far as entry of the name of Durga Prasad at the initial stage in the Khasra of 1368 Fashl is concerned it is sufficiently justified on the consideration that it was the name of Durga Prasad which was recorded in the Khasra column No 5 for a very long time and therefore the entry of the name of Durga Prasad in the Khasra of 1368 Fashl at the initial stage was in accordance with the then existing entries. The subsequent alteration in that entry by bringing in the name of two persons named above by the lekhpal could be justified on the assumption that the lekhpal could have found those two persons as in occupation of the land at that time. At any rate the entries made by the revisionist were made in exercise of powers given to the lekhpal under the Land Records Manual. I am not in this case concerned with the question whether the assumption of the revisionist that the aforesaid two persons were in actual occupation of the plots is correct or not. There is no finding to indicate that it is not correct. Even if that assumption be assumed to be incorrect the remedy for such a conduct would lie elsewhere. It might be open to the real occupant to show by appropriate proceedings that Deoki Nandan and Shrimati Ishwara Devi were really not in occupation of the land but that consideration alone cannot be a ground for conviction under Section 218 of the Indian Penal Code. If he made the entries in exercise of powers reserved to him by law it is a different matter that he exercised that power erroneously. That erroneous entry could have been corrected by the higher revenue authorities but that could not be made a ground for the prosecution of the revisionist for offence under Section 218 of the Indian Penal Code.

12 The next question is what should be the appropriate order to be passed in this case. I have just been thinking of the propriety of sending back the case to the trial Magistrate for fresh decision after considering the various lines of defence adopted by the revisionist. It however appears that the revisionist has been undergoing prosecution at least from the year 1962. I am informed that to begin

with a complaint was filed in respect of the same conduct of the revisionist by Durga Prasad himself. It however failed. Durga Prasad died. Then another complaint was made by Durga Prasad's son Dilip Kumar. That also proved abortive and was rejected in the year 1963. Dilip Kumar again started prosecution of the revisionist thereafter in the year 1963. Fashl and it was in October 1964 that the revisionist was committed to the Court of session to stand trial.

13 In view of the long and protracted prosecution either on the basis of the complaint or otherwise I am of the opinion that the revisionist has been sufficiently penalised and harassed in the matter and ends of justice warrant that there should not be a retrial of the revisionist again.

14 The revision petition is allowed and the conviction of the revisionist for offence under Section 218 of the Indian Penal Code so also the sentence awarded to him by the trial Judge as well as by the appellate Judge are set aside. The revisionist is acquitted. The revisionist is on bail. He need not surrender and his bonds are discharged.

Revision allowed

1970 CRI L J 336 (Vol 76, C N 89)

(ALLAHABAD HIGH COURT)

T P MUKERJEE J

Ghamandi and others Appellants v State Respondent

Criminal Appeal No 2057 of 1965 D/- 18-9-1968 against order of S J Etawah D/- 30-9-1965

Penal Code (1860) Ss 391 395 — Conviction of less than five persons — Legality

In spite of the acquittal of a number of persons if it is found as a fact that along with the persons convicted under Section 395 there were other unidentified persons who participated in the offence bringing the total number of participants to five or more the conviction of the identified persons though less than five is perfectly correct. (1911) 12 Cri LJ 193 (Cal) & AIR 1947 Nag 57 & AIR 1951 Orissa 71. Foll AIR 1957 Andh Pra 954 & AIR 1953 Raj 49 Disting (Para 8)

Cases Referred	Chronological	Paras
(1957) AIR 1957 Andh Pra 954		
(V 44) = 1957 Cri LJ 1227 In re		
K Appalaswami		6
(1953) AIR 1953 Raj 49 (V 40) =		
1953 Cri LJ 447 Devi v State		6
(1951) AIR 1951 Orissa 71 (V 39)		
Sukh Misra v State		8
(1947) AIR 1947 Nag 57 (V 34) =		
47 Cri LJ 822 Narayan Dinba v		
Emperor		8

BM/DM/A669/69/JHS/D

(1911) 12 Cri LJ 193 = 15 Cal WN
434, Rashidazaman v. Emperor 8

A. G. A., for State; R. K. Shanglo, for Appellants

JUDGMENT:— (1-5) (After stating the facts, His Lordship proceeded.)

6. A point of law has now been raised by the learned counsel for the defence that out of the six dacoits, two having been acquitted, it was not possible to sustain the conviction of the remaining four on a charge under Section 395, I. P. C. which contemplates participation of at least five persons in the offence. In support of his contention he relied on two decisions. The first is a decision of the High Court of Andhra Pradesh in the case of *In re, K. Appalaswami*, AIR 1957 Andh Pra 954 and the case of *Devi v. State*, 1953 Cri LJ 447 = (AIR 1953 Raj 49). Both these decisions were by single judges of the respective Courts. In the first case seven persons who were, apparently, known to the complainant had been named in the first information report as having committed a dacoity by forcibly harvesting and removing his crop. The Sessions Judge found that there was no case against three of the accused persons and he acquitted them for want of proof. He, however, convicted the other four under Sec 395, I. P. C. Before the High Court a point was taken on behalf of the appellants that in the circumstances of the case, three of the accused persons having been acquitted the charge of dacoity against the other four under Section 395, I. P. C. could not be sustained. The learned Judge accepted the contention observing as under.

"I am impressed with this argument. It is true that in the Sessions Court the prosecution witnesses stated, that apart from these accused there were a number of persons cutting the crops but this is belied by Exhibit P-12 the charge-sheet and by the admission made by the investigating officer. Nor does the Sessions Judge say that there were seven people who were engaged in removing the crop but the identity of persons other than the appellant has not been satisfactorily established."

It would thus be found that in that case the learned Judge was not satisfied that seven persons had participated in the dacoity. In point of fact, the learned Judge ultimately acquitted all the three accused persons who had appealed against their conviction. The observation of Chandra Reddy, J., quoted above, proceeded entirely on the basis that there was no evidence in the case to show that more than three persons were engaged in the alleged dacoity. It was on this basis that it was held that conviction of the three appellants under Section 395, I. P. C. was not tenable.

7. In the other case which came from

the Rajasthan High Court, there were five accused persons who were put on trial, but two of them were acquitted on the ground that only three had taken part in committing the offence. It was, therefore, held that those three persons could not be convicted under Section 395, I. P. C. for the offence of decoity. In this case also the Court held that even as regards the three appellants who had been convicted by the Sessions Judge, no offence was proved beyond a reasonable shadow of doubt. The result was that all the appellants were acquitted. In the course of his judgment the learned Judge observed as follows:—

"The learned Sessions Judge has made an obvious error in convicting the three accused under Section 395 of the Penal Code. It was alleged that there were only five accused who committed the offence. Out of five, two were acquitted by the Sessions Judge himself. According to his finding only three accused took part in the offence, and therefore, the offence could not, in any case be one under Section 395 of the Indian Penal Code."

In view of what has been stated above it would appear that the observation of the learned Judge in point was in the nature of an obiter. In any case, the observation has to be read in the context of the facts of that case which are very different from the facts of the present case.

8. As I have already noticed, in the present case all the prosecution witnesses have clearly stated that there were six miscreants who were engaged in the commission of the dacoity and, as a matter of fact, two of them namely Ghamandi and Hetram were actually arrested by the villagers after a hot chase. The arrested dacoits were beaten up by the villagers and they gave out the names of the other four dacoits as Ramphal, Zalim alias Jagrua, Sarman and Gudru. Of these four dacoits, two of them have been acquitted by the learned sessions Judge on the ground that the evidence of identification as against those two accused could not be safely relied upon. It is possible that the two appellants viz., Ghamandi and Hetram who had been apprehended on the spot, had given out two wrong names purposely. The fact that two of the accused persons viz., Sarman and Gudru, were acquitted on the ground that the evidence of identification against them was not satisfactory, does not necessarily mean that the offence in the present case was committed by only four persons.

The learned counsel for the State has produced before me certain authorities to support this view. The earliest case in point appears to be the decision of the Calcutta High Court in the case of *Rashidazaman v. Emperor*, 12 Cri LJ 193 (Cal). In that case eight persons were charged

with dacoity but four of them were acquitted. It was contended on behalf of the defence that in consequence of the acquittal the charge of dacoity under Section 395 I P C could not be sustained against the remaining four. The learned Judges negated the contention and upheld the conviction of the four appellants on the charge of dacoity. The decision of the Calcutta High Court in this case was cited with approval by the Nagpur High Court in the case of Narayan Dinba v Emperor AIR 1947 Nag 57 in which it was laid down that the mere fact that the evidence was not sufficient to convict four of the accused persons actually charged could not in any way affect the question of the number of persons engaged.

In a case before the Orissa High Court Suka Misra v State AIR 1951 Orissa 71 a similar question arose. Twelve persons were put on trial to answer a charge of dacoity. Nine of them were ultimately acquitted and three convicted under Section 395 I P C. The case was heard by a Division Bench of the High Court constituted of Jagannadhadas and Panigrahi JJ. Panigrahi J who delivered the leading judgment had no hesitation in holding that the conviction of the three of the appellants on the charge of dacoity was quite correct. Jagannadhadas J however came to the same conclusion with some amount of apparent hesitation. Ultimately, he agreed with Panigrahi J. The correct position is that in spite of the acquittal of a number of persons if it is found as a fact that along with the persons convicted there were other unidentified persons who participated in the offence bringing the total number of participants to five or more the conviction of the identified persons though less than five is perfectly correct. In the present case as I have pointed out above there is the consistent testimony of the prosecution witnesses that there were six dacoits including the four appellants. This is also specifically the case stated in the first information report. If therefore two of the dacoits could not be traced and identified there is no reason why the remaining four cannot be convicted of the offence of dacoity under Sec 395 I P C.

9 Lastly the learned counsel for the appellants pleaded that the sentences imposed on the appellants were too severe and should be appreciably reduced. I am unable to accept the contention. The sentences imposed by the learned Sessions Judge were perfectly justified in view of the seriousness of the crime.

10 The appeal is dismissed. Appellants Nos 1 and 2 are in gaol. They will serve out the sentences imposed upon them. Appellants Nos 3 and 4 are on bail. Their bail bonds are cancelled.

They must immediately surrender and serve out the sentences imposed on them.
Appeal dismissed

1970 CRI L J 388 (Vol 76, C N 89)

(ANDHRA PRADESH HIGH COURT)

CHINNAPPA REDDY J

Public Prosecutor Appellant v Kusana-
pudi Narasimha Raju Respondent

Criminal Appeal No 301 of 1968
D/- 18-6-1969 from order of Addl Judl
1st Class Magistrate Narasapur in C C
No 1492 of 1967

Prevention of Food Adulteration Act
(1954) Sections 2 (xiii) 7 10 (1) 10 (2) —
Sale for analysis — Included in definition
sale under Section 2 (xiii) — Article
actually sold for purpose of analysis
— Prosecution need not prove that article
was intended for sale — AIR 1959
Mad 333 Dissented from

The question whether an article of food was intended for sale or not would be irrelevant in cases of actual sales whether such sales be for human consumption or use or analysis. The question would be relevant only in cases where the act of the accused is sought to be treated as sale by reason of the other limbs of the definition of sale in Section 2 (xiii) that is whether what is alleged is an agreement of sale an offer for sale the exposing for sale or having in possession for sale of any such article including an attempt to sell any such article.

(Para 17)

The definition of sale under S 2 (xiii) is a special definition. It includes among other things a sale for analysis even though such sale is not a usual consensual sale. Therefore when a Food Inspector takes a sample under Section 10 (1) or S 10 (2) and offers its cost to the person from whom it is taken and such payment is accepted there is a sale for analysis. It is open to the person from whom a sample is taken to refuse to accept the price in which case there is no sale. While a food Inspector cannot be prevented from taking a sample there is nothing in the Act which compels a person from whom the sample is taken to accept the price which the Food inspectors offers for it. The refusal to accept the payment offered by the Food Inspector cannot amount either to preventing a Food Inspector from taking a sample or to preventing a Food Inspector from exercising any power conferred on him by or under the Act. The person in whose possession the article of Food is may allow the Food Inspector to take the sample and yet refuse to accept payment for it. In such a case there is no sale for analysis. But where the price offered by the Food Inspector is accepted by the per-

HM/HM/D540/69/BNP/B

son from whom the sample is taken and there is thus a sale for analysis it is clearly unnecessary for the prosecutor to establish that the article of food which in fact was sold was intended for sale AIR 1959 Mad 333, Dissented from, AIR 1966 SC 128 & AIR 1964 All 199 & AIR 1966 All 231, Rel on, (1967) 2 Andh WR 424, Explained

(Para 5)

Cases Referred: Chronological Paras

(1967) 1967-2 Andh WR 424 = 1967 Mad LJ (Cri) 863, Public Prosecutor v. Pitchaiah	11, 15
(1966) AIR 1966 SC 128 (V 53) = 1966 Cri LJ 106, Mangal Das v Maharashtra State	6
(1966) AIR 1966 All 231 (V 53) = 1966 Cri LJ 501, Nagar Swasth Adhikari, Municipal Corporation Agra v Raghunath Singh	9 10, 16
(1965) AIR 1965 Mad 146 (V 52) = 1965 (1) Cri LJ 452, In re Rathamani	11
(1964) AIR 1964 All 199 (V 51) = 1964 (1) Cri LJ 502, Municipal Board, Faizabad v Lal Chand	8, 10
(1962) 1962 (1) Cri LJ 152=1961 Ker LT 308, Food Inspector Calicut v. Parmeswara Chettiar	6, 14
(1959) AIR 1959 Mad 333 (V 46) = 1959 Cri LJ 997, Public Prosecutor v. Kandaswami Reddiar	11, 15
(1942) AIR 1942 Mad 609 (V 29) = 43 Cri LJ 863, In re Ballemkonda Kanakayya	6

K Jayachandra Reddy Addl. Public Prosecutor and M B Rama Sarma, for Respondent

JUDGMENT:— This is an appeal by the State against the order of acquittal of the respondent of an offence under S 16 (1) read with Ss 7, 2 (i) (a) and (l) of the Prevention of Food Adulteration Act and R 44 (b) of the Prevention of Food Adulteration Rules. The prosecution case is briefly as follows—

2. On 22-8-1966 at about 7 A M Pw 1 the Food Inspector of Narasapur saw the accused carrying buffalo milk in a brass pot. He called Pw 2, a dalayat in the Court of the District Munsif, and, in his presence, purchased sample of milk from the accused paying him the price for it. He then followed the procedure prescribed by Section 11 of the Prevention of Food Adulteration Act, divided the sample into three parts after adding preservative, put each part into a clean dry bottle, gave one bottle to the accused, sent one bottle to the Court and sent one bottle to the Public Analyst for analysis. The report of the Public Analyst showed that the sample contained 43 per cent of solids-not-fat as against the standard of 9 per cent solids-not-fat prescribed by the rules. The Analyst was of opinion that the sample contained 52 per cent of extraneous water. The prosecution examined three witnesses, PW 1 being the Food Inspector who took

the sample, PW 2 the mediator and PW 3 the Food Inspector who succeeded PW 1. The accused denied the offence and stated that the milk belonged to his landlord and that the Food Inspector caught him when he was taking the milk to him. He examined his landlord as a defence witness. DW 1 stated that about a year prior to the date on which he gave evidence in Court, the accused came to his house and told him that while he was getting milk for DW 1 the Food Inspector caught him and that the Food Inspector wanted DW 1 to meet him. DW 1 went to the Food Inspector and told him that the milk belonged to him and that the accused was bringing it for him. The Food Inspector, however, prepared a statement that the accused used to sell milk to DW 1 and wanted him to sign on it. As it was not a true statement he refused to sign. The learned Magistrate thought that it was the duty of the prosecution to establish that the accused was a vendor of milk and that on the day in question he was carrying the milk for the purpose of sale. He observed that there was not an iota of evidence to establish that the accused was a vendor of milk. On the other hand basing on a statement in the cross-examination of P.W. 2 that the accused told P.W. 1 that he was not carrying the milk for the purpose of sale and that the milk belonged to Somayajulu his master for whom he was carrying it, he held that at the earliest moment the accused came out with the version that the milk was not intended for sale. The learned Magistrate also relied upon the evidence of DW 1 as supporting the version of the accused. The learned Magistrate observed that though a sale to a Food Inspector for Analysis was a sale under S 2 (xii) of the Act, such a sale was made under the compulsive authority of the Food Inspector and therefore it was open to the accused to establish that he was not a milk vendor and that the milk was not intended for sale. He found that in the present case the accused had established that the milk which he was carrying and from which a sample was taken was not intended for sale, but that it was intended for the personal use of DW. 1 and that the accused was not a milk vendor. On those findings the learned Magistrate acquitted the accused.

3. The learned public prosecutor urges that the entire approach of the learned Magistrate to the question at issue was wrong and misconceived. He submits that once sale for analysis is established no further question arises except whether the sample was adulterated. The question whether the article of food which was sold to the Food Inspector was intended for sale or not is not entirely irrelevant. It is not necessary for the prosecution

to establish that the article of food was intended for sale nor is it permissible for the accused to attempt to prove that it was not intended for sale. There is great force in the submissions of the learned public prosecutor and I find that a plain reading of the provisions of the Act compel me to agree with those submissions.

4 Section 16 read with S 7 of the Prevention of Food Adulteration Act, in so far as they are relevant for the purposes of this case render any person who sells any article of food which is adulterated liable for the prescribed punishment. It is therefore necessary to know when a person is considered to have sold an article of food under the provisions of the Act. Sale is defined by S 2 (xiii) in the following manner—

“Sale with its grammatical variations and cognate expressions means the sale of any article of food whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption use or for analysis and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article and includes also an attempt to sell any such article.”

It is apparent that this is a special definition of Sale and it includes even an agreement of sale, an offer for sale, exposing for sale and possession for sale. It includes a sale for analysis even if such a sale is not the usual consensual sale. It is necessary to refer here to the provisions of the Act by which a sale for analysis may be effected. Section 10 (1) of the Act empowers the Food Inspector among other things to take samples of any article of food from (i) any person selling such article, (ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee, (iii) a consignee after delivery of any such article to him. He is also empowered under S 10(2) to enter and inspect any place where any article of food is manufactured, stored or exposed for sale and take samples of food for analysis. Whenever he takes a sample either under S 10(1) or under S 10(2) he is obliged by S 10(3) to pay to the person from whom the sample is taken its cost. S 10(7) prescribes that whenever action is taken under S 10(1) or S 10(2) it is the duty of the Food Inspector to call one or more persons to be present at the time when such action is taken and take his or their signatures. S 11 prescribes the procedure to be followed by Food Inspector after he takes samples. S 16(1) (b) makes a person who prevents a Food Inspector from taking a sample as authorised by the Act liable to punishment. S 16(1) (c) renders a person who

prevents a Food Inspector from exercising any other power conferred on him by or under the Act liable to punishment.

5 When a Food Inspector takes a sample under S 10(1) or S 10(2) and offers its cost to the person from whom it is taken and such payment is accepted, there is a sale for analysis. It is open to the person from whom a sample is taken to refuse to accept the price in which case there is no sale. While a Food Inspector cannot be prevented from taking a sample, there is nothing in the Act which compels a person from whom the sample is taken to accept the price which the Food Inspector offers for it. The refusal to accept the payment offered by the Food Inspector cannot amount either to preventing a Food Inspector from taking a sample or to preventing a Food Inspector from exercising any power conferred on him by or under the Act. The person in whose possession the article of food is may allow the Food Inspector to take the sample and yet refuse to accept payment for it. In such a case as I said there is no sale for analysis. Where there is no sale for analysis the Food Inspector, if he sends the sample for analysis and if it is found to be adulterated and if he decides to launch a prosecution, may have to establish that even if there is no sale for analysis there is a sale within the meaning of the other limbs of S 2(xiii) of the Act. This he can establish by proving that the article of food was offered for sale or exposed for sale or that the person from whom he took the sample was in possession of the article for sale. In such an event it may be necessary for the Food Inspector to prove that the article of food was intended to be sold. But where the price offered by the Food Inspector is accepted by the person from whom the sample is taken and there is thus a sale for analysis it is clearly unnecessary for the prosecutor to establish that the article of food which in fact was sold was intended for sale. In a case where there is a sale for analysis to insist that the prosecution must establish that the article of food was intended for sale is to insist on proof of an additional requirement not contemplated by the Act. Conversely to permit the person who has sold a sample for analysis to establish that the article of food was not intended for sale is to introduce an element not contemplated by the Act.

6 In *Re Bellembronda Kankayya* AIR 1942 Mad 609 Horwill J held that the parting with a commodity when it was demanded by the Sanitary Inspector in exercise of his powers under S 14 of the Madras Prevention of Food Adulteration Act would not amount to a sale within the meaning of S 5 of that Act. In *Food Inspector Calicut v Parameswara Chet-*

iar, 1962 (1) Cri L. J. 152 (Ker), Raman Nayar, J. held—

"As sale is a voluntary transaction and a seizure or compulsory acquisition in exercise of statutory power is not a sale within the ordinary sense of that word. Nor does the definition of 'sale' in Section 2 (xiii) as including a sale of food for analysis make it one, for, the first requisite even under the definition is that there must be a sale In my view when a Food Inspector obtains a sample under S. 10 of the Act there is no sale."

The view of Horwill, J. and Raman Nayar, J. was not accepted by their Lordships of Supreme Court and both these judgments were overruled in *Mangal Das v. Maharashtra State*, AIR 1966 SC 128. Their Lordships rejected the argument advanced in that case that where a person is required by the Food Inspector to sell to him a sample of the commodity there is an element of compulsion and therefore it cannot be regarded as a sale. This result according to them followed from the special definition of sale in Section 2 (xiii) of the Act which specifically included within its ambit a sale for analysis.

7. The rejection by their Lordships of the Supreme Court of the proposition that there must be a consensus before it can be said that there is a sale even for analysis clearly implies that once the taking of a sample by the Food Inspector and the payment of price for it are established it is not open to the Court to go behind the transaction and discover whether the article of food was intended for sale. Otherwise the door would be wide open for a defence being put forward in every case where a sample is taken and price paid for it that the article of food was not intended for sale, rendering the enforcement of the prevention of Food Adulteration Act impossible and the creation of absolute offences under act meaningless.

8. In *Municipal Board, Faizabad v. Lal Chand*, AIR 1964 All 199, the accused who owned a tea shop had stored milk which was intended to be used in the preparation of tea but which was not intended to be sold. The Food Inspector purchased a sample of milk and on analysis it was found to be adulterated. It was held by a Division Bench of the Allahabad High Court that the accused could not be convicted for storing adulterated milk because the milk which was stored was not intended for sale. He could however be convicted for selling adulterated milk to the Food Inspector since sale of adulterated milk for analysis was itself an offence. They observed:—

"No doubt the respondent could not be convicted for storing the milk at their shop which was of the quality or purity

below the prescribed standard, as the milk was not stored for sale but was stored for mixing it with tea which was sold at their shop but they did sell milk to the Food Inspector and the selling of adulterated milk was itself an offence. Even sale for analysis comes within the definition of 'Sale' under Section 2(xiii) of the Act. Under Section 7 of the Act, therefore, even this sale of adulterated milk was an offence even though it might have been made for the purpose of analysis.

Learned counsel for the respondents drew our attention to the provisions of Section 10 (3) and also Section 16 (1) (b) of the Act by pointing out that the respondents could not refuse to sell under the law and that if they could not refuse to sell which they were compelled to do they could not be said to have sold the milk voluntarily, or sold it at all in the eye of law.

Now sub-section (3) of Section 10 of the Act provides that where any sample is taken under clause (a) of sub-section (1) or sub-section (2) its cost calculated at the rate at which the article is usually sold to the public shall be paid to the person from whom it is taken and clause (b) of sub-section (1) of Section 16 provides that if any person prevents a Food Inspector from taking a sample as authorised by this Act he shall be guilty of an offence under the Act. It was not obligatory upon the respondents to sell the milk to the Food Inspector. When the Food Inspector came to take the sample they could say that he could very well take the sample but they were not going to sell it. They did not do any such thing. The receipt Ex. Ka-3 indicates that they did sell it for sample. No doubt it was the duty of the Food Inspector as provided under Section 10(3) to pay the price but if the respondents had refused to take the money the Food Inspector could not have compelled them to take it. If they had done so, they would not have committed any offence under Section 16(1) (b) of the Act which provides that the preventing of a Food Inspector from exercising any power conferred on him by the Act is an offence. By not taking the price, they were not preventing the Food Inspector from exercising his power. They could allow the sample to be taken away by the Food Inspector telling him that he could take it if he wanted to do so but as they were not selling the milk they would not accept its price for they were storing milk only for mixing it with tea which alone they were selling at their shop.

9. In *Nagar Swasth Adhikari, Municipal Corporation, Agra v. Raghunath Singh* AIR 1966 All 231 where a defence was put forward that the milk from which a

sample was taken by the Food Inspector and for which the price was paid was not intended for sale but was being taken by the accused to his father-in-law's house for the latter's consumption a learned single Judge of the Allahabad High Court observed

In the case of a hawker who carries articles of food for sale by hawking it is not possible in every case for the prosecution to prove its actual sale to a customer. Realising this practical difficulty the Legislature has provided that sale of any article of food even for analysis will be a sale within the meaning of the Act. In the instant case if the milk which was being carried by the respondent was not for sale he could have refused to accept the price offered by the Food Inspector for the sample.

10 I respectfully agree with the observations of the learned Judges in AIR 1964 All 199 (as above) and AIR 1966 All 231 (as above).

11 Sri. M B Ramasarma learned counsel for the accused relied upon Public Prosecutor v Kandaswamy Reddiar AIR 1959 Mad 333 in Re Rathaman AIR 1965 Mad 146 and upon the observations of my learned brother Obul Reddi J in Public Prosecutor v Pitchaiah (1967) 2 Andh W R 424.

12 In the first of the cases Somasundaram J while holding that there was sale to the Food Inspector nonetheless thought that the accused could not be convicted as the milk was not intended for sale. He said

This is an appeal against the acquittal of the respondent who was charged for an offence under the Food Adulteration Act, that is for selling adulterated milk. In such a case the first essential requisite to be established is that the milk from which the Sanitary Inspector gets a small quantity from the vendor as sample is intended for sale.

But in acquitting the accused the learned District Magistrate held that there was no sale as such to PW 1. Here the learned District Magistrate is not correct. What was given by the accused to PW 1 is undoubtedly sale but what was really to be decided was whether the milk which the accused was taking was intended for sale. On that question there is room for doubt and therefore the acquittal of the accused can be justified on that ground.

13 The learned Judge did not refer to any of the provisions of the statute and did not state any reason for the qualification introduced by him. With great respect I do not agree with Somasundaram J.

14 In the second case Anantanarayanan J followed the decision of Raman Nayar J in 1962 (1) Cri. L. J. 152 (Ker) (as

above) which has since been overruled by the Supreme Court. The very observations of Raman Nayar J on which Anantanarayanan J placed reliance were disapproved by the Supreme Court.

15 In 1967-1 Andh W R 424 (as above) my learned brother Obul Reddi J was pressed with an argument that the accused from whom a sample of curd was purchased by the Food Inspector was not carrying the curd intending it for sale at the time when the sample was taken. The decision of Somasundaram J in AIR 1959 Mad 333 (as above) was cited before my learned brother as supporting the argument. My learned brother appears to have thought that in order to attract the decision of Somasundaram J the accused would have to establish by reliable evidence that he was not a vendor of the article of food and that the article of food was not intended for sale. It was in that context my learned brother said—

'Whether a particular article of food is intended for sale or not is a question of fact in each case. If the defence of the accused person is that if an article of food for instance 'curd' in this case was not intended for sale but was intended for domestic consumption and that he had no alternative but to submit to the authority of the Food Inspector the onus is upon him to establish that he is not a vendor and that the article of food was prepared for his or his relations domestic consumption. If by reliable evidence the respondent fails to establish that the article of food was not for sale but meant for domestic consumption then he will be selling an article of food if it is found adulterated which is prohibited under Section 7 of the Act.

16 My learned brother expressed no approval of the view of Somasundaram J but thought that the evidence in the case before him did not attract the application of the judgment of Somasundaram J. I have no doubt that my learned brother did not intend to lay down that even in cases of sales for analysis it must be established that the article of food was intended to be sold. That he did not intend to lay down any such propositions clear from the fact that he extracted the observations (Extracted by me earlier) of the Allahabad High Court in AIR 1966 All 231 (as above) with approval and wound up his discussion by stating—

In view of the authoritative pronouncement of the Supreme Court the doubt if any whether the sale for analysis would come within the ambit of sale has been dispelled.

17 In the light of the foregoing discussion, I am of the view that the question whether an article of food was intended for sale or not would be irrelevant in cases of actual sales whether such

sales be for human consumption or use, or for analysis. The question would be relevant only in cases where the act of the accused is sought to be treated as a 'Sale' by reason of the other limbs of the definition of 'Sale' in S 2(xiii), that is, where what is alleged is 'an agreement of sale, an offer for sale, the exposing for sale or having in possession for sale of any such article', including, 'an attempt to sell any such article'.

18. In the present case, there was undoubtedly a sale to the Food Inspector and that concludes the matter. I find the respondent guilty of an offence under Section 16(1) read with Section 7, Section 2 (i) (a) and (l) of the Prevention of Food Adulteration Act and sentence him to pay a fine of Rs. 200/- in default to undergo rigorous imprisonment for a period of three months I have not imposed a sentence of imprisonment as the accused is a first offender and appears to be petty milk vendor

Appeal allowed

1970 CRI. L. J. 393 (Vol. 76, C. N. 90)
(ANDHRA PRADESH HIGH COURT)

ANANTHANARAYANA AYYAR, J.

The Public Prosecutor, Appellant v Matha Satyam, Respondent

Criminal Appeal No 120 of 1968, D/- 1-7-1969, from order of Judl 1st Class Magistrate, Rajam, in C C No 57 of 1967

Prevention of Food Adulteration Act (1954), Ss. 16 (1) (a) (i), 7, 2 (i) (a), 2 (xiii) and 10 (3) — Food Inspector taking sample — Whether a sale — A question of fact — Seller can refuse to accept price — Acceptance of amount as cost of article — A sale is presumed within S. 2 (xiii) — Sale is offence liable to be punished under the section. (Prevention of Food Adulteration (Central) Rules (1955), R. 44 (b)).

When the evidence in a case is that a sample was taken by the Food Inspector from a person who has an article of food in his possession, the question as to whether there resulted a sale for analysis has to be decided on the facts of that case

A person in possession of a food article is not bound to receive the price and he has got a right to refuse or to receive it and to indicate that he is not making a sale of the article of food for analysis and that he is just allowing the officer to take a sample.

When a person allows or does not prevent sample of article of food in his possession being taken for analysis and receives the amount tendered to him as cost by the Food Inspector under S 10(3) of the Act, it will be presumed that he

made a sale of the article for analysis as defined in S. 2(xiii). But this presumption is rebuttable (Para 7)

If it is proved that the accused made a sale for analysis to the Food Inspector the question whether the article of food was intended by the accused for sale apart from the Food Inspector taking a sample for analysis would be irrelevant (Para 8)

If upon analysis the article of food is found to be adulterated, the vendor is guilty under S 16(1) and S 7 read with S 2(i) (a) and Rule 44 (b) C A No 301 of 1968, D/- 30-1-1968 (Andh Pra) & AIR 1964 All 199, Rel on., AIR 1942 Mad 609 & (1962) 1 Cri LJ 152 (Ker) held dissented from in C A No 301 of 1968, D/- 30-1-1968 (Andh Pra) & AIR 1966 SC 128 & (1967) 2 Andh WR 424 & AIR 1966 All 231, Ref (Para 9)

Cases Referred: Chronological Paras.

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| (1968) C A No 301 of 1968, D/- 30-1-1968 (Andh Pra) | 4- |
| (1967) 1967-2 Andh W R 424 = 1967 Mad L J (Cri) 863, Public Prosecutor v Pichaiah | 4, 7 |
| (1966) AIR 1966 SC 128 (V 53) = 1966 Cri L J. 106, Mangal Das v. Maharashtra State | 4- |
| (1966) AIR 1966 All. 231 (V 53) = 1966 Cri L J. 501, Nagar Swasth Adhikari, Municipal Corporation, Agra v. Raghunath Singh | 4- |
| (1964) AIR 1964 All 199 (V 51) = 1964 (1) Cri L J. 502, Municipal Board, Faizabad v Lal Chand | 4, 7 |
| (1962) 1962 (1) Cri L J. 152 = 1961 Ker L T 308, Food Inspector, Calicut v Parameswara Chettiar | 4 |
| (1942) AIR 1942 Mad. 609 (V 29) = 43 Cri L J 863, In re Bellemkonda Kanakayya | 4 |

D Reddiappa Reddy, for Public Prosecutor, for Appellant, M. S K Sastrv, for Respondent.

JUDGMENT:— In C C 57 of 1967 on the file of the Judicial First Class Magistrate Rajam, the Food Inspector, Rajam Panchayat Board filed a complaint against the accused alleging that on 21-6-1967 the accused had brought two seers of buffalo milk to Sankara Vilas for sale, that the Food Inspector took a sample of milk and gave Rs 0.50 p to the accused towards the price of the sample of milk after observing all the prescribed formalities that on analysis the milk was found to be adulterated and that therefore, the accused committed an offence punishable under Sections 16(1) and 7 and read with Section 2 (i) (a) and (l) and Rule 44 (b) of the Prevention of Food Adulteration Act. The accused denied having committed the offence. The learned Magistrate, after full trial, acquitted the accused. The learned Public Prosecutor filed this appeal against the acquittal.

2 The prosecution examined two witnesses and their evidence is as follows —

PW 2 is the proprietor of Sanbara Villas Coffee hotel. The accused is a milk-vendor. He was selling milk to the hotel daily and on 24-6-67 at about 7-00 AM the accused brought milk to PW 2 for sale. Then the Food Inspector PW 1 purchased half a litre of milk as sample from the accused for analysis and paid Rs 0.50 p to the accused. The latter received the amount and issued a receipt Ex. P-1. Such states as follows —

You have purchased from me half seer of buffalo milk on 24-6-67 at 7-00 AM near Kalpu Guruvulus hotel for sending the same to Hyderabad for purpose of analysis. As you have paid half rupee towards the (cost) therefore I am in receipt of the same.

It bears the thumb impression of the accused. Ex. P 2 is the notice Ex. P-3 is another receipt signed by the accused in which he mentioned that PW 1 purchased half a seer milk and after paying the price he filled it in three bottles, corked and sealed them and gave one bottle to him. It is signed by PW 2. Ex. P 4 is the mediator's report which was prepared by PW 1 the Food Inspector. It purports to contain the signature of PW 2 and one T. Ramakrishna Rao (not examined) who is also said to be the scribe of it and the words "mark of Yenduvu Venkaya" who is the peon of PW 1. One of the sample bottles was duly analysed by the public analyst who sent a report Ex. P 6 to the effect that it contained only 11 per cent of added water. When questioned the accused stated as follows —

Q You have heard the evidence of P W 2 by name Surya Rao to the effect that you would be selling milk every day to the Shankara Vilas Hotel. What do you say?

Ans I have got one buffalo. I will sell milk to whoever purchases (from me).

When questioned about the actual occurrence he stated as follows —

I was taking milk to my nephew Chittappa Appalaswamy on his requisition. On my way P W 1 caught hold of me and took me to the Office. He gave me Rs 0.50 p and served a notice on me. I was made to affix thumb impressions."

One sample bottle was given to me. I was made to affix my thumb impressions. When questioned about the result of the analysis the accused stated as follows —

I did not mix water to it.

3 He pleaded 'Not guilty' to the charge framed against him under Sections 16 (1) (a) and 7 read with Section 2(a) (a) and (b) of the Prevention of Food Adulteration Act and Rule 44(b) and clause A-11 in Appendix B of PFA rules. He examined one defence witness

Chitti Appalaswamy whom the accused referred to above. He simply stated that he had asked the accused to supply him milk as he had relations on some personal obligations. When cross-examined he stated that he did not know that the accused was selling milk or even what the accused did with the milk of his she-buffaloe. The learned Magistrate in his Judgment referred to the contention of the accused that he never intended to sell milk and he was taking it free of cost to his nephew DW 1. But he did not discuss the evidence of DW 1 or express any opinion as to whether it was reliable or not or conclude that the statement of the accused was true but he held that the prosecution failed to prove the charge beyond reasonable doubt for reasons mentioned by him in his judgment as follows —

(1) Purchase of milk by PW 1 for sampling in this case cannot be treated as a sale.

(2) The only mediator that was present at the time of seizure of sample of milk was under the influence of the Food Inspector PW 1 and therefore he is not disinterested and not independent.

(3) The prosecution evidence is unreliable as there are corrections of date in Exs P-2 and P-4.

4 Ground No 1. The learned Public Prosecutor has relied on the decision of Chinnappa Reddy J in C A No 301 of 1968 D/- 30-1-1968 (Andh Pra). In that case the relevant facts were as follows —

"The Food Inspector purchased a sample of milk for analysis from the accused and paid him the price for it and the milk on analysis was found to be adulterated. The accused pleaded that he was just conveying the milk to his landlord DW 1. The learned Magistrate acquitted the accused holding that the milk belonged to his landlord and just when he was conveying the milk the Food Inspector came and took a sample from him. The learned Magistrate held that though a sale to a Food Inspector for analysis was a sale under Section 2(xiii) of the Act, such a sale was made under the compulsive authority of the Food Inspector and therefore it was open to the accused to establish that he was not a milk-vendor and that the milk was not intended for sale and that the accused had proved such fact by showing that the milk belonged to his master DW 1 and that the accused was merely a carrier of the milk."

In appeal the learned public prosecutor contended that once a sale for analysis was established and that the fact was established and the article of food was to be adulterated an offence had been made out and that the question whether the article of food which was sold to the Food Inspector was intended for sale or not is entirely irrelevant and that it was not necessary for the prosecution to

establish that the article of food was intended for sale nor it is permissible for the accused to attempt to prove that it was not intended for sale"

Chinnappa Reddy, J after considering a large number of decisions, accepted this contention and concluded as follows —

"In the light of the foregoing discussion, I am of the view that the question whether an article of food was intended for sale or not would be irrelevant in cases of actual sales whether such sales be for human consumption or use, or for analysis. The question would be relevant only in cases where the act of the accused is sought to be treated as "sale" by reason of the other limbs of the definition of "sale" in Section 2 (xiii), that is, where what is alleged is "an agreement of sale, an offer for sale, the exposing for sale or having in possession for sale of any such article" including, an attempt to sell any such article."

He disagreed with the decisions in *In Re Bellemkonda Kanakayya*, AIR 1942 Mad. 609 and in *Food Inspector, Calicut v. Parameswara Chettiar*, 1962 (1) Cri L J. 152 (Ker.) in view of the decision of the Supreme Court in *Mangal Das v. Maharashtra State*, AIR 1966 SC 128. He explained the observations of Obul Reddi J in *Public Prosecutor v Pitchaiah*, (1967) 2 Andh. W R 424 Chinnappa Reddy, J. approved of the decisions in *Municipal Board, Faizabad v. Lal Chand*, AIR 1964 All. 199 and *Nagar Swasth Adhikari, Municipal Corporation, Agra v Raghunath Singh*, AIR 1966 All 231. In particular he approved of the passages in AIR 1964 All. 199 which are as follows:—

... ..

"It was not obligatory upon the respondents to sell the milk to the Food Inspector. When the Food Inspector came to take the sample they could say that he could very well take the sample but they were not going to sell it. They did not do any such thing. The receipt Ex Ka-3 indicates that they did sell it for sample. No doubt it was the duty of the Food Inspector as provided under Section 10(3) to pay the price but if the respondents had refused to take the money the Food Inspector could not have compelled them to take it. If they had done so, they would not have committed any offence under Section 16(1) (b) of the Act which provides that the preventing of a Food Inspector from exercising any power conferred on him by the Act is an offence. By not taking the price, they were not preventing the Food Inspector from exercising his power They could allow the sample to be taken away by the Food Inspector telling him that he could take it if he wanted to do so but as they were not selling the milk they would not accept its price for they were storing milk only for mixing it with tea which alone they were selling at their shop"

In the present case the accused has specifically admitted that while he was taking the milk, P.W. 1 caught him and took a sample of milk from him and gave him the price and also one sealed sample bottle. P.W. 1 says that he purchased the milk saying that he wanted it for analysis. The accused did not deny the fact of taking of milk by P.W. 1 from him on his saying that the sample of milk was required for analysis. There is no room to doubt the evidence of P.W. 1 that the accused sold the milk for analysis that he paid Rs. 0.50 p as price for the milk to the accused and that the latter received the price. It has not been suggested to P.W. 1 or P.W. 2 that the accused refused to sell the milk to P.W. 1 for analysis. A suggestion was made to P.W. 1 in cross-examination as it would appear from the following answer.

"It is not true to say that I did not heed the representation of the accused that the milk was not for sale"

It does not appear that any suggestion was specifically put to P.W. 1 or P.W. 2 that the accused refused to receive the price or otherwise indicate that he was not receiving any price for the milk he sold to P.W. 1 or was not making a sale for analysis.

5. The learned Magistrate has held that P.W. 2 is not an independent witness because he is a hotel proprietor and subjected to influence of P.W. 1. The presence of P.W. 2 at the scene of offence was natural and no suggestion has been put to him in cross-examination to show that his evidence was interested. When a question was put to the accused that he was selling milk to Sankara Vilas that is a hotel of P.W. 2 the accused denied that fact but only stated that he would sell milk to whomsoever purchased from him. There is no room to doubt the evidence of P.Ws 1 and 2 that the accused brought milk for sale in the vicinity of P.W. 2's hotel.

6. Ex. P-2 contains a correction in the date. At one place in Ex. P-2 the date 26-6-1967 was corrected so as to appear as 24-6-1967. In that the figure "6" was over written so as to appear as "4". But the date 24-6-1967 is without any correction under the signature of P.W. 1 in Ex. P-2. In Ex. P-4 the figure "4" in the date 24-6-1967 under the signature of P.W. 2 seems to be overwritten on another number which is not very clear. But there is no correction in the date under the signature of G. Rama Krishna Rao in Ex. P-4. The learned Magistrate concluded as follows: "It appears as if Ex. P-4 was prepared on 26-4-1967 and the signature of P.W. 2 was obtained on Ex. P-4 on some date other than 24-4-1967 and hence the correction of the date 24-6-1967". But in Ex. P-4 the date 24-6-1967 is put without any correction under the signa-

ture of Ramakrishnan Rao who is said to have written Ex P-4 No suggestion was put to PW 1 or PW 2 about the correction in the date in Exs P-2 and P-4 The version of the accused is that he was asked to come to the office in the evening and that there his thumb impressions were obtained on some papers Ex P-2 purports to contain his thumb impression. It was not his case that his thumb impressions were obtained on any date other than the date viz 24-6-1967 the date of purchase of milk for analysis Ex P-3 which contained the thumb impression of the accused and PW 2 contains the date 24-6-1967 without any correction From the corrections it cannot be inferred that Exs P-2 and P-4 must have been prepared on some date other than 24-6-1967 or that the evidence of PWs 1 and 2 is not reliable

7 The learned advocate for the accused contends that the provision under Section 10(3) is part of the transaction of a Food Inspector taking a sample and that therefore the person from whom the Food Inspector takes sample is under obligation to receive the cost which is tendered by the Food Inspector and that therefore receiving the price by the accused does not amount to a sale I agree with the observations of the learned Judge in AIR 1964 All 199 which I have already extracted that the person in possession of a food article is not bound to receive the price and he has got a right to refuse or to receive it and to indicate that he is not making a sale of the article of food for analysis and that he is just allowing the officer to take a sample Obul Reddi J has observed in (1967) 2 Andh W R 424 that where there was a sale for analysis in a particular case is a question of fact which has to be decided on the facts of that case with reference to the definitions as given in Sec 2 (xii) of the Act When the evidence in a case is that a sample was taken by the Food Inspector from a person who has an article of food in his possession the question as to whether there resulted a sale for analysis has to be decided on the facts of that case If the person in possession of an article of food refuses to receive the price tendered by the Food Inspector it can be an indication of the fact that he was not selling the article of food but was only allowing a sample to be taken and not preventing the sample being taken by the Food Inspector so that he may not commit an offence and become liable for punishment under Ss 16 (1) and 7 of the Prevention of Food Adulteration Act But when a person allows or does not prevent sample of article of food in his possession being taken for analysis and receives the amount tendered to him as cost by the Food Inspector under Section 10(3) of the Act it will be presumed

that he made a sale of the article for analysis as defined in Section 2 (xii) But this presumption is rebuttable It has not been rebutted in the present case

8 If it is proved that the accused made a sale for analysis to the Food Inspector the question whether the article of food was intended by the accused for sale apart from the Food Inspector taking a sample for analysis would be irrelevant I respectfully agree with the decision of Chinnappa Reddy J

9 The reason No 1 given by the learned Magistrate for not treating the transaction as a sale is untenable The reasons Nos 2 and 3 given by the learned Magistrate for acquitting the accused are also untenable I find that the prosecution has established that the accused has committed an offence and accordingly I find the accused guilty under Section 16 (1) (a) (i) and 7 read with Section 2(i) (a) (1) and Rule 44(b) of the Prevention of Food Adulteration Act

10 The learned Advocate for the accused contends that the accused is a very poor man He has got only one buffalo and the complaint itself shows that the accused is a petty milk-vendor and that he has no previous convictions So I consider that a sentence of fine of Rs 100/- would meet the ends of justice Accordingly I set aside the acquittal and convict and sentence the accused to pay a fine of Rs 100/- in default to suffer rigorous imprisonment for two months The accused is given three weeks time to pay the fine from the date of receipt of records in the Court of Judicial First Class Magistrate Rajam

Appeal allowed

1970 Cr L J 396 (Vol 76, C N 91)
(ASSAM AND NAGALAND HIGH COURT)

P K GOSWAMI AND
M C PATHAK JJ

Nasia Pradhan and others (Accused),
Appellants v The State Respondent

Criminal Appeal No 96 (J) of 1965 D/-
29-5-1968 from order of Addl S J
U A D Dibrugarh D/- 14-5-1965

(A) Constitution of India Art 22 — Criminal P C (1898) S 340 — Assam Law Department Manual R 19 — Scope — Sessions trial — Accused at one stage intimating that he would have his own defence but on date of hearing he is undefended — Duty is cast on public prosecutor to bring it to notice of Court so that Court can appoint somebody to defend accused — Accused not getting fair trial — Entire trial is vitiated

S 340 Cr P C and Art 22 of the Constitution do not refer particularly to

KM/LM/F521/69/SSG/P

a case under Section 302, IPC nor for providing for free legal aid under the law. The State Government in conformity with the object or intention underlying Section 340, Cr P C and later engrafted in the Constitution, has made some provision for defence of pauper accused who have got to face a charge where the extreme penalty is provided under the law, namely death Rule 19 in the Assam Law Department Manual, published under the authority of the State Government of Assam, provides for defence of a pauper accused of murder. (Para 6)

Under R 19(3) even if the accused at one stage intimated that he would have his own defence but on the date of hearing he is undefended, a duty is cast on the public prosecutor to bring it to the notice of the Court so that the Court can appoint somebody to defend the accused. If none is available as per the list, a gentleman of the Bar present in Court may be requested to defend the accused. The object underlying this provision is that no accused who is accused of a charge which may lead to the extreme penalty under the law should be deprived of a defence. Otherwise this leads to inadequate defence of the accused persons before the court of session and the entire trial is vitiated for the accused not having got a proper and fair trial.

(Para 7)

(B) Criminal P. C. (1898), Ss. 340, 423 — Murder Case — Accused at one stage intimating that he would have his own trial, but on date of hearing he is undefended — Inadequate defence of accused — Accused not getting fair trial — Entire trial vitiated — Accused already serving three years in jail — Accused persons also receiving injuries — Case held could not be remanded for retrial — Accused persons acquitted.

(Paras 7, 8)

L Datta, for Appellants, A M Mazumdar, Public Prosecutor, for Respondent

GOSWAMI, J.:— This appeal from jail is directed against the judgment of conviction under Section 304 part I read with Section 34 and also under Section 326 read with Section 34, IPC and sentence of rigorous imprisonment for ten years on the first count and three years under the second count to run concurrently passed by the learned Additional Sessions, Upper Assam Districts at Dibrugarh

2. The prosecution case is that the deceased Bharat Pradhan was in possession of a plot of land with bamboos standing thereon. There was already a dispute with respect to that land for which there was a proceeding under Section 145, Criminal Procedure Code, and the preliminary order was drawn on 14-5-1962 and also the land was attached on the same

day, as will appear from Exhibit 2. It is said that the accused armed with axes and daos started cutting the bamboos on the land, whereupon the deceased Bharat Pradhan along with others went and protested, at which the accused persons dealt dao and axe blows on Bharat, who succumbed to the injuries. Mahi Chandra Pradhan also was in that group and when he intervened, he was also assaulted and he sustained grievous injuries. After the incident they were both lying injured on the land.

3. The defence of the accused is that they claim possession of the land and on that day in order to save their crops from damage by cattle they were cutting bamboos on the land to make some fencing.

4. Initially there were six accused who were charged, but the learned Additional Sessions Judge acquitted Dhane-swar Goala and Pacha Mura on the view that these two persons were merely labourers and had not shared any common intention to assault the complainant party.

5. At the outset our attention has been drawn to the fact that the accused were undefended before the Court of Session. It also appeared that initially there was a counsel appointed by the learned Additional Sessions Judge to defend the accused persons, who appeared to be undefended at that stage. Later on, however, on the adjourned date when they signified their intention to engage their own counsel, the learned Additional Sessions Judge terminated the appointment of the State counsel and allowed their prayer. It so happened that on the adjourned date of hearing when the accused were brought to trial they appeared to be undefended and the order-sheet showed that the trial proceeded. When we have perused the entire record we find that there is some cross-examination of the prosecution witnesses although in a meagre and unsatisfactory way, perhaps the accused themselves did what their wits would allow them to do under the circumstances of the case.

6. Section 340 of the Criminal Procedure Code may be read:

"(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader

x x "

Even under the Constitution, Article 22 makes provision for an opportunity to be given to the accused to be represented by a lawyer of his own choice. Article 22 (1) is in the following words:

"(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest nor shall he be denied the

right to consult and to be defended by, a legal practitioner of his choice

x x x x x

Both Section 340 Cr P C and Article 22 of the Constitution do not refer particularly to a case under Section 302 IPC nor for providing for free legal aid under the law. All the same we find that the State Government in conformity with the object or intention underlying Sec 340 Cr P C and later engrafted in the Constitution has made some provision for defence of pauper accused who have got to face a charge where the extreme penalty is provided under the law namely death. Rule 19 in the Assam Law Department Manual published under the authority of the State Government of Assam, provided for defence of pauper accused of murder. It runs thus

'(1) When an accused is committed for trial on a charge of murder the committing Magistrate shall at the time of passing order for his commitment enquire of the accused whether he will make arrangements for his own defence in the Court of Sessions or wishes to be defended at the expense of Government and shall communicate the result of his enquiry to the Sess Judge direct filing a copy of the letter with the commitment record. If the accused expresses a wish to be defended at Government expense the committing Magistrate shall state in the letter whether in his opinion the accused can afford to engage a pleader in the Sessions Court giving the grounds for his opinion. It shall be stated whether the accused was defended by a pleader or mul tar in the Lower Court

(2) On receipt of intimation that a prisoner committed to the Court of Sessions on a charge of murder desires to be defended at the expense of Government it has been arranged that the Sessions Judge shall unless he sees reason to believe that the prisoner is in a position to pay for his own defence appoint a pleader for the purpose. To this end the Sessions Judge shall maintain a list of Barristers or pleaders of the districts in which Sessions trials are ordinarily held who are willing to accept briefs for the defence of prisoners on their trial for murder and ordinarily one of the persons on such list should be engaged.

(It is not necessary to refer to some corrections made in this sub-rule by certain correction slip No 25)

(3) If notwithstanding these precautions it appears at the commencement of the trial that an accused charged with murder is undefended the public prosecutor shall bring the fact to the notice of the presiding Judge and request him to appoint a pleader for the defence of the prisoner. The Judge may then appoint any Barrister or pleader on the list refer-

red to above or any member of the Bar present in Court to defend the prisoner

x x x x x

7 It is clear therefore, from sub-rule (3) of Rule 19 that even if the accused at one stage intimated that he would have his own defence but on the date of hearing he is undefended a duty is cast on the public prosecutor to bring it to the notice of the Court so that the Court can appoint somebody to defend the accused. If none is available as per the list a gentleman of the Bar present in Court may be requested to defend the accused. The object underlying this provision is that no accused who is accused of a charge which may lead to the extreme penalty under the law should be deprived of a defence. This is a salutary procedure and is in the wake of clamour of all accused persons in a criminal trial who are indigent to receive free defence at the expense of the State. We are therefore surprised that the learned Additional Sessions Judge having once appointed a Counsel to defend these accused persons should have thought it fit to terminate the appointment and refrain from resuming his assistance when the accused were in fact undefended before him. All this has led to inadequate defence of the accused persons before the Court of Session.

According to the prosecution the land was under attachment which means that it was in the custody of the Court and any one entering upon the land after the order of attachment was promulgated would be committing an act of trespass. If the accused had gone there they were committing trespass so also the complainant party when they entered the land it is the prosecution case that the accused were first there and were cutting the bamboos. They claimed to use the bamboos as fencing to protect their crops. We have put the question to the public prosecutor who is unable to show from the records that this plea of the accused that they were cutting the bamboos in order to preserve their crops has been denied by any prosecution witness. If therefore the accused were merely cutting the bamboos in order to put up a fence to save their crops it may be debatable whether they were actually entering the land with intention to commit an offence. Be that as it may the land being already under attachment the complainant party also had no business to enter on the land but only could report to the Court which attached the land for taking appropriate steps against the accused persons. The question which arose in the entire circumstances of the evidence in the case was, who the aggressor was. This point however was absolutely ignored by the learned Additional Sessions Judge. This has happened because the accused were

not properly defended and it is a case where we may say that the entire trial is vitiated for the accused not having got a proper and fair trial. We are, therefore, unable to uphold the conviction of the accused persons under all the sections charged.

8. The next question would be, whether this is a fit case where we should think of remanding the case for retrial. The occurrence took place on 15th October, 1962. Apart from the fact that Bharat Pradhan died as a result of the injuries and Mahi Chandra Pradhan and three others received injuries, amongst the accused we find there are three persons Garbaria Pardhan, Petua Pradhan and Nasia Pradhan, who also had similarly received injuries. The accused have already served three years in jail. We are, therefore, unable to accede to the request of the learned public prosecutor for a remand of the case for retrial of the accused. The accused-appellants are acquitted of the charges under Section 304 Part I, read with Section 34 and also under Section 326 read with Section 34, Indian Penal Code. They shall be discharged from their jail custody forthwith.

9. The appeal is allowed.

10. M. C. PATHAK, J.: I agree.

Appeal allowed.

1970 CRI. L. J. 399 (Vol. 76, C. N. 92) (BOMBAY HIGH COURT)

VAIDYA, J

P. V. Masand and others, Petitioners v The State of Maharashtra and another, Respondents

Criminal Revn Appln No 1081 of 1967, D/- 20-11-1968

Criminal Procedure Code (1898), Ss. 476, 476-B, 195(3), 6-A, 17-B — District Magistrate is one of Executive Magistrates and is subordinate to Court of Session within S. 476-B — Order of District Magistrate under S. 476 — Person affected by such order has right of appeal to court of Session under S. 476-B — ILR (1964) Cut 515, Foll.; AIR 1967 Bom. 41, held no longer good law in view of Cri. Revn. Appln. No. 955 of 1966, D/- 21-10-1966 = (reported in 1968-70 Bom LR 588). (Prs. 18, 17, 14, 12, 11, 9)

Cases Referred: Chronological Paras

(1967) AIR 1967 Bom 41 (V 54) = 68 Bom L R 233, Ramchandra Nagoji Kadam v Dhondiram Nagoji Kadam 18

(1966) Cri Revn. Appln No 955 of 1966 D/- 21-10-1966 = 70 Bom LR 588, Chatrapati Shivaji Co-op Housing Society Ltd v State of Maharashtra 18

(1964) ILR (1964) Cut 515 = 30 Cut L T 356, Bharat Pati v Brindaban Pande 16

(1959) Cri. Revn Appln No. 145 of 1959, D/- 8-7-1959 (Bom) 2

(1959) Cri. Revn Appln No 1585 of 1959, D/- 8-4-1960 (Bom) 2

R W Adik with N. H Gursahani, for Petitioners, M. P. Kanade, Asstt Govt. Pleader, for State, G L Bhatia and H C. Bhatia, for Respondent No. 2

ORDER:— This revision application raises an important point of law as to whether an appeal lies from an order passed by the District Magistrate under Section 476 of the Criminal Procedure Code to the Court of Sessions under Section 476-B of the said Code

2. The revision application is filed by the four persons against whom the order was passed by the District Magistrate, Thana under Section 476 of the Criminal Procedure Code in the following circumstances

Gajadhar Bhagchand Prithiyani, respondent No 2 in this revision application, filed on September 4, 1958 an application under Section 145 of the Criminal Procedure Code alleging that on September 3, 1958, he was forcibly and wrongfully dispossessed by the four opponents in that application (1) Lachhamandas Sitaldas, who is not a party in this revision application, (2) Pahlajrai Sitaldas, Petitioner No 3 in this revision application; (3) Vassumal Bodaram, and (4) Pamandas Bodaram who are also not parties in this revision application. The application filed by Gajadhar had a chequered history. It is not necessary to mention all the facts relating to that application or the details of the proceedings in respect of that application, including Criminal Revn Appln, No 145 of 1959, which was decided on July 8, 1959 (Bom) by Mr Justice Mudholkar and Mr Justice Naik and Criminal Revn Appln No 1585 of 1959, which was decided on April 8, 1960 (Bom) by Mr Justice Patel and Mr Justice Patwardhan in this Court. It is sufficient to state for the disposal of the present revision application that an order was passed by the District Magistrate, Thana, upon that application under Section 145 of the Criminal Procedure Code on July 29, 1963 restoring possession of the room to Gajadhar and in pursuance of that order Gajadhar has been in possession of the said room since 1963.

3. On December 20, 1963, Gajadhar made an application to the District Magistrate, Thana, submitting that during the proceedings in the application under Section 145 of the Criminal Procedure Code, which were, according to the applicant, protracted unduly on account of the influence which his opponents were holding, his opponents relied on an anti-dated false agreement purporting to be of

December 25 1956 and filed false affidavits and gave perjured evidence to the effect that one Dr Kripal who was actually in United Kingdom was in possession of Room No 15 under that agreement Gajadhar further alleged that all the persons concerned with that agreement and with the affidavits filed in the said proceedings and the persons who gave evidence against him were liable to be prosecuted for forgery and perjury. He therefore prayed that the District Magistrate should sanction prosecution of the persons concerned

4 The District Magistrate thereupon held an inquiry under Section 476 of the Criminal Procedure Code considered the documentary evidence and other material before him and passed an order sanctioning prosecutions against the four petitioners in this revision application and one Manik Israni who died subsequently as the District Magistrate came to the conclusion that the witnesses who had given the evidence by the affidavits vouching the authenticity of the aforesaid agreement and the other witnesses who filed affidavits confirming the say of Pahlajrai that Dr Kripal was in possession of Room No 15 must be regarded as having given false evidence. Petitioner No 1 was ordered to be prosecuted for the offences under Sections 197 and 202 of the Indian Penal Code because according to the learned District Magistrate Petitioner No 1 who was at the relevant time an Honorary Magistrate put his signature in token of his attestation of the aforesaid agreement on September 9 1958 even though the document was purported to have been executed on December 25 1956 and the signatures to the document were not before him. He also held that petitioner No 1 attested a true copy of the said document on September 11 1958 notwithstanding that he had himself scored out his attestation. The District Magistrate ordered Petitioner No 2 to be prosecuted under Section 199 of the Indian Penal Code as he found that Petitioner No 2 made an affidavit on December 5 1958 stating falsely that he was aware of the fact that Dr Kripal had purchased Room No 15 and had also seen the agreement of the sale under which Dr Kripal had become the owner of Room No 15 and had further stated that after the departure of Dr Kripal in 1957 he had been invited in Room No 15 by Kripal's father Pahlajrai. Then petitioner No 3 in this revision application who was opponent No 2 in the application filed under Section 145 of the Criminal Procedure Code was ordered to be prosecuted under Section 193 for fabricating false evidence by creating a false agreement and also under Section 209 of the Indian Penal Code for using the said forged document in the course of the proceedings under Sec 145

of the Criminal P C. The deceased Manik Israni was ordered to be prosecuted for offences under Sections 193 and 199 of the Indian Penal Code for filing a false affidavit. Petitioner No 4 Asudomal Kundandas was ordered to be prosecuted under Sections 193 and 199 of the Indian Penal Code for filing false affidavits and for making a false statement that Dr Kripal resided in Room No 15 for about one year.

5 It must be stated here that the said order of the District Magistrate does not bear any date. However it was forwarded by the District Magistrate to the Judicial Magistrate First Class on June 30 1964. After forwarding of the papers by the District Magistrate nothing serious appears to have been done by the District Magistrate till a complaint was filed on February 19 1966 in the Court of the Judicial Magistrate First Class at Thana which was numbered as Criminal Case No 267 of 1966. Consequently summonses were issued against accused No 1 under Section 209 read with Section 114 of the Indian Penal Code and against accused Nos 2 to 5 under Sections 196 199 and 209 read with Section 114 of the Indian Penal Code. Although processes were issued on February 19 1966 the summonses were not served till April 5 1966. However accused No 2 was present on April 27 1966 and accused Nos 3 and 5 were present in the Court after service of the summonses on April 28 1966. But accused Nos 1 and 4 were not served till then and fresh summonses had to be issued against them.

6 On May 18 1966 the case was taken up before the Court and accused Nos 1 and 4 also appeared. But it is clear that the process was issued on all the Petitioners and the deceased Israni on May 18 1966 and they appeared in the proceedings through Advocates. Manik Israni died subsequently. In spite of all these steps having been taken there is nothing on the record to show that the order of the District Magistrate sanctioning the prosecution under Section 476 of the Criminal P C was communicated to the Petitioners by the District Magistrate even though the said order appears to have been passed sometime before June 13 1964 when the District Magistrate forwarded papers to the Judicial Magistrate. What we find on record is a certified copy of that order and certain correspondence addressed on behalf of some of petitioners to the District Magistrate which shows that an application for a certified copy of the order of the District Magistrate was made on January 16 1966. It appears that the said certified copy was ready for delivery and was delivered on November 25 1966 though in the certified copy which is filed against the entry copy ready on' originally dated 6-10-66 was

struck off and instead date '25-11-67' was written. It is indeed shocking to find, in the first place, that the District Magistrate did not care to communicate the order, which he had passed, to the parties concerned and in the second place, his office did not care to supply the certified copy of the order, which ran into only about six written pages, for a period of more than 10 months

7. On getting the certified copy on November 25, 1966 the Petitioners filed an appeal against the order of the District Magistrate on November 28, 1966 in the Court of Session at Thana. But it appears that although it was presented on that day, the proper Court-fee stamps were not paid and the Office raised an objection with regard to the limitation and it was only on December 20, 1966 that the third Additional Session Judge, Thana, in view of an affidavit filed in the course of the proceedings by petitioner No 2 explaining the delay and in view of the fact that the certified copy was applied for on January 16, 1966 and was ready for delivery and delivered on November 25, 1966, admitted the appeal and thereafter the Petitioners paid the Court-fees on December 21, 1966. The learned Second Additional Sessions Judge, Thana, who heard the appeal, however, by his order dated August 16, 1967, held that the Sessions Court had no jurisdiction to entertain the appeal and ordered that the appeal should be returned to the appellants for presentation to the proper Court.

8. Feeling aggrieved by the order of the District Magistrate and also the order of the Second Additional Sessions Judge, the Petitioners filed the present criminal revision application on November 28, 1967. The revision application was admitted by this Court on December 8, 1967 and the stay order was also issued staying the proceedings in Criminal Case No 267 of 1966 in the Court of the Judicial Magistrate, First Class, Thana. The Petitioners, however, did not remove the objections raised by the office in respect of this revision application. One of the said objections was that the petitioners had not filed along with the revision application a certified copy of the impugned order of the District Magistrate under Section 476 of the Criminal Procedure Code, although they had taken time from time to time for filing the certified copy. Gursahani has also produced the appeal memo which was filed along with the appeal memo in the Court of Sessions, Thana and it appears to have been returned to the petitioner along with the appeal. Mr Gursahani has also produced the appeal memo which was returned to his clients and both the certified copy and the appeal memo before the Sessions Court are taken on the record today. But it must be observed that the Petitioner No 3 who was opponent No 2

in the proceedings under Section 145 of the Criminal P C appeared to be very anxious to protract the proceedings by not taking the necessary steps in time to remove the office objections and it is necessary for the quick disposal of this case that any attempt by Petitioners to delay the proceedings should not be allowed to succeed.

9. Mr Gursahani, the learned counsel for the Petitioners has submitted that the learned Second Additional Sessions Judge was not right in his view that no appeal lay against the order of the District Magistrate under Section 476-B of the Criminal P C. He has also submitted that the order of the District Magistrate is illegal and without jurisdiction and wrong on merits. However, as the learned Sessions Judge has decided the matter only on the preliminary point of jurisdiction and as I am of the view that the view taken by the learned Sessions Judge was wrong, I do not propose to discuss the merits of the case. Moreover for reasons to be stated presently I hold that the Petitioners have the right of appeal on facts as well as on law against the order passed by the District Magistrate before the Court of Session.

10. Mr Kanade, the learned Assistant Government Pleader has sought to support the order passed by the Additional Sessions Judge on the ground that whereas under Section 476-B read with Sec 195 (3) of the Criminal P C, the right of appeal is conferred on the parties affected by the order under Section 476 of the Criminal P C, only when ordinarily an appeal lies from the sentence passed by the District Magistrate and as no sentence of punishment can be passed by the District Magistrate under the provisions of the Criminal P C now in force, the Petitioners had no right of appeal against the order passed by the District Magistrate. Mr Bhatia who appeared for Gajadhar, respondent No 2, supported the contention raised by Mr Kanade and further argued that the order was passed by the District Magistrate sometime before June 30, 1964 and the Petitioners came to know of the order in 1964 and hence the appeal presented by them in the Court of Session on 11-10-1966 was hopelessly time-barred. Mr Bhatia further submits that the affidavit filed by the Petitioner No 2 in the Court of Session does not disclose sufficient material on the basis of which the Court could excuse the delay in filing the appeal and he is entitled to raise the point of limitation, as that was not considered by the Second Additional Sessions Judge after his client received notice of the appeal. I do not wish to deal with the contention regarding limitation at this stage because it is open to the Respondent No 2 to raise the point of limitation before the Court of Session. The order against which this

revision application is filed is the order returning the appeal filed by the Petitioner for presentation to the proper Court. The merits of the appeal are not at all considered by the Sessions Judge.

11 Hence the only point which I shall deal with for the purpose of the disposal of this revision application is the point of jurisdiction decided by the Second Additional Sessions Judge. There can be no doubt that against any order passed under Section 476 of the Criminal P C directing a prosecution the person prosecuted can file an appeal after the filing of the complaint under Section 476-B which runs as follows—

Any person on whose application any Civil Revenue or Criminal Court has refused to make a complaint under Sec 476 or S 476-A or against whom such a complaint has been made may appeal to the Court to which such former Court is subordinate within the meaning of Sec 195 sub-section (3) and the Superior Court may thereupon after notice to the parties concerned direct the withdrawal of the complaint or as the case may be itself make the complaint which the subordinate Court might have made under S 476 and if it makes such complaint, the provisions of that section shall apply accordingly.

12 The definition of the Court to which an appeal can be preferred as incorporated in Section 476 of the Criminal P C is to be found in Section 195 sub-s (3) which runs as follows

(3) For the purposes of this section a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court or in the case of a Civil Court from whose decrees no appeal ordinarily lies to the principal Court having ordinary civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate

In view of these provisions therefore the first question that arises is as to whether the District Magistrate is a criminal Court within the meaning of Section 476-B of the Code of Criminal Procedure. The District Magistrate is one of the Executive Magistrates mentioned under Section 6-A of the Code of Criminal Procedure. Section 17-B of the Code lays down

17B Courts of Session and Courts of Magistrates (including Courts of Presidency Magistrates) shall be Criminal Courts inferior to the High Court and Courts of Magistrates outside Greater Bombay shall be Criminal Courts inferior to the Court of Session

13 The next question that has to be considered is as to whether the Court of Session is a Court to which appeals ordinarily lie from an order of the District Magistrate for the purpose of Sec 476-B

and S 195 sub-section (3) of the Code of Criminal Procedure

14 Mr Gursahani submitted that under Section 476-B of the Code in respect of any proceedings in any Criminal Court the petitioner against whom a complaint is filed under Section 476 of the Code is entitled to appeal to the Court to which the District Magistrate is subordinate within the meaning of Section 195 sub-section (3) of the Code. Subordination defined in Section 195 (3) is not a general subordination or an administrative subordination. Section 195 sub-sec (3) of the Code gives a special meaning to the word and that meaning is that if appeals ordinarily lie against any order passed by the District Magistrate to the Court of Session, the District Magistrate would be subordinate to the Court of Session.

15 Mr Gursahani relied on the provisions of Sections 406 406-AA and 406-A of the Criminal Procedure Code and contends that since those sections provide for appeals from the orders under Secs 118 436 (2) and 122 of the Code of Criminal Procedure it must be held that the District Magistrate is a subordinate Criminal Court for the purpose of Sections 195 (3) and 476-B of the Code. He submits that the word "sentence occurring in Section 195(3) of the Code does not necessarily imply 'sentence of punishment after conviction'. But it means any order passed by a Criminal Court. He relies on the meaning of the said word as given in Wharton's Law Lexicon where sentence of a Court is given the meaning as

definite judgment pronounced in Criminal Proceedings. Mr Gursahani contends that the orders referred to in Sections 406 406-AA and 406-A of the Code being all orders or definite judgments pronounced in Criminal Proceedings they are sentences as explained by Wharton's Law Lexicon. He also relied on the meaning of the word sentence given in Concise Oxford Dictionary of Current English 1964 Edition where the meaning given to the word sentence is verdict although there is a gloss that this meaning is rare and its usual meaning is declaration of punishment awarded to person condemned in a criminal trial. He argued that it is also possible that in view of the accepted meaning in Law Lexicon of the word sentence to mean a Judgment of the Criminal Court legislature after introducing the scheme of separation of judiciary and executive did not think it necessary to amend the provisions of Section 195 (3) of the Criminal Procedure Code.

16 Mr Gursahani has also relied on a decision in *Bharat Pati v Brindaban Panda* ILR (1964) Cut 515 which fully supports his argument. In that case there was a proceeding under Section 143 of the Criminal Procedure Code and as it was

considered necessary by the Sub-Divisional Magistrate, before whom the said proceedings were heard, to prosecute one of the parties, an order was passed by him under Section 476 of the Criminal Procedure Code. An appeal was filed to the Sessions Court against the said order and the Sessions Judge came to the conclusion that no appeal lay under Section 476-B of the Criminal Procedure Code against the order of the Sub-Divisional Magistrate under Section 476 of the Code. Narasimham, C. J. held:

"Here the learned Sessions Judge has committed a serious error. The scheme of separation of judiciary from the executive does not in any way affect the judicial powers of the Sessions Judge under the Code of Criminal Procedure which have been kept intact. His Court is superior to that of all Magistrates whether executive or judicial both for the purpose of exercising revisional jurisdiction and also for the exercise of appellate powers where appeals have been provided against orders of Magistrates. It is true that trial of cases has been transferred to the Judicial Magistrates and the Sessions Judge is their appellate authority subject to the provisions of Chapter XXXI of the Code of Criminal Procedure. It is also true that under the allocation of functions between the Executive and the Judiciary the jurisdiction of the Executive Magistrates is limited to those provisions of the Code dealing with prevention of offences mentioned in Chapters VIII, IX, X, XI and XII of the Code. The learned Sessions Judge, however, is not right in saying that no appeal is provided against the orders passed by Executive Magistrates, while exercising powers under those Chapters. An order passed by an Executive Magistrate in a proceeding under Sections 107, 109 or 110, Criminal P. C., is appealable to the Court of Session under Section 406 and Section 406-A, Criminal P. C. Hence, by virtue of sub-section (3) of Section 195, Criminal P. C., even Executive Magistrates are deemed to be subordinate to the Court of Session. An appeal will, therefore, lie under Section 476-B, Criminal P. C. to the Court of Session, against an order passed by an Executive Magistrate under Section 476, Criminal P. C."

17. With respect I entirely agree with the view taken by Narasimham, C. J. as, in my judgment, that view appears to be the proper view on a reasonable construction of Section 195 (3) and, I, therefore, uphold the contention of Mr. Gursahani that the Petitioner had a right of appeal against the order of the District Magistrate to the Court of Session.

18. The learned Sessions Judge, Thana, relied on a decision of this Court in Ramchandra Nagoji Kadam v. Dhondiram Nagoji Kadam, 68 Bom LR 233 = (AIR 1967 Bom 41) which has been overruled by

the Division Bench of this Court consisting of Mr. Justice Patel and Mr. Justice Paranjape on October 21, 1966 in Criminal Revn. Appln. No 955 of 1966 (Reported in (1968) 70 Bom LR 588). The case on which the learned Sessions Judge relied and which was overruled, related to the question as to whether the revisional powers could be exercised in regard to the decisions by the Executive Magistrates, and it has been held that if the Magistrate was acting as a Criminal Court, the order would be subject to revisional jurisdiction under S 435 of the Criminal P. C. It is not necessary to discuss the cases, further, because in the present case the specific provisions of Ss 476-B and 195 (3) of the Cr. P. C. which conferred a right of appeal on the persons aggrieved by an order under S 476 of the Code required to be construed and as stated by me above, on a proper construction of these provisions, it is clear that the petitioners had a right of appeal to the Court of Session against the order of the District Magistrate.

19. In the result the order passed by the Second Additional Sessions Judge, Thana, directing the return of the appeal for presentation to the proper Court is set aside and the appeal memo which is filed by Mr. Gursahani today in this Court is directed to be forwarded to the Sessions Judge, Thana; and he shall dispose of the appeal on merits (including the point of limitation raised by Mr. Bhatia) in accordance with law. As there has been a considerable delay in the disposal of these proceedings following the order of the District Magistrate under Section 476, Criminal Procedure Code passed prior to 30th June 1954, the Sessions Judge should expedite the hearing of the appeal. Rule absolute.

Application allowed

1970 CRI. L. J. 403 (Vol. 76 C. N. 93)
(CALCUTTA HIGH COURT)

AMARESH ROY AND N C. TALUKDAR JJ.

Bhulakiram Koiri, Appellant v. The State, Respondent

Death Ref No 3 of 1967, Criminal Appeal No 148 of 1967, D/- 23-2-1968

(A) Penal Code (1860), Section 302 — Trial for murder — Absence of corpus delicti — Crime can be proved by circumstantial evidence.

In a trial for murder, fact of death can be proved by circumstantial evidence and notwithstanding that there is no dead body or trace of it, or any direct evidence as to the manner of death of a victim, the corpus delicti may be proved

IL/LL/D870/68/BNP/B

by such circumstances as render the commission of crime certain and beyond reasonable doubt AIR 1962 Cal 504 and AIR 1963 SC 74 Foll (Para 7)

(B) Penal Code (1860) Section 302 — Trial for murder — Circumstantial evidence leading to commission of crime by accused — Non-establishment of motive — Trial is not vitiated AIR 1949 PC 103 and AIR 1955 SC 807 and AIR 1940 Cal 561 and AIR 1962 Cal 501, Foll (Para 8)

(C) Evidence Act (1872) Sections 24, 25 — Extra judicial confession — Confession made to private person in presence of police officer is inadmissible AIR 1956 SC 217, Foll (Para 11)

(D) Evidence Act (1872) Section 24 — Retracted confession — Absence of any corroborative evidence — Conviction solely based on retracted confession is illegal AIR 1956 SC 217, Foll (Para 11)

(E) Evidence Act (1872) S 30—Retracted confession by one of co-accused — Use of against other co accused — It has very weak evidentiary value — Great extent of corroboration is necessary for conviction Case law discussed (Para 12)

(F) Evidence Act (1872) Section 45 — Expert depending on probabilities and not on firm conviction in his ultimate opinion — Opinion carries little value (Para 13)

(G) Evidence Act (1872) Section 45 — Evidence of footprint expert — Evidentiary value — Unsafe to convict accused solely on his opinion — Science of identification of foot-print impression is not exact science Case law discussed (Para 16)

(H) Criminal P C (1898) Section 367 — Appreciation of evidence — Circumstantial evidence — Duty of Court — (Evidence Act (1872) Section 3)

In a case in which the entire evidence pointing to the guilt of the accused is of circumstantial nature the circumstances from which the conclusion of guilt is to be drawn must in the first instance be fully established and all the facts so established must be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude other hypothesis but the one proposed to be proved. In other words there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. Case law discussed (Para 17)

Cases Referred Chronological Paras

(1964) AIR 1964 SC 1184 (V 51) = 1964 (2) Cri LJ 344 Jogia Hajam v State of Bihar 12

(1963) AIR 1963 SC 74 (V 50) = 1963 (1) Cri LJ 70 Raghav Prapanna Tripathi v State of U P 7, 17

(1963) AIR 1963 SC 200 (V 50) = 1963 (1) Cri LJ 235 H G Agarwal v State of Maharashtra 17

(1962) AIR 1962 Cal 504 (V 49) = 1962 (2) Cri LJ 354 Arun Kumar Banerjee v State 7 8

(1960) AIR 1960 SC 29 (V 47) = 1960 Cri LJ 137 Govinda Reddy v State of Mysore 17

(1960) AIR 1960 SC 500 (V 47) = 1960 Cri LJ 682 Anant Chintaman Lagu v State of Bombay 7 17

(1960) AIR 1960 Bom 461 (V 47) = 1960 Cri LJ 1327 Loku Basappa Pujari v State 10

(1960) AIR 1960 Cal 183 (V 47) = 1960 Cri LJ 338 State v Manindranath Das 12

(1959) AIR 1959 Pat 534 (V 46) = 1959 Cri LJ 1335 Basudeo Gir v State 15

(1958) 1958 Pat LR 246 Ramkaran Mistri v State of Bihar 15

(1956) AIR 1956 SC 217 (V 43) = 1956 Cri LJ 421 Aher Raja Khima v State of Saurashtra 11

(1956) AIR 1956 SC 415 (V 43) = 1956 Cri LJ 805 Pritam Singh v State of Punjab 15

(1955) AIR 1955 SC 807 (V 42) = 1955 Cri LJ 1653 Atley v State of U P 8

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(1955) AIR 1955 Assam 51 (V 42) = 1955 Cri LJ 437 Ganesh Gogoi v State 15

(1954) AIR 1954 Pat 131 (V 41) = 1954 Cri LJ 201 State v Karu Gope 15

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(1940) AIR 1940 Cal 561 (V 27) = 42 Cri LJ 285 Upendranath Ghosh v Emperor 8

- (1936) AIR 1936 Mad 426 (V 23) =
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(1933) AIR 1933 Cal 426 (V 20) =
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(1902) 6 Cal WN 98, Ram Swarup
Rai v. Emperor 10
(1900) 4 Cal WN 129 = ILR 27 Cal
295, Empress v. Jadhav Das 10
(1897) 1 Cal WN 33, Queen Empress
v. Fakir Md. Sheikh 15
(1354) 2 C & K 309, Towell's Case 17
Prasun Chandra Ghosh, for Appellant,
S. N. Banerjee, D. L. R; Harsit Chandra
Ghosh, for Respondent.

N. C. TALUKDAR, J.:— This is a Reference under Section 374 of the Code of Criminal Procedure, dated the 7th March, 1967 from Sri D C. Chakraborti, Additional Sessions Judge, 1st Court, Howrah for confirmation of the sentence of death passed by him on the accused-appellant Bhulakiram Koiri alias Bhulai, who has been convicted under Section 302 read with Section 34 of the Indian Penal Code, while the co-accused Probhuram Pashi alias Probhua was acquitted of the said charge, in Sessions Trial Case No 1 of January, 1967. The accused-appellant also has preferred an appeal against the said order of conviction and sentence.

2. The prosecution case which brings to light the unfortunate case of a spited friend, can be put in a short compass. The accused-appellant Bhulakiram and the deceased Musafir Singh were friends and co-employees under Messrs Guest, Keen, Williams Ltd at Shibpur, Hawrah. Musafir was rather extravagant in nature and used to touch his friends for loans. Musafir had occasion to take loan from the accused-appellant Bhulakiram but did not repay the same in spite of repeated demands. Bhulakiram became sore and threatened to take action. He is said to have observed that though there was friendship, there would be a fight some day. On the 22nd November, 1965, after the night-shift was over at the factory of Messrs. Guest, Keen, Williams Ltd, Bhulakiram took Musafir to the hotel of P. W. 9, Curmit Singh near the said factory and they had some snacks and also some wine, which they had brought along with themselves. Thereafter they left the hotel premises and on the way were joined by the co-accused Probhuram Pashi alias Probhua. Together they proceeded to the betel and cigarette shop of P. W. 11, Ganga Prosad Gupta. The said shop is opposite to the gate of Guest, Keen, Williams Ltd. After purchasing some betel and cigarettes they left. Near about

the said shop lived one Mantu Sarkar, the brother of P. W. 17, Jatindra Chandra Sarkar and he also joined the party. Mantu Sarkar however, is still absconding. They all went near the Dhobi ghat where Bhulakir and Mantu gave the fatal blows and Probhua assisted them. When Musafir was considered to be dead, the body was thrown into the jhil and the party thereafter left the place. A natural commotion followed from the finding of the body in the jhil on the following morning. Ganga Prosad Gupta, P. W. 11, out of curiosity went to see the dead body and found the deceased to the companion of the above-mentioned Probhua and Bhulakiram whom he knew before and he reported about his knowledge to P. W. 2, Narayan Shaw, who is his father-in-law. P. W. 2, has a grocery shop near about the place and he also in his turn, when he met Probhua near his shop on the 24th November 1965 at about noon time, questioned him as to whether the latter knew about the said murder. Probhua is alleged to have made a confessional statement, whereby he implicated himself as well as the co-accused Bhulakiram and Mantu, to the said Narayan Shaw and was taken to the place of a resident of the locality viz. P. W. 22, Sudhangshu Ganguly, who is a Development Officer of the Life Insurance Corporation Calcutta and a Deputy Group-Commandant of the Howrah Home Guard. When taken to his place, Probhua repeated his confessional statement and thereafter the said Sudhangshu Ganguly tried to contact the O. C. of the Shibpur police station but failed and then contacted P. W. 30, Bidhu Shusan Bhowmick, the Circle Inspector of Police. Howrah and took Probhua and Narvan Shaw to his quarters. After reporting to him as to what he had learnt, Sudhangshu Ganguly placed Probhua and Narayan Shaw in his charge. The Circle Inspector thereafter contacted the O. C. of Shibpur police station and S I. Nihar Ranjan Chatterjee, (P. W. 28), came to his residence for investigation. Probhua was arrested at the house of the Circle Inspector and it is said that he made certain statements which were recorded by the said S I. Nihar Ranjan Chatterjee, whereafter Probhua took the said officer to the house of the accused Bhulakiram at about 5-45 p.m. on that day. Neither Bhulakiram nor the members of his family were found in his house and on some information that the members of the family were contemplating departure by train from Howrah, the officer with the landlord P. W. 5, Joy Narayan Singh as also the police party, proceeded to the Howrah railway station and on searching the compartments in the UP Amritaswar Express, Bhulai's parents P.W. 7 and P.W. 18 and also the other members of his family could be found. All of them were brought back by the officer to the police station and

their statements were recorded. At about that time the police came to know that Bhulai had come back to his house and they proceeded to apprehend him there. P W 6 Akhil Chandra Dey who is another tenant in the said premises came and reported about Bhulai who was later on detained by the inmates of the house and brought to the police station. Bhulai made certain statements at the police station which P W 28 SI Nihar Ranjan Chatterjee recorded. On making the said statements Bhulai led the officer to a pond in front of holding No 384/1 Circular Road Shibpur Howrah. Reaching there Bhulai is said to have pointed out a place which was full of water-hyacinth and an underwear and a bundle containing Gamcha handkerchief and Khaki half-pant all slightly wet and containing blood-stains were brought out from the said place by the accused Bhulai in the presence of witnesses Bhulai thereafter led the police-party to the house of Mantu Sarkar who was not found and is still absconding. Certain articles viz two pieces of bandage-cloth with stains at places were seized therefrom. P W 17 Jitendra Chandra Sarkar who is the brother of the said absconding accused was present at the time of the said search. Bhulai was produced before the Magistrate on the following day viz the 25th November 1965 and taken over to police custody for verification of statements. On the 26th November 1965 Bhulai led the investigating officer and the police party to a pond in Gopal Chowdhury Lane and pointed out a place stating that he had thrown the dagger there and the dagger Ext 5 with some blood-like stains thereon was found and seized by the police therefrom in presence of witnesses. Thereafter there was an enquiry under Section 307-A of the Code of Criminal Procedure before Sri K R Banerjee Magistrate 1st Class Howrah who ultimately committed the two accused viz the accused-appellant Bhulakiram on a charge under Section 302 of the Indian Penal Code and the co-accused Probhua, who has since been acquitted on a charge under Section 302/114 of the Indian Penal Code. In the court of Session the said charges were cancelled and a single charge under Section 302 read with Section 34 of the Indian Penal Code was framed against both the accused. The charge is inter alia as follows—

That the said two accused persons along with one Phanindra Ch Sarkar alias Montu Sarkar on or about the day of 22nd and 23rd November 1965 at Shalimar B F Siding Jhil Police Station, Shibpur Howrah some time between 11-30 pm of 22nd and 1 am. on 23rd, in furtherance of common intention of them all did commit murder by intentionally or knowingly causing the death of Musa-

fir Singh and thereby committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

3 Both the accused pleaded not guilty to the charges framed and the defence case inter alia was that the accused persons are not connected with the crime and that they have been roped in falsely by interested persons. Accused Bhulakiram took the plea that he did not know Musafir Singh as alleged or at all and further stated inter alia in course of his statement under Section 342 of the Code of Criminal Procedure in the court of Sessions that the Chappal Ext 1 that was found did not belong to him that he did not know co-accused Probhua that he never made any statement before P W 28 Nihar Babu and that the recovery of the articles in the case was not due to any such statement made by him as alleged or at all. In the committing court he had stated in his examination under Section 342 Cr P C that he was wholly innocent that he received some Puja bonus on the 21st or 22nd day of November 1965 as an employee at the Guest Keen Williams Ltd and with that money he was getting ready to proceed to his native village along with his parents and others that he did not go in for work on that day and that he could not go to his native village because when he came to his residence after getting leave for taking his luggage to the railway station, the police arrived after arresting his parents at the station.

4 The prosecution in this case has examined 32 witnesses besides proving several exhibits to prove the crime. They form a motley crowd and can be classified into six groups. The first group consists of the doctor viz P W 1 Dr Sudhir Narayan Bose (Medical Officer attached to Howrah General Hospital) who held the post-mortem. The next group consists of the photographer P W 29 Bejoy Kumar Mukherjee who has a photographic shop at 220 G T Road Shibpur Howrah. The third group consists of the search and seizure-witnesses viz P W 14 Sahabuddin Molla P W 15 Atiar Rahaman P W 17 Jitendra Chandra Sarkar P W 19 Gouri Kanta Banerjee Group-Commandant of Home Guard Shibpur and P W 24 Manmatha Nath Dutta of 6/1 Ola Bibitala 1st Bye Lane Shibpur. The fourth group consists of P W 22 Sudhangshu Ganguli who is the Deputy Group-Commandant of the Howrah Home Guards before whom the purported confession was made. The fifth group is the circumstantial evidence group and consists of P W 2 Narayan Shaw P W 3 Govind Ram P W 4 Lal Bhagaban Singh P W 5 Jay Narayan Singh, P W 6 Akhil Chandra Dey P W 7 Sadal Koiri P W 8 Bhola Goala P W 9 Gurmit Singh P W 10 Bindu Singh P W 11 Ganga Prosad

Gupta, P.W. 12 Ram Bhajan Shaw, P.W. 13 Probhu Dhubi and P.W. 18 Bachu Koiri. The sixth and the last group is the police or investigating group and consists of P.W. 16 Benoy Bhusan Chakravarti, who is the foot-print expert, attached to the Forensic Science Laboratory, Medical College, Calcutta, P.W. 20. constable Satyendra Nath Dutta, P.W. 23 Sub-Inspector Khagendra Nath Banerjee, P.W. 25, Head Constable Narendra Chandra Dey, P.W. 26, constable Basdeo Sukul, P.W. 27 Sub-Inspector Sunil Chandra Guha and P.W. 28 Sub-Inspector Nihar Ranjan Chatterjee, the investigating officer who took up the investigation from P.W. 32 Sub-Inspector Hirendra Kumar Bose, P.W. 30 Bidhu Bhusan Bhowmik, the Circle Inspector (A) Howrah and P.W. 32, Sub-Inspector Hirendra Kumar Bose who was the first investigating officer in this case until he made over charge to P.W. 28 Nihar Ranjan Chatterjee. This completes the tally of the prosecution witnesses examined by the prosecution to prove the crime and we will consider the said evidence in its proper context, in the light of the submissions made on behalf of the accused-appellant as well as the State

5. Mr. Prasun Chandra Ghosh, Advocate, engaged by the State to appear on behalf of the accused-appellant, made a six-fold submission. He argued in the first instance that the corpus delicti has not been proved in the present case and as it is a factor going to the very root of the case, the entire prosecution has been nullified thereby. His second contention is that there is no motive as to why this dastardly crime would be committed and in a case, resting entirely on circumstantial evidence, the absence of any motive would be material. The next submission of Mr. Ghosh is about the reception of inadmissible evidence which has vitiated the trial. Mr. Ghosh next contended about the relevancy and effect of the retracted extra-judicial confession, purported to have been made by the accused-appellant Bhulakiram and also by the co-accused Probhu. The fifth contention of Mr. Ghosh is that the evidence of the foot-print expert is clearly bad and cannot form the legal basis for a valid conviction. The sixth and last submission of Mr. Ghosh is that the present case depends entirely on circumstantial evidence and the chain of circumstance as established by the prosecution is not so far complete as not to leave any reasonable ground for a conclusion therefrom, consistent with the innocence of the accused

6. Mr. Sambhu Nath Banerjee, Deputy Legal Remembrancer, with Sri Harashit Chandra Ghosh, Advocate, appearing on behalf of the State, submitted in the first instance that the corpus delicti has been

well-established because the evidence on record is sufficient to identify the body of Musafir and in any event, in view of the facts and circumstances of the case, even if the corpus delicti be held to have not been proved, that would not necessarily imply that the offence charged falls through and that the prosecution has failed to connect the accused-appellant with the same. Mr. Banerjee next contended that sufficient motive has been ascribed and proved in this case by a body of cogent evidence and there is no reason as to why the same should not be considered sufficient. The next contention of Mr. Banerjee is that the evidence impugned by Mr. Ghosh as inadmissible is not really so and even if a part of it be deemed to be so, the order of conviction and sentence is not affected thereby because of the other body of evidence on record quite clear and cogent. As regards the evidence by P.W. 16, the Footprint expert, the learned Deputy Legal Remembrancer submitted that it is quite reliable and forms a material link in the chain of circumstances adduced by the prosecution against the accused-appellant. He contended in this context that if the chappal of the left foot, marked 'Y', can be held to have been established as belonging to the accused-appellant, the opinion of the expert, based on a comparison of the same and the footprint-impressions marked 1 to 4, would be quite sufficient to connect the accused-appellant with the crime. Mr. Banerjee finally mentioned the chain of circumstances appearing from the evidence on record and submitted that it was such as to show that within all human probability the act must have been done by the accused and that the chain is so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused

7. We will now proceed to consider the respective submissions as catalogued above, so ably made by the learned counsel appearing on behalf of both the sides, in the light of the evidence on record. As regards the first point urged by Mr. Ghosh that the corpus delicti in this case has not been proved, he has referred to the evidence of P.Ws 1 and 32 along with Ext. 1. The same according to him does not prove beyond reasonable doubt that the body was that of Musafir Singh, the deceased. The Chit which was supposed to have accompanied the cadaver was missing and the evidence of P.Ws 4 and 10, who have identified the body as relations, is not dependable and not free from reasonable doubt because it is curious that the said witnesses never even went to the hospital and their conduct in this behalf is suspicious. In this connection Mr. Ghosh has referred to the evidence of P.W. 32 who said that at

about the time when he wrote the Challan for sending the dead body to the morgue one Lal Bhagwan Singh and another Bindu Singh came and identified the dead body as that of Musafir Singh. In Ext 3 the person killed has been referred to as an unknown person and the post-mortem report mentioned 'Unknown' later on reported to be identified as Musafir Singh, male 35 years Hindu. Mr Ghosh has contended that the Chit referred to in the evidence of PW 32 that what he learnt from Lal Bhagwan and Bindu Singh he had noted on a piece of paper and asked the constable to deliver that to the doctor is missing and therefore the evidence of identification before PW 32 is doubtful. As we have already mentioned the evidence of PWs 4 and 10 on this point is also not free from reasonable doubt because of their strange conduct from the beginning and also from the factum of their not having gone to the hospital in connection with this dastardly outrage on a person supposed to be near and dear to them. Mr Ghosh while on this branch of his submission has contended that the best evidence on this point has not been produced and therefore the necessary presumption adverse to the prosecution under Section 114 Illustration (g) of the Indian Evidence Act should have been drawn. He has inter alia urged that the dead body should have been identified by somebody from Messrs Guest Keen, Williams Ltd by the charge-man or any co-worker—but the same has not been done. Neither has the dead body been identified by any resident of the locality nor even by the wife of the deceased who strangely enough has not been even examined in this case on this material point. It has appeared, as pointed out by Mr Ghosh in the evidence of PW 4 Lal Bhagwan Singh that Musafir, since deceased, had married 5 or 6 years before his murder and at the time of the said murder his wife was in the native village in the district of Chapra. Mr Ghosh has contended that in view of the nature of the belated and suspicious nature of identification of the cadaver it was expedient that the best and compelling evidence on this point should have been adduced by the prosecution and the failure to do so has resulted in a failure of justice. In reply Mr Banerjee has contended that there is no reason as to why the evidence of PWs 4 and 10 on this point should be discarded merely because they being relations had not gone to the hospital or shown much interest in the beginning. This body of cogent and clear evidence should not be thrown overboard when nothing has appeared in their cross-examination to disbelieve their evidence. Mr Banerjee has further urged that even if there was no body or trace of a body or any direct evidence as to the manner of

death of a victim the corpus delicti may be proved by other circumstances. He has referred in this connection to the case of Arun Kumar Banerjee v State AIR 1962 Cal 504. Mr Justice P. B. Mukharji and Mr Justice N. K. Sen held in that case at pp 507 and 508 that 'we cannot accept the broad proposition urged for the appellants that there can be no conviction on a charge of murder on circumstantial evidence'. In a recent decision of the English Courts in Reg v Onufrejczyk (1955) 1 QB 388 Lord Goddard C J of England lays down the principle that in a trial for murder the fact of death can be proved by circumstantial evidence. The learned Lord Chief Justice of England lays down the further principle that notwithstanding that there is no body or trace of a body or any direct evidence as to the manner of death of a victim the corpus delicti may be proved by such circumstances as render the commission of the crime certain and leave the jury with no degrees of reasonable doubt. That in our view presents the correct proposition and we respectfully agree with that statement of the law. In a later decision of the Supreme Court in the case of Raghav Prapanna Tripathi v State of Uttar Pradesh AIR 1963 SC 74 Their Lordships observed at page 88 as follows:

In King v Horry (1952) NZ LR 111 the headnote states the law as follows—

'At the trial of a person charged with murder the fact of death is provable by circumstantial evidence notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime. Before he can be convicted the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt. The circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for. This statement of the law was approved in (1955) 1 QB 388 at p 394 except as to moral certainty and that statement of the law has received approval of the Supreme Court in AIR 1960 SC 500. It was also said in (1952) NZ LR 111

'That the jury viewing the evidence as a whole was entitled to regard the concurrence of so many separate facts and circumstances themselves established beyond all doubt and all pointing to the fact of death on or about July 13 1943—as excluding any reasonable hypothesis other than the death of the person alleged to have been murdered and as having therefore sufficient probative force to establish her death.

We agree with the contention of Mr. Banerjee as a whole that the circumstances as proved in the present case are such that the corpus delicti has been proved thereby and even if not so, the commission of the crime and the relative offence charged can be established, if the circumstances on record, lead on to establish the crime, beyond reasonable doubt.

8. As regards the second contention of Mr. Ghosh as to the purported absence of any motive in the present case leading on to the crime, we are afraid we are unable to agree with him. It is quite true as has been observed by Lord Porter in the case of Wali Mohammad v. King, 53 Cal. W. N 318 at page 321=(AIR 1949 PC 103 at p 106). "Moreover though proof of motive is not essential, it is a material consideration". In this connection a reference may be made to the case of Atley v. State of Uttar Pradesh, AIR 1955 SC 807. At p. 810 of the said report, Mr. Justice B. P. Sinha (as His Lordship then was) sitting with Mr. Justice Vivian Bose and Mr. Justice Ayyar observed that "where there is clear proof of motive for the crime, that lends additional support to the finding of the court that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. But the fact that the prosecution has failed to lead such evidence has this effect only, that the other evidence bearing on the guilt of the accused has to be very closely examined". In the case of Upendra Nath Ghosh v. Emperor, AIR 1940 Cal 561 Mr. Justice Bartley and Mr. Justice Sen have held at p 563 that "in a case depending on circumstantial evidence the question of motive is more important and it was the duty of the learned Judge to emphasise this absence of motive, which was a circumstance in favour of the accused". In a more recent case viz., in the case of AIR 1962 Cal 504 Mr. Justice P. B. Mukharji and Mr. Justice N. K. Sen have held at p 509 that "motive certainly is of great importance where conclusion rests on circumstantial evidence. But where the circumstances can lead but to one conclusion of guilt, the non-establishment of motive is not crucial". We agree with the principles laid down in the above-mentioned cases. Moreover, in this case, it cannot be said that there is no motive. A clearcut motive has been ascribed by the prosecution. The motive ascribed is the tiff over the loan that was taken by the deceased Musafir Singh from the accused-appellant, Bhulakiram. The evidence on the record, however, establishes that the sum of Rs 101.64 p. was found on the dead body when it was recovered. It is in this context that Mr. Ghosh has argued that it is strange that the said amount was not taken away by the assail-

ants, if the purported motive for the offence as ascribed by the prosecution, was true. There is some force in the said argument. But that by itself would not make the charge unsustainable and, therefore, we will proceed to consider the other points raised on behalf of the defence by Mr. Ghosh.

9. Mr. Ghosh has urged in the next place that the trial has been vitiated by the reception of inadmissible evidence and in that connection he has mentioned three different classes of evidence, which have been received and admitted and according to him, have formed the basis of the order of conviction and sentence ultimately passed. The first group according to him is the evidence let in under Section 27 of the Indian Evidence Act, the second group consists of the post-mortem report which has been admitted into evidence and marked as Ext 1, and the third one, pointed out by him, is the answer that was taken from the accused, by questions put to him by the Additional Sessions Judge, in his examination under Section 342 Cr. P. C.

10. In connection with the first group, Mr. Ghosh referred to the evidence of PWs 5, 19 and 28 and also to the seizure-list, Ext 4(c) dated 24th November, 1965, and the evidence of P.Ws 14, 15, 25 and 28 and the search-list Ext 4(d) dated the 26th November, 1965. Mr. Ghosh has urged that the reception of the said body of evidence and the reliance thereupon by the Additional Sessions Judge, have vitiated the order of conviction and sentence and prejudiced the accused-appellant materially in a case under Sec 302/34 I.P.C. The statement made by PW 5, Joy Narayan Singh in his evidence that "Bhulai brought out a blood-stained cloth from the water. He brought a Genji, a Lungi and a Gamcha. So far as I remember, there was an underwear as well" is not admissible under Section 27 of the Indian Evidence Act. Ext 4(c) however does not refer to the seizure of any Genji or Lungi as deposed to by P.W. 5. P.W. 19, Gouri Kanta Banerjee, stated that "the arrested person pointed out a place in the tank and said

"ओई खाने फेल देवा आछ ओई खाने आछ"

It was thrown away there, it is there". This is also not admissible under Sec 27 of the Indian Evidence Act. P.W. 28, Nihar Ranjan Chatterjee's evidence that the accused "pointed out a place and stated that he had thrown a dagger at that place" is also inadmissible. His further evidence as recorded that "at a place with waist-deep water Bhulai stated to have put a dagger there. Mr. Havildar began to search and he lifted a folded dagger with black handle", is also not admissible. Besides these, the remarks column of Ext 4(c) runs as follows:

articles 1 to 5 are recovered according to the confession and direction of the accused Bhulakiram Koiri and in presence of the witnesses and the accused Bhulakir. This is also not admissible in law PW 25 Head Constable Narendra Chandra Dey's statement also that Bhulai pointed a place and stated to have thrown a dagger at that place. My feet touched some thing I raised it and found a dagger. Bhulai said that that was the dagger is similarly bad. The remarks column in Ext 4(d) also refers to the recovery from the tank as shown by the aforesaid two accused and also according to the confessional statements of the said arrested accused persons Probhuram Pashi and Bhulai alias Bhulakiram Koiri. This is also bad and not admissible. The second group according to Mr Ghosh consists of the post-mortem report (Ext 1) Mr Ghosh has urged that it is grossly inadmissible and has referred to some cases in support of his contention. Mr Ghosh has referred to the case of *Empress v Jadav Das* (1900) 4 Cal. WN 129 wherein Mr Justice Prinsep and Mr Justice Hill observed at pp 143 and 144 that a post-mortem report is not admissible as evidence except to contradict the officer who made it. It may however be used by that officer when under examination for the purpose of refreshing his memory. Mr Ghosh referred also to the case of *Ram Sarup Rai v Emperor* (1902) 6 Cal. W N 98 wherein Mr Justice Ghosh sitting with Mr Justice Taylor have observed at p 101 that 'The post-mortem report could not be used as evidence at the Sessions trial except by way of refreshing the memory of the person who made it or to contradict him'. The Division Bench of the Madras High Court held the same view in the case of *In Re Rangappa Goundan* ILR 59 Mad 349= (AIR 1936 Mad 426) and relied on the decision of the Calcutta High Court in the case of (1900) ILR 27 Cal 295=4 Cal WN 129. Mr Justice Cornish and Mr Justice K S Menon held at page 351 that 'But a post-mortem report proves nothing. It is not even evidence and can only be used by the witnesses who conducted the post-mortem enquiry as an aid to memory'. These propositions have already been stated in (1900) 4 Cal WN 129. A recent decision of the Bombay High Court however held the other view. In the case of *Lolu Basappa Pujari v State* AIR 1960 Bom 461 Mr Justice Shah and Mr Justice Patel held at p 46, that 'The notes of post-mortem examination are but a contemporaneous record made by the medical officer who performed the post-mortem examination on a dead body for forming his opinion as to the cause of death. If instead of orally deposing before the court about the individual observa-

tions made by him, the medical officer states that the notes maintained correctly set out his observations and the notes are then tendered in evidence no fault can be found with the admission of those notes on the record. We may hasten to observe that the notes of the post-mortem examination are of course not intended to be mechanically admitted on the record of the case. It may however be observed that for the purpose of determining the point at issue in this case a decision on the said point is not necessary. There has in fact been no prejudice caused to the accused-appellant by the admission of the post-mortem report in evidence as Ext 1. The third group referred to by Mr Ghosh in this connection, consists of questions Nos 10 to 13 put to the accused-appellant by the Additional Sessions Judge Howrah in his examination under Section 342 of the Code of Criminal Procedure. Question No 10 is as follows:

Witness No 22 Sudhangshu Ganguli, said that on 24th November 1965 the accused Prabhua told that Bhulai and another Bengali killed Musafir Sudhangshu Babu said before the Magistrate that Prabhua had helped you. Question No 11 is as follows: Witness No 28 Daroga Nihar Babu said that you gave a statement before him and afterwards you led him near a tank opposite to 344/1 Circular Road and there you showed him a place wherefrom these articles with blood-stains (Exts XVI XVII XVIII XX) were recovered. Do you want to say anything regarding this? Question No 12 is as follows: Witness No 19 Gouri Kanta Banerjee said that on going near the tank you said I have thrown there and those are the things. Do you want to say anything about the evidence of Gouri Babu? and Question No 13 is in these terms: Witness No 28 Daroga Babu said that on 28th November 1965 you led Daroga Babu and others near the pond at Gopal Chowdhury Lane Shibpur and told them that the dagger was thrown there. Do you want to say anything regarding this evidence? We hold in any event that question No 10 as referred to above and put to the accused is clearly bad and prejudicial. It is not a question which is sustainable in law and is based upon the same misconception of admissibility of evidence as referred to above. We are satisfied that Mr Ghosh's contention in this behalf is correct and that the deviations complained of are bad in law and have prejudiced the accused-appellant.

11 The next branch of Mr Ghosh's submission is about the relevancy and admissibility of the extra-judicial confession by the accused-appellant as also by the co-accused Probhua. So far as the extra-judicial confession by the accused-appellant is concerned, Mr Ghosh has

referred to Ext. 2, the injury report of Bhulakiram, wherein the doctor has mentioned as follows:

"He says that when he was stabbing Musafir with a dagger of about 13" length by his left hand (as he is a lefthander) on 22nd November, 1965 and about 11-30 pm the sharp end of the dagger accidentally cut his own skin of right arm just in front of the elbow joint."

and contends that it is grossly inadmissible. The evidence of P.Ws 1 and 28 discloses that it has been made in the presence of the police officers and that the accused was brought by the police officers. In this connection it further appears that the said statement as made on the 25th November, 1965 is not voluntary. The order-sheet of the committing Magistrate's court would show that neither on the 26th November, 1965 nor on the 27th November, 1965, there was any prayer made on behalf of the prosecution for recording such a confession. If in fact such a confession had seen the light of the day so far back as on the 25th November, 1965, it is passing strange that the police would keep silent and sit on the fence over the same. This curious silence and the absence of any such prayer on these two material dates, therefore, rule out the authenticity of the statement purported to be a confession and, in any event, it affects the voluntariness thereof. In this connection Mr. Ghosh has referred to the case of *Aher Raja Khuma v. State of Saurashtra*, AIR 1956 SC 217 wherein Mr. Justice Vivian Bose (with Mr. Justice Chandra Sekhar Aiyar) delivering the majority judgment observed at p 221 that "Now the law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage whether it is true or false does not arise. It is abhorrent to our notions of justice and fair play and is also dangerous to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realises that anything he says may be used against him; and any attempt by a person in authority to bully a person into making a confession or any threat or coercion would at once invalidate it, if the fear was still operating on his mind at the time he makes the confession." In the facts of the present case we are not satisfied that such fear was not present and that, in any event, the said statement was voluntary, as alleged. About the evidentiary value of such a retracted confession their Lordships have observed that "although in law it is open to the court to convict an accused on his confession itself, though he has retracted it at a later stage, nevertheless the court would require some corroboration to the confessional statement before convicting an accused person on such a statement

and what amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case." We hold that in view of the evidence on record, such corroboration is conspicuous by its absence.

12. Mr. Ghosh has further contended that the retracted extra-judicial confession of the co-accused Prabhua, so far as it relates to the present accused-appellant, is clearly bad. He has referred in this connection to several cases. In the case of *Kashmira Singh v. State of Madhya Pradesh*, AIR 1952 SC 159 their Lordships have held at p 160 of the said judgment that "it is evident that it is not evidence in the ordinary sense of the term because as the Privy Council say in *Bhuboni Sahu v. King*, 76 Ind App. 147 at p 155 = (AIR 1949 PC 257 at p 260)

"it does not indeed come within the definition of 'evidence' contained in S 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination". Their Lordships also pointed out that it is 'obviously evidence of a very weak type It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities"

They stated in addition that such a confession cannot be made the foundation of a conviction and can only be used in 'support of other evidence' their Lordships ultimately held that 'In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chukerburti*, (1911) ILR 38 Cal. 559 at p. 589 = (12 Cri L J 2) wherein he said that such a confession can only be used to 'lend assurance to other evidence against a co-accused'. The above-mentioned case was considered in a later decision by the Supreme Court in the case of 1 *Haricharan Kurmi*, 2 *Jogia Hajam v. State of Bihar*, AIR 1964 SC 1184 at p 1188. Chief Justice Gajendragadkar observed that "This question was considered on several occasions by Judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person As was observed by Sir Lawrence Jenkins in (1911) ILR 38 Cal 559 at p 589 = (12 Cri L J 2) a confession can only be used to 'lend assurance to other evidence against a co-accused'. Mr. Ghosh next cited the decision of the Judicial Committee in 76 Ind App 147 = (AIR 1949 PC 257). At p 155 (of Ind App) = (at p 260 of AIR) their Lordships of the Judicial Committee observed that "a confession of a co-accused is obviously evidence of a very weak type. It does not come within the definition of 'evidence' contained in Section 3, Evidence Act It is a much weaker

type of evidence than the evidence of an approver" In a Calcutta case viz *State v Manindra Nath Das* AIR 1960 Cal 183 Mr Justice Guha Roy and Mr Justice N K Sen have held that a self-exculpatory statement of the accused could not be treated as a confession and could be used only as an admission as against the accused himself and it could not be used as evidence at all against the other accused. After going through the retracted extra-judicial confession of the co-accused Probhua, we find that it is very much a self-exculpatory one and not really a confession and cannot in any event be used in the manner as made in the Court of Session. We may incidentally observe that such statements by the co-accused merely pinpoint the hazards faced by the other accused in a joint trial. As was rightly pointed out by Lord Porter in the case of 53 Cal W N 318 = (AIR 1949 PC 103) the difficulty in all cases where the two persons are accused of a crime and where the evidence against one is inadmissible against the other is that, however carefully assessors or a jury are directed and however firmly a judge may steel his mind against being influenced against one by the evidence admissible only against the other nevertheless the mind may inadvertently be affected by the disclosures made by one of the accused to the detriment of the other.

13 The next branch of Mr Ghosh's submission relates to foot-prints and the nature and effect of the evidence of the expert thereupon. PW 16 Binay Bhushan Chakraborty is the expert on foot-prints attached to the Forensic Science Laboratory, Medical College Calcutta. On 16-8-1966 he received amongst others one leather slipper of the left foot marked 'Y' by him and 4 specimen foot-prints marked 1 to 4. The slipper is exhibit 7 and the specimen footprints are exhibits VII to X. He stated that some comparable features could be deciphered from the slipper marked 'Y'. On comparison similarity in features was noticed between the slipper marked 'Y' with left foot specimen footprint marked by him. He was ultimately of the opinion that in all probabilities marks 'Y' and '1' are production of the one and the same left foot. Mr Ghosh has contended that the evidence of the footprint expert is not sufficient to connect the accused-appellant with the crime. Upon an analysis of the said evidence we agree with Mr Ghosh. It is passing strange that an expert in his ultimate opinion would depend on probabilities and not on firm conviction in the absence whereof the said evidence would become dangerously thin indeed and the court of law would not take that by itself into consideration for the purpose of fixing the guilt of the accused. The expert

having reached the point of interrogation or of probability cannot be relied upon for the purpose of a conviction in a case under Section 302 IPC. It is difficult for us to comprehend as to how the expert was satisfied by comparing the specimen footprint of the accused as taken marked '1' with the slipper of left foot marked 'Y'. It is also difficult to understand as to how marks 'Y' and '1' being photographed in superimposed manner in his presence and enlarged thereafter could be of any material help in connecting the accused with the crime.

14 Apart from the nature of the evidence of the expert as discussed above the science of identification by footprint impression is still an imperfect science and it is inexpedient to place reliance on the result of such identification. Several authorities on the subject have been referred to before us apart from the case law cited on the point both by Mr Prasun Chandra Ghosh and Mr S Banerjee the learned D L R. In support of his contention Mr Ghosh has referred to the observations of Charles E. O'Hara & James W. Osterburg made in their book *An Introduction to Criminalistics*. In the 4th printing (1960) of the said book the authors have observed at page 107 that 'it is not always a simple matter to identify the shoe of a suspect as being unquestionably the shoe that made the impression at the scene of the crime. The large-scale manufacture of a few predominant brands of shoes gives the defence counsel grounds for establishing a strong doubt concerning the unique correspondence between the cast of the impression and the defendant's shoe. In many cases the sole of the cast is without characteristics except for the shape of the shoe. The era of cheap shoes has led many people to the habit of purchasing new shoes rather than repairing old ones. By referring to the principles laid down therein about the walking pattern.' Mr Ghosh has submitted that the method adopted in the present case upon the admission of PW 16 has not conformed to the norms enjoined in this behalf. Mr Banerjee has referred to the book on *Footprints* by G. W. Gayer (1st Edn 1909). At page 6 the author has observed that 'When two impressions are being compared with each other with the object of finding out if both have been made by the same foot, one thing must be clearly understood if they are impressions of the same foot they will agree in all essential points and there will be no points of disagreement. The difficulty in the present case is regarding the two impressions as sought to be compared by the expert and there even the expert has only found some comparable features and not an agreement in all essential points. Mr Gayer has further ob-

served at page 12 of the said book that "It is useless to compare measurements of feet with measurements of impressions of feet left on the ground because the sole is very liable to spread when pressure is brought on it" We agree with the said observation and hold that the said difficulty obtains in the present case also Mr. Banerjee referred in the next place to the treatise on 'Modern Criminal Investigation' (5th Edn) by Dr Harry Soderman and John J. O'Connell The learned authors have observed that "from the view point of criminology, sole-prints are not as important as finger and palm-prints, but occasionally they may have some measure of importance". Thereafter the authors have discussed the classification for this purpose as devised by Wilder and Wentworth and by Dr Emil Jerlov of the Maternity Hospital of Halsingborg, Sweden As to the identification of foot-prints it has been further observed in the said book at page 166 that "In order to get a true picture of the formation of the foot in different positions, it is necessary to take four different footprints, namely, in normal standing position, in walking, in a standing position with pressure on the outer portion of the foot, and in a standing position with pressure exerted on the inner part of the foot" It would therefore appear that the comparison as made in this case is defective and no fool-proof opinion can be advanced on the basis of the same We may refer in this connection to the well-known treatise on "Criminal Investigation", as adopted by J. Collyer Adam (1924 Edn) from the "System der Kriminalistik" of Dr. Hans Gross The same is an authority on the subject and has been referred to by G W Gayer and also both by Dr Harry Soderman and John J O'Connell and by Charles E O' Hara and James W. Osciburg As to the importance and use of footprints the learned author has observed at p 325 of the said book that "As a rule, footprints are but seldom found where they are wanted Moreover, when they exist, they are rarely entire and complete, and for that reason are considered of no value On the other hand when well-preserved traces do exist, the essential thing is to be able to interpret them and to know how to make good use of them On this science is dumb and has hardly even approached the question". As to the reproduction of footprints, he has further observed at page 363 that "We trust it is unnecessary at this stage to repeat that all important impressions must be reproduced One can hardly imagine an Investigating Officer so indifferent or so inexperienced as to experiment with the original footprint itself It is however a fact that such persons exist, so that we cannot too strongly point out the danger of damaging an impression'. Unfortu-

nately, however, the examination in this case of the foot impression suffers from the said defect and the method as adopted has been quite unsatisfactory and has resulted in a serious prejudice to the accused-appellant.

15. In this connection reference has been made to several decisions on the point Mr. Ghosh has referred to the decision in *Bhikha Gobar v. Emperor* by Chief Justice Beaumont and Mr Justice Sen, AIR 1943 Bom 458 Chief Justice Beaumont delivering the judgment held at p 460 that it is not sufficient "that the footmarks tallied with the accused's shoes That may mean no more than that these marks were made by shoes of a size corresponding to the size of the accused's shoes That is not enough There may be a large number of shoes in the village of the size of the accused's shoes The evidence must go further and show that the marks had some peculiarity which was found in the shoes of the accused, and would not be found in most other shoes" The next case cited is that of *In re Paramban Mammadu*, AIR 1951 Mad 737 Mr Justice Horwill and Mr Justice Rajagopalan observed at p 740 that "The opinion of a footprint expert is not admissible as evidence . . The value of evidence with regard to footprints is obviously very much less trustworthy than evidence with regard to fingerprints . . With regard to footprints, on the other hand, it would seem from the evidence and from what we have been able to read from Dr. Hans Gross's book on *Criminal Investigation* that one can only compare with the general shape of footprints found with the shape of impressions taken from the feet of the person suspected" The next case cited by Mr Ghosh is that of *Ganesh Gogoi v. State*, AIR 1955 Assam 51 Chief Justice Sarjoo Prosad and Mr Justice Ram Labhya delivering the judgment observed at page 54 that "Section 45, Evidence Act does not include footprints within its ambit as it does the finger impressions Notwithstanding this omission, the evidence of footprints expert has been admitted with the qualification that there should be other evidence to bring home the charge to the accused The rule on the point is that the opinion of the footprint expert would not by itself suffice to base conviction on and the rule has been applied to testimony of other experts including experts on fingerprints". A reference was also made to the decision by Mr Justice S C Misra and Mr Justice U N Sinha in the case of *Basudeo Gir v. State*, AIR 1959 Pat 534 Mr. Justice Misra referred to the various authorities and decisions on the point and observed at p 536 that "In my opinion, the word "science" which has been defined in the *Universal Dictionary of English language*, referred to by the learned Judge, as great

proficiency dexterity skill based on long experience and practice is sufficiently wide to include the evidence of an expert'. Mr Justice Sinha agreed with the said view and referred to the two previous decisions by the Patna High Court namely in the case of *State v Karu Gope* AIR 1954 Pat 131 and in the case of *Ramkaran Mishra v State of Bihar* 1958 Pat LR 246 wherein the opinion of the expert was considered on merit without any reference to Section 45 of the Indian Evidence Act. It is quite true that in Section 45 of the Indian Evidence Act there is no mention of footprint impression in specific terms. As a matter of fact the words 'finger impression' were added by Section 3 of the Indian Evidence Act 5 of 1899. In this context it would be pertinent to refer to the case of *Queen Empress v Fakir Md Sheikh*, (1897) 1 Cal WN 33 where Mr Justice Banerji held at page 35 that though the comparison of thumb-impression is allowable such comparison must be made by the Court itself and the opinion of the expert as to the similarity of such impression is not admissible under Section 45 of the Evidence Act. It is also pertinent to consider that in Ceylon Section 45 of the Indian Evidence Act has been amended to include the words 'palm-impression or foot impression after finger-impression' wherever they occur in this section. Therefore the state is not in a flux so far as Ceylon is concerned. However as has been held in AIR 1959 Pat 534 such evidence by an expert on footprint could come within the ambit of the word science as used in Section 45 of the Evidence Act. The utmost bounds of human thoughts are however ever expanding and the outer periphery of science are extending everyday. The expression science is accordingly acquiring a wider connotation in the world today. Identification of people by smell or even by their teeth are now in vogue and are considered to come within the ambit of science. Forensic Odontology or the science of identifying people by their teeth was recently relied upon for the detection of crime in the High Court at Edinburgh. The cloud however has been lifted and the point settled in the case of *Pritam Singh v State of Punjab* decided by Mr Justice Bhagwati. Mr Justice Venkatarama Aiyar and Mr Justice Sinha reported in AIR 1956 SC 415. Mr Justice Bhagwati who delivered the judgment observed at page 423 that 'The science of identification of footprints is no doubt a rudimentary science and not much reliance can be placed on the result of such identification. The track evidence however can be relied upon as a circumstance which, along with other circumstances would point to the identity of the culprit though by itself

it would not be enough to carry conviction in the minds of the Court

16 We hold therefore that it is unsafe to base a conviction on the basis of the expert's evidence alone regarding foot print or sole print. As considered in the light of the observations made by the various authorities on the subject and in view of the principles laid down in the different cases on the point the science of footprint or sole print or of track evidence appears to be still in an embryonic stage. It may have travelled beyond the stage of crude empiricism but has not yet reached the stage of an exact science.

17 We shall now pass on the last submission of Mr Ghosh with regard to circumstantial evidence. Mr Ghosh has submitted emphatically that this is preeminently a case which consists entirely of circumstantial evidence and that the chain of circumstances as established by the prosecution is very thin and is not of such a character that it is wholly inconsistent with the innocence of the accused and is consistent with his guilt. This is a material submission going to the very root of the case and if it succeeds is sufficient by itself to warrant the acquittal of the accused. Therefore it will be pertinent to consider what exactly circumstantial evidence is. Circumstantial evidence is the evidence of circumstances as opposed to what is called 'direct evidence'. Circumstantial evidence is the evidence of the surrounding circumstances or the accumulated circumstances and if put together it points to one direction, namely to the guilt of the person accused — that is circumstantial evidence. *Wills in his Principles of Circumstantial Evidence* 7th Edition at page 6 has observed that 'Circumstantial Evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved but by the bearing upon that fact of other and subsidiary facts which are relied upon as inconsistent with any result other than the truth of the principal fact'. It is quite true as was observed by Baron Parke in *Towell's case* (1854) 2 C & K 309 that 'Direct evidence of person who saw the fact if that proof is offered upon the testimony of men whose veracity you have no reason to doubt is the best proof but on the other hand it is equally true with regard to circumstantial evidence that the circumstance may often be so clearly proved so closely connected with it or lead to one result in conclusion, that the mind may be as well convinced as if it were proved by eye-witnesses. It will be pertinent in this context to consider some of the decisions of the Supreme Court on the point as to what constitutes the proper test of circumstantial evidence. In the case of *Hanuman Govard Narayankar v State of Madhya Pradesh*, AIR 1952 SC

343, Mr. Justice Mahajan (as His Lordship then was) delivering the judgment observed at pp 345 and 346 that:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of guilt of the accused. Again, the circumstance should be of a conclusive nature and tendency and they should be such as to exclude other hypothesis, but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused". In a subsequent case viz., of *Govinda Reddy v State of Mysore*, reported in AIR 1960, S C 29 the Supreme Court followed the previous decision in AIR 1952 S C 343 and approved of "the mode of evaluating circumstantial evidence" as stated therein. In the case of *Anant Chaintaman Lagu, v. State of Bombay*, AIR 1960 SC 500, Mr. Justice Hidayatullah (as His Lordship then was) observed at page 523 that "Circumstantial evidence in this context means a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt". In a later decision viz., of *M. G. Agrawal v State of Maharashtra*, AIR 1963 S C 200, Mr. Justice Gajendragadkar (as His Lordship then was) observed at page 206 that "It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt". Mr. Gosh has further referred to the case of AIR 1963 S C 74, wherein Mr. Justice Kapur, holding the minority view with Mr. Justice Hidayatullah (as His Lordship then was) observed at page 81 that "any circumstance which destroys the presumption of innocence, if properly established, can be taken into account to find out if the circumstances lead to no other inference but of guilt. Thus, what we have to see is whether, taking the totality of circumstances which are held to have been proved against the appellants, it can be said that the case is established against the appellants. i.e. the facts established are inconsistent with the innocence of the appellants

and incapable of explanation on any hypothesis other than that of guilt". We may in this connection also refer to the observation of Lord Coleridge, J. in *Rex v. Dickman Newcastle Summer Assizes, 1910* that "circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one or another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety".

18. In the light of the abovementioned principles, we will now proceed to consider the respective chains. The chain of circumstances as claimed to have been established against the accused-appellant has been catalogued by Mr. Banerjee as follows:-

(i) Bhulakiram and deceased Musafir Singh worked in the same factory and were friends. Musafir Singh took a loan of money from Bhulakiram and for non-payment of the same there was a quarrel about 15/20 days before the murder when Bhulakiram threatened to take some action some day by saying "

"दोस्ती था लेकिन कुस्ती होगी"

(There was a friendship, but, there will be fight)

(ii) On the night of occurrence, i.e., 22nd November, 1965, accused Bhulakiram after the night-shift took meals and drank wine with a companion in the hotel of Gurmit Singh (P. W. 9) near the factory where he worked. This companion had at least some facial similarities with deceased Musafir Singh.

(iii) On the night of murder Bhulakiram returned to his house after the usual hours of closing of the gate, wearing a gamcha and a 'genji' with a chaddar worn round the head and with a bundle in left hand. When it was proved that he had worked in the night-shift which continued up to 10-30 p.m., the things which he had on his person suggested that he had the necessity of changing the normal working dress for some reason in the meanwhile. Bhulakiram was not inclined to give any explanation of this unusual dress at the time of arrival in the house after the usual hours of closing of the gate of the house.

(iv) The manner in which he entered the house with his right hand bent and raised upwards was suspicious and the medical evidence suggested that he had received an accidental injury from a sharp cutting weapon 3/4 days before the 25th November, 1965.

(v) On the morning following the night of murder a chappal was found near the Dhobi ghat and that was satisfactorily established to be of the left foot of accused Bhulakiram

(vi) Shortly after the arrest of Probhua the co-accused who admitted his presence near the place of occurrence the whole family of the accused Bhulakiram started for Howrah Railway Station for going home apprehending some trouble

(vii) When the family had left for Howrah as per previous arrangement there was no reasonable ground for Bhulakiram making a stealthy visit to the house at about 8/9 p.m. He also gave no satisfactory explanation of his conduct in attempting to escape

(viii) Probhua who admitted his presence at the place of occurrence led the police party to the house of the accused Bhulakiram

(ix) Bhulakiram in course of his statement to P W 28 referred to a tank and led the police party there shortly after his arrest and from a place pointed out by him, certain blood-stained garments were found. Though the origin of the blood-stains in most of the articles could not be detected on account of disintegration the origin of one was detected and that was human. Bhulakiram offered no explanation about his conduct for he denied to have made any statement or to have pointed out any place

(x) Bhulakiram led P W 28 S I Nihar Chatterjee to another tank in Gopal Chowdhury Lane on the 26th November, 1964 and pointing out a place stated that he had thrown the dagger there. From the base of the portion of the tank pointed out, a dagger was recovered. It had blood-stains though the origin could not be detected on account of disintegration and the accused Bhulakiram during examination under Section 342, Criminal P.C. *offered a wild story by way of explanation.*

19 Mr Ghosh on the other hand has submitted that the said circumstances have mostly not been proved by evidence which is admissible in law and the chain, in any event far from being complete leaves dangerous gaps and many of the material links are missing. (After discussing the evidence his Lordship proceeded)

20 In this case if we jettison the body of evidence already discussed and found to be inadmissible no conviction can be upheld upon the residue. What we are left with is but a lot of suspicion and only a scintilla of evidence which in its turn is mildewed and moth-eaten we must remember that 'of things that do not exist and things that do not appear the reckoning in a court of law is the same. It is pertinent in this context, to refer to the case of *Emperor v Arif Ali*, 37 Cal WN

595 = (AIR 1933 Cal 426) wherein Chief Justice Rankin sitting with Mr Justice Pearson and Mr Justice Guha observed at p 597 (of Cal WN) = (at p 429 of AIR) that I repudiate altogether the doctrine that capital offences are tried as *res integra* on the paper book. But if there is no sufficient evidence to warrant a conviction we have in my judgment the obligation to say so. In this case also we feel compelled to hold that far from any sufficient and legal evidence being on the record there is such a paucity of the same that it must enure to the benefit of the accused. As has been observed by Dr P K Sen in his *Treatise Penology Old and New* (Tagore Law Lectures 1929) that Human life is too sacred to be lightly sacrificed at the altar of law. We fully agree with the said observations and hold that the prosecution evidence in this case leaves such wide gaps and rents that *ex debito iustitiae* the accused-appellant must be allowed to pass through the same with impunity.

21 Before we part with the case we are constrained to observe that the investigation as made in the case has been perfunctory and the procedure adopted at the trial has been in contravention of law. As has already been observed above a body of evidence wholly irrelevant and grossly inadmissible has been let in to cloud the issue and burden the record. It is an ill-wind that blows no body any good and we find that the accused has been seriously prejudiced thereby.

22 In the result we refuse to accept the Reference and allow the appeal. The order of conviction and sentence is set aside and the accused-appellant is acquitted of the charge and we direct that he be set at liberty forthwith.

23 AMARESH ROY J I fully agree with the reasons and conclusions stated in the judgment just delivered by my Lord.

24 I would only like to add a few words about the procedure adopted in the court below. There appears to be a degree of laxity on the part of the prosecution and of the trial Judge giving rise to the apprehension that requisite care to ensure fair trial was absent. The search and the seizure-list marked exhibits in the case bear testimony to this lack of care spelling out deliberate unfairness on the part of the prosecution in so far as those contained purported confessional statements of the accused person. These are clearly inadmissible. Neither the prosecution in the trial court nor the trial Judge had taken the care to weed out those inadmissible and prejudicial matters offered with the evidence in the court, to ensure a fair trial. The same criticism holds good with regard to statements purported to have been admitted under Section 27 of the Indian Evidence Act.

25. I am constrained to observe that the necessary care to bring the legal materials on record has not been taken in the case. In contrast the great pains taken by the learned Advocate Mr. Prasun Chandra Ghosh for the accused-appellant for pointing out those illegalities and fairness of the learned Deputy Legal Remembrancer Mr. Sambhunath Banerjee in that respect to place all materials before this court have helped us to a great extent. We only hope that we may not have to come across the same laxity in future in other trials in this State.

Order accordingly.

1970 CRI. L. J. 417 (Vol. 76, C. N. 94)

(DELHI HIGH COURT)

S. N. ANDLEY AND
S. N. SHANKAR, JJ.

The Union of India and others, Appellants v. Khalil Kecherim, Respondent.

L. P. A. No 59 of 1968, D/- 14-10-1968, against Judgment of T. V. R. Tatachari, J., D/- 26-8-1968 in C.W.P. No. 1300 of 1967.

(A) Customs Act (1962), Ss. 77, 79, 80 and 2(22) — Tourist Baggage Rules (1958), Cl. 3(1) — Term 'baggage' as used in Ss. 77 and 80 is not confined merely to bona fide baggage within meaning of S. 79 or to personal effects as defined by Cl. 3 of Rules of 1958 and includes any article contained in baggage even though it be in commercial quantities. AIR 1965 SC 722, Ref. (Paras 7 to 11)

(B) Customs Act (1962), Ss. 111 and 80 — There is no import within meaning of Customs Act in a case where goods are entrusted under S. 80 and are not carried by passenger beyond customs barrier. AIR 1958 SC 341, Foll. (Para 12)

(C) Customs Act (1962), S. 80 — It may be matter of discretion with proper officer to accept or not to accept for detention any article given to him under S. 80, but once discretion has been exercised, it cannot be revoked subsequently. (Para 13)

(D) Customs Act (1962), Ss. 80, 110, 128, 130 and 131 — Constitution of India, Art. 226 — Detention of diamonds under S. 80 — Subsequent seizure of diamonds under S. 110 — Writ petition challenging order of seizure — Held, contention that provisions in the Act for appeal and revision against any action taken under the Act barred petition could not be accepted. W. P. No. 1300 of 1967, D/- 26-8-1968 (Delhi), Affirmed. (Para 14)

(E) Customs Act (1962), S. 2 (22) — 'Goods' — Definition is inclusive — It includes "any other kind of moveable property" — It means any item of moveable

property or any article may be "goods" and can therefore be a part of or contained in "baggage", which is included in the definition. (Para 7)

Cases Referred: Chronological Paras

(1968) Writ Petn. No 1924 of 1967, D/- 7-2-1968 (Mad), In re, A. Shaukataly v Collector of Customs, Madras 12

(1965) AIR 1965 SC 722 (V 52) = 1965 (1) Cri L J. 641, State of Maharashtra v. George 11

(1958) AIR 1958 SC 341 (V 45) = 1958 SCR 1102, Central India Spinning & Weaving and Manufacturing Co., Ltd. v. Municipal Committee, Wardha 12

K L Arora, for Appellants, Ravinder Narain, for Respondent

JUDGMENT:— This appeal has been filed against the judgment and order dated August 26, 1968 of Tatachari, J. by which a writ petition filed by the respondent was allowed, the seizure of the diamonds belonging to the respondent was declared unwarranted and illegal, the order of seizure was quashed and the appellants were directed to return the packet containing diamonds to the respondent

2. The facts following led up to the filing of the writ petition. On August 14, 1967 the respondent arrived from overseas by an Air France flight at Palam Airport, New Delhi. Upon arrival at the airport, he requested the Customs Officer on duty to keep in customs custody a packet which was declared by him to contain four smaller packets containing diamonds of the value of approximately \$ 34,000. Thereupon the Customs Officer on duty issued a detention receipt stating that one packet containing four smaller packets said to contain diamonds of the value of \$ 34,000 sealed with the passenger's own seal and the customs seal over his signatures had been received. It was further stated on the face of this receipt by the Customs Officer "declared re-export allowed" and "declared — pending re-export out of India."

The respondent thereafter left for Bombay from where he returned on August 24, 1967 on which date he was to fly by an Air France flight leaving New Delhi at night. Before his departure, the respondent requested for return of the diamonds as he was leaving India but they were not delivered back or released. The respondent, therefore, did not leave by the Air France flight and approached the appellants again on the following day for delivery of the diamonds. The diamonds were not returned but in the evening the respondent's statement was recorded. On August 26, 1967 a Panchanama was prepared wherein it was stated, inter alia, "since the diamonds which

were detained for re-export on August 14 1967 vide D R. No 1372/88 are liable for confiscation under the Customs Act 1962 (No 52 of 1962) the diamonds are accordingly seized under Section 110 of the same Act. A demand for return of the diamonds was made on August 30 1967 and since it was not complied with the respondent filed Civil Writ No 1300 of 1967 in this Court.

3 It is not disputed that the detention receipt aforesaid was issued to the respondent under Section 80 of the Customs Act 1962 after the respondent had made the declaration contemplated by Sec 77 of the said Act. These two sections appear in Chapter XI of this Act which contains special provisions regarding baggage goods imported or exported by post and stores and are in these terms—

Section 77 The owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer

Section 80 Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77 the proper officer may at the request of the passenger detain such article for the purpose of being returned to him on his leaving India. Two other provisions of this Act which have a material bearing on this case are Section 110 (1) and Section 111 (d). Section 110 (1) gives power to the proper officer to seize any goods if he has reason to believe that they are liable to confiscation under this Act. Section 111 provides that certain goods brought from a place outside India shall be liable to confiscation and clause (d) provides for confiscation of any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

4 The contention of the appellants is that the diamonds in question were seized under Section 110(1) because they were imported or attempted to be imported contrary to the prohibition contemplated by clause (d) of Section 111. The prohibition is said to be contained in the Tourist Baggage Rules 1958 which were framed in exercise of powers conferred by Section 75 of the Sea Customs Act 1878 and which it is not disputed are applicable in respect of the Customs Act 1962. Clause 3(1) of these rules provides that the personal effects imported by a tourist shall be allowed to be imported temporarily free of import duty provided that they are for the personal use of the tourist, are carried on the person of or in the luggage accompanying

the tourist that there is no reason to fear abuse and that these personal effects are exported by the tourist on his leaving India for a foreign destination. The Explanation to this clause defines personal effects as meaning all clothing and other articles which a tourist may personally and reasonably require including inter alia personal jewellery but excluding all merchandise imported for commercial purposes.

5 There is no doubt that the diamonds in question are in such quantities and are of such value that they cannot be described as personal jewellery which is included in the term personal effects as defined by this explanation and that being so they can be treated only as merchandise. These diamonds must therefore be treated as goods imported whereof or an attempt to import which would make them liable to confiscation under Clause (d) of Section 111 and liable to seizure under sub-section (1) of Section 110 of the said Act.

6 The main contention of the appellants is that these diamonds are not baggage within the meaning of Sections 77 and 80 read with the Tourist Baggage Rules 1958 and therefore the detention receipt issued to the respondent under Section 80 would be of no avail to protect him against the application of Sec. 110(1) and Section 111(d) of the said Act.

7 The expression 'baggage' has not been defined by the said Act but it is included in the definition of goods in sub-sec (22) of Section 2. The definition of goods given in this act is an inclusive definition and apart from baggage it also includes any other kind of moveable property. One argument of the appellants is that since baggage is included in goods the latter cannot be included in the former. This argument loses sight of the fact that 'any other kind of moveable property' is also included in the definition of goods. Any item of moveable property or any article which may be goods can therefore be a part of or contained in baggage.

8 In the said Act and the rules framed thereunder a distinction has been made between baggage and bona fide baggage. Section 79 talks of bona fide baggage which is exempt from customs duty and in respect of bona fide baggage the proper officer has been empowered to pass free of duty any article which is in the baggage of a passenger and which has been in his use for a prescribed minimum period or it is for his use or it is a bona fide gift or souvenir. Therefore any article in the baggage of a passenger even though it may be goods within the meaning of the Act will be allowed to be imported free of duty if it is passed under Section 79 of this Act. I therefore do not find any force in the contention

that an article of moveable property which is included in "goods" cannot be included in "baggage".

9. Baggage is synonymous with luggage. Webster gives the following meaning of baggage.

"a group of travelling bags, trunks, or both especially when packed and in transit, personal belongings of travellers either carried by hand or checked with a carrier luggage"

The Shorter Oxford English Dictionary gives the following meaning to baggage —

"The collection of property in packages that a traveller takes with him on a journey: luggage"

Therefore, the word "baggage" is a comprehensive term which means the luggage of a passenger, accompanied or unaccompanied, and comprises of the trunks or bags and the personal belongings of the passenger contained therein and it must be in this comprehensive sense in which "baggage" has been used in Sections 77 and 80 of the Customs Act. If "baggage" in Section 80 of this Act means only bona fide baggage as contemplated by clause 3 of the Tourist Baggage Rules, 1958, there will hardly be any occasion for the application of Section 80 of the Customs Act I am, therefore, of the opinion that "baggage" has to be given the larger and ordinary meaning.

10. Section 80 talks of "any article" which is dutiable or the import of which is prohibited and the expression "any article" is comprehensive enough to include an article which is not a part of bona fide baggage as contemplated by Section 79 or "personal effects" as specified by clause 3 of the Tourist Baggage Rules. It may be contained in the baggage of a passenger. If the passenger declares such an article under Section 77, he may still import it if he is prepared to pay the duty and if its import is not prohibited. If the passenger is not prepared to pay the duty and/or cannot produce the requisite import licence, he will not be allowed to clear it for import. In such a case, he may make a request to the proper officer to detain such article for the purpose of being returned to him on his leaving India. It does not matter if the article is in such quantities or is of such value that it is an article of merchandise and cannot be said to be comprised in bona fide baggage or personal effects. The only requirement of Section 80 is that such an article is contained in the baggage in the larger sense which includes the trunks and bags in which the luggage is contained. By making the declaration under Section 77 and the request under Section 80, the passenger expresses his intention not to import such an article. That being so, it cannot be said that such an article has been imported or attempted to be imported within

the meaning of Clause (d) of Section 111 or becomes liable to seizure under Section 110(1) of the Customs Act. I am, therefore, of the view that the term 'baggage' as used in Ss 77 and 80 of this Act, is not confined merely to bona fide baggage within the meaning of Sec 79 of the Act or to personal effects as defined by Clause 3 of the Tourist Baggage Rules, 1958 and includes any article contained in the baggage even though it be in commercial quantities.

11. Reliance has been placed by the appellants on a decision of the Supreme Court in *re State of Maharashtra v George*, AIR 1965 SC 722. That was a case under the Foreign Exchange Regulation Act, 1947. The passenger was carrying gold bars concealed in a jacket which he wore. He remained sitting in the plane which was on a flight from Zurich to Manila and which landed en route at Santa Cruz Airport in Bombay. The passenger was asked by the Customs authorities to come out of the plane and the gold was seized. The gold was not declared or entered in the manifest of the plane. It was contended on behalf of the passenger that the gold was his personal luggage and not cargo and, therefore, it was not necessary to have it declared and entered in the manifest. Such declaration was required by the second proviso to the notification issued on November 8, 1962 under Section 8(1). This notification gave general permission, inter alia, to the bringing of gold into any port or place in India when the gold was on through transit to a place outside the territory of India but the second proviso required that such gold must be declared in the manifest for transit as 'same bottom cargo' or 'transshipment cargo'. This notification superseded an earlier notification dated August 25, 1948 which did not contain any provision like the second proviso to the notification dated November 8, 1962. It is relevant to mention that it was conceded on behalf of the State of Maharashtra

"that if the exemption notification which applied to the present case was that contained in the notification of the Reserve Bank dated August 25, 1948 the respondent had not committed any offence since (a) he was a through passenger from Geneva to Manila as shown by the ticket which he had and the manifest of the aircraft and besides (b) he had not even got down from the plane"

It was, therefore, by reason of the second proviso that it was held by the Supreme Court

"that the proper construction of the term 'cargo' when it occurs in the notification of the Reserve Bank is that it is used as contra-distinguished from personal luggage in the law relating to the carriage of goods"

In the absence of a similar provision under the Customs Act or in the Tourist Baggage Rules 1958 I do not find it possible to accept the contention of the appellants that 'baggage' used in Section 80 of the Customs Act means only personal baggage or bona fide baggage under Section 79 or personal effects under Clause 3 of the Tourist Baggage Rules. I may only add that merchandise per se is not excluded from the term personal effects used in the explanation to Clause 3 of the Tourist Baggage Rules 1958. The exclusion is in respect of merchandise which is imported for commercial purposes.

12 The next question therefore that arises is whether the diamonds in question which were undoubtedly merchandise were imported for commercial purposes so as to attract the provisions of Sections 111(d) and 110(1) of the Customs Act 1962 and the Tourist Baggage Rules 1958. Import has been defined in the Customs Act as bringing into India from a place outside India and upon this definition the contention of the appellants is that the moment the plane landed at Palam Airport there was an import of the diamonds into India which includes the territorial waters of India. I am not prepared to accept this contention because if this contention is accepted any goods or articles which are contained in a plane which has landed in India or in a ship which has entered the territorial waters of India would be liable to the payment of duty or to confiscation if the import thereof is prohibited even though the goods or articles are not unloaded from the plane or the ship for being brought into India. I find support for this conclusion upon the decision of the Supreme Court in *re Central India Spinning and Weaving and Manufacturing Co Ltd v Municipal Committee Wardha* AIR 1958 SC 341 where it has been held that if goods are not unloaded from the carrier they would not be said to have been imported into the municipality within the meaning of Section 66(1) (a) which provided for a terminal tax on goods or animals imported into the limits of the municipality. The Supreme Court has further held that—

import is not merely the bringing into but comprises something more i.e. incorporating and mixing up of the goods imported with the mass of the property in the local area.

Unless therefore the goods are brought into the country for the purpose of use, enjoyment, consumption, sale or distribution so that they are incorporated in and mixed up with the mass of the property in the country they cannot be said to have been imported or brought into the country. That this is the meaning to be attached to the word 'import' as used in

the Customs Act is also clear from the explanation to clause (3) of the Tourist Baggage Rules which excludes only such merchandise from the term personal effects as is imported for commercial purposes. The object of Section 80 is to exclude any article from the purview of Sections 110 and 111 if a declaration is made under Section 77 and the article is entrusted to the proper officer. If the article is so entrusted there are no commercial purposes which can be achieved. In my view therefore there is no import within the meaning of the Customs Act in a case where the goods are entrusted under Section 80 and are not carried by the passenger beyond the customs barrier.

Reliance has been placed by the appellants upon an unreported decision of a learned Single Judge of the Madras High Court which was delivered on 7-2-1968 in *Writ Petn. No 1924 of 1967 (Mad)*. In *re A Shaunkataly v Collector of Customs Madras* in that case no declaration was made under Section 77 by the passenger. In fact it appears from the judgment that the passenger did not ask that the brief-case containing precious stones should be bonded. It further appears that the passenger came out with a request for bonding only after the cloth bags containing the precious stones had been cut and the precious stones had been discovered. On the facts therefore there was a clear intention on the part of the passenger to import or to make an attempt to import precious stones. The learned Judge distinguished the Supreme Court decision in the case of the *Central India Spinning and Weaving and Manufacturing Co Ltd* AIR 1958 SC 341 on the ground that the Municipalities Act did not contain the definition of the word 'import'. With respect I differ from the view expressed because it is apparent from the judgment of the Supreme Court that Section 66(1) (a) of the said Act talks of import into or export from the limits of the Municipality.

13 The next argument on behalf of the appellants is that it is the discretion of the proper officer whether or not to accept for detention any article which is given to him under Section 80 of the Customs Act and therefore even if the discretion has been exercised it can be revoked subsequently. It may be that it is a matter of discretion with the proper officer to accept or not to accept but once the discretion has been exercised it can be revoked subsequently. It may be that it is a matter of discretion with the proper officer to accept or not to accept but once the discretion has been exercised, the proper officer is under a statutory obligation to return the article to the passenger on his leaving India and there is no question of his being entitled to revoke the discretion subsequently.

14. The last argument which was addressed by the appellants was that the Customs Act contains provisions for appeal and revision against any action that may be taken under the Act and, therefore, this Court should not interfere in the exercise of its powers under Article 226 of the Constitution. Such an argument was addressed before the learned Single Judge also and was repelled. The learned Single Judge exercised his discretion by entertaining the petition under Article 226 of the Constitution. In my view, the learned Single Judge was right in exercising his discretion in the circumstances of this case.

15. I, therefore, dismiss the appeal with costs. Counsel's fee is assessed at Rs. 250/-.

16. S. N. SHANKAR, J.: I agree.

Appeal dismissed

1970 CRI. L. J. 421 (Vol. 76, C. N. 95)
(GOA, DAMAN AND DIU J. C'S COURT)
V. S. JETLEY, J. C.

Assistant Collector of Customs and Central Excise, Goa, Applicant v Uttam Bala Revankar, Respondent

Criminal Revn. Appln. No. 23 of 1968,
D/- 19-6-1969.

(A) Criminal P. C. (1898), Sections 1 and 5(2) — Code came into force in Goa on 1-11-1963 and Portuguese Criminal P. C. stood repealed by virtue of Sections 3 and 4 of Goa, Daman, Diu (Laws) Regulation 1962 — Offence punishable under Rule 126-P Defence of India Rules, 1962 committed in Goa on 25-6-1963 — Offence is triable in accordance with Criminal P. C. and not Portuguese Criminal P. C. — Order dated 6-11-1963 passed by Lt. Governor providing to the contrary is ultra vires under Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962 — Nor can the 1962 Order be saved under Section 4 of the 1962 Regulation or under Section 10 (1) of the (Administration) Act, 1962 — Goa, Daman and Diu (Administration) Ordinance (1962), Section 8 — Goa, Daman and Diu (Administration) Removal of Difficulties Order (1962) — (Goa, Daman and Diu (Administration) Act (1962), Sections 11 (2) and 10 (2)) — (Goa, Daman, Diu (Laws) Regulation (1962), Sections 3, 4 and 7).

Where an offence punishable under Rule 126-P, Defence of India Rules was committed in Goa on 25-6-1963 i.e. prior to the coming into force of Indian Criminal P. C. in Goa on 1-11-1963, and the prosecution for the offence was started in Goa in 1966

Held, that the offence should be tried and otherwise dealt with according to the provisions of the Indian Criminal P. C. and not the Portuguese Criminal P. C. which stood repealed with effect from 1-11-1963 by virtue of Section 4 (1) of the Goa, Daman, Diu (Laws) Regulation. The effect of Section 4 (2) of the Regulation was that action taken under Portuguese Criminal P. C. was saved notwithstanding its repeal (Para 4)

The order dated 6-11-1963 passed by the Lt. Governor providing that all Criminal Proceedings in relation to offences committed prior to date of coming into force of Criminal P. C. shall be tried according to Portuguese Law in force could have no effect as the said order was not intra vires the provisions of Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962 under which he purported to act. There is no clause in the 1960 order enabling the Central Government to remove any difficulty which arises in giving effect to the provisions of the ordinance or in connection with the administration of this territory. The source of the order dated 6th November, 1963, was the 1962 Order, which was relatable to Section 11 (2) of the Goa, Daman and Diu (Administration) Act 1962. Nor could the Order dated 6-11-1963 be saved by Section 4 of the 1962 Regulation (Para 4)

The Order dated 6-11-1963 was not relatable to Section 10 (2) Goa, Daman and Diu (Administration) Act (1962) and as such could not be saved under it (Para 4)

The law is well settled that no person has a vested right in any course of procedure. The Indian Code of Criminal Procedure is procedural law and the directive, in sweeping terms, in the order dated 6th November, 1963 appears to disregard this principle. It also includes within its sweep offences under the law other than the Acts specified in the Schedule appended to the 1962 Regulation and, for this, there is no legislative sanction. The Defence of India Act, 1962, is not one of the statutes specified in the Schedule appended to the 1962 Regulation. In view of Section 7 of the 1962 Regulation the application of the Indian Code of Criminal Procedure was barred in relation to the offences under the Acts specified in the Schedule appended to the 1962 Regulation before 1st November, 1963, but thereafter this bar was lifted (Para 4)

(B) Defence of India Rules, (1962), Rule 126-P (4) — Rule was added by Defence of India (Seventh Amendment) Rules, 1963 on 24-6-1963 — Offence under Rule 126-P committed in Goa on 25-6-1963 — Offence is triable summarily by a Magistrate in accordance with procedure prescribed in Chapter 22, Criminal

P C (1893) and not by the Portuguese P C by virtue of Rule 126 P (4) read with Section 43 Defence of India Act — Object of this Rule is speedy trial in a summary way of offences relating to contravention for which penalties are provided in Rule 126 P — (Defence of India Act (1962) Section 43) (Para 4)

(C) Defence of India Act (1962) Sections 1 and 3 — Act enacted by Parliament on 12-12-1962 and the Defence of India Rules 1962 framed under Section 3 extend to the whole of India including the territory of Goa Daman and Diu which became part of India with effect from 20-12-1961 by virtue of Section 2 Constitution (Twelfth Amendment) Act 1962 — No express extension of the Act and the Rules to those territories was necessary as in the case of pre liberation laws in force (Para 5)

(D) Defence of India Rules (1962) Rules 126-P and 126-J — Pendency of appeal before Administrator under Rule 126-J has no bearing on validity of prosecution for offence under Rule 126 P (Para 5)

(E) Defence of India Act (1962) Section 1 (3) — Prosecution under R 126 P Defence of India Rules 1962 started in 1962 is not in any way affected by expiry of Act due to revocation of proclamation of emergency on 10-1-1968 under Article 352 (2) (a) of Constitution in view of Section 1 (3) (Para 5)

Cases Referred Chronological Paras

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| (1966) AIR 1966 SC 334 (V 53) =
(1966) 1 SCR 120 Lekhraj v
Dy. Custodian Bombay | 4 |
| (1958) AIR 1958 SC 232 (V 45) =
1958 SC 1052 Balakrishna v
Union of India | 4 |
| (1958) AIR 1958 SC 915 (V 45) =
1958 Cri LJ 1423 Anant Gopal
Sheorey v State of Bombay | 4 |

S Tambe Govt Pleader for Appli-
cant Soli Sorabji for Respondent

ORDER — This revision application under Section 435 of the Code of Criminal Procedure is directed against the decision given by the learned Sessions Judge Panaji, dated 22nd January 1968 whereby he rejected the application in revision filed by the respondent Uttam Bala Revankar

2 The material facts leading to the revision application in this Court are that on 20th April 1965 a complaint was filed by the Assistant Collector of Customs and Central Excise Goa against the respondent for contravention of rule 126P and some other rules of the Defence of India Rules, 1962. The substance of the complaint was that on 25th June 1963 at about 9 a.m. on the basis of secret information received, the residence of the res-

pondent was raided at Margao and during its search 72 bars of gold bullion weighing 58,767.86 grams valued at about Rs. 3,14,878 were found concealed. The said bars were seized and after necessary formalities the respondent was prosecuted. The respondent challenged the legality of this prosecution on the following grounds: (1) that the Defence of India Rules are not validly applied to the territory of Goa Daman and Diu and as such no action can be taken thereunder; (2) assuming they are validly applied the respondent is exempted from prosecution because of having subscribed to the Gold Bond Scheme notified by the Government of India on 19th October 1965; (3) that the respondent has preferred an appeal before the Administrator appointed under Rule 126 J of the Defence of India Rules and therefore the prosecution should not be proceeded with; and (4) that the prosecution violates the fundamental right of the respondent guaranteed to him under Article 14 of the Constitution.

The learned Magistrate after hearing the Assistant Collector of Customs and Central Excise and the respondent's counsel dismissed these objections by his order dated 7th November 1967. He held: (1) that the Defence of India Rules are applicable; (2) that the departmental proceedings are different from criminal proceedings and that the question of pending appeal has no bearing on the validity of criminal prosecution; and (3) that Article 14 is inapplicable. The question of exemption from the prosecution because of the Gold Bond Scheme was not considered by him.

The respondent felt aggrieved and later moved the Sessions Court in the exercise of its revisional jurisdiction. In the revision application the objections urged before the learned Magistrate were repeated but the learned Sessions Judge instead of giving his decision on those objections disposed of the case on the sole ground that he had no jurisdiction to deal with this application. This order was passed by him on 22nd January 1968 after hearing counsel for the parties. In dismissing the application the learned Sessions Judge relied on the order GAD/74/67 25007 dated 6th November 1963 passed by the Lt Governor. According to him the criminal prosecution launched was to be governed by the procedure laid down in the Portuguese Code of Criminal Procedure and not the Indian Code of Criminal Procedure. The Portuguese Code of Criminal Procedure being applicable he held that he had no jurisdiction to deal with the application in revision under Section 435 of the Indian Code of Criminal Procedure. He also held that the procedure under Rule 126P(4) of the Defence of India Rules was not applicable and that the contention of the State that the prosecution was

governed by the Indian Code of Criminal Procedure was not tenable. The State felt dissatisfied with this decision and hence approached this Court in revision. This, in broad, is the background of this case.

3. The short question for consideration is whether the Criminal Prosecution is to be regulated according to the procedure laid down in the Portuguese Code of Criminal Procedure or the Indian Code of Criminal Procedure, and, for that purpose, it is necessary to reproduce the order passed by the Lt Governor, dated 6th November, 1963.—

"In exercise of the powers conferred by the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962 and notwithstanding anything to the contrary contained in any law for the time being in force in this Territory, the Lieutenant Governor makes the following order:

All criminal proceedings in relation to offences committed prior to the date of coming into force of the Criminal Procedure Code shall be carried on under the law in force in the Territory before the date."

By order and in the name of
the Lieutenant Governor of
Goa, Daman and Diu.

The alleged offence in this case was committed on 25th June, 1963. The Indian Code of Criminal Procedure came into force in this territory on 1st November, 1963. It follows from this order that the Criminal Proceeding in relation to this offence is to be "carried on under the law in force" in this territory, before 1st November, 1963. The procedural law then in force was the Portuguese Code of Criminal Procedure. The Portuguese Penal Code, a substantive law, did not provide for the alleged offence. This order was passed in exercise of the powers conferred by the Goa, Daman and Diu (Administration) Removal of Difficulties Order (hereinafter referred to as 'the 1962 Order'). Is this order intra vires the 1962 Order? If it is, then the conclusion of the learned Sessions Judge would be correct but not otherwise. The 1962 Order was passed by the Central Government in exercise of the powers conferred by Section 8 of the Goa, Daman and Diu (Administration) Ordinance, 1962, promulgated by the President on 22nd November, 1962. Section 8 (1) of the Ordinance provides that if any difficulty arises in giving effect to the provisions of this Ordinance or in connection with the administration of Goa, Daman and Diu, the Central Government may, by order, make such further provision as appears to it to be necessary or expedient for removing the difficulty. The proviso

states that no such power shall be exercised after the expiry of two years from the appointed day. The "appointed day" under the Ordinance is 20th December 1961. Sub-section (2) provides that any order under Sub-section (1) may be made so as to be retrospective to any date not earlier than the appointed day. The Ordinance was repealed by the Goa, Daman and Diu (Administration) Act, 1962 enacted on 27th March, 1962, which came into force with effect from 5th March, 1962.

4. Mr S Tamba, learned Government Pleader, submits that the Order dated 6th November, 1963 is not in conformity with the 1962 Order passed by the Central Government and, therefore, it has no effect. In other words, it is ultra vires the 1962 Order. A perusal of the 1962 Order would seem to support this submission. The 1962 Order contains 4 Clauses. Clause (1) relates to title; it employs a legal fiction, the effect of which is that the order came into force with back effect from 20th December, 1961. Clause (2) provides that powers conferred and duties imposed by or under any provision of law in force immediately before 20th December, 1961, would be exercisable and performed by the respective functionaries specified in Column II thereof. Clause (3) enables the Administrator of this territory to exercise any power or perform any duties of the Governor-General of the State of India before liberation. This territory was known as "the State of India" before liberation. Clause (4) contemplates delegation of powers by the Administrator and other officials specified therein. There is no other clause enabling the Central Government to remove any difficulty which arises in giving effect to the provisions of the ordinance or in connection with the administration of this territory. The source of the Order dated 6th November, 1963, is the 1962 Order, which is relatable to Section 11(2) of the Goa, Daman and Diu (Administration) Act 1962. Under that provision, notwithstanding repeal of the ordinance, anything done or any action taken in exercise of any of the powers conferred by or under the ordinance shall be deemed to have been done or taken in exercise of the powers conferred by or under the said Act. Mr Sorabji, learned counsel for the respondent, submits that assuming this order is not intra vires the 1962 Order, he invokes Section 4 of the Goa, Daman and Diu (Laws) Regulation 1962, promulgated by the President, in support of its validity. He submits that a wrong citation or failure to indicate the exact source of authority does not vitiate the order, if it can be supported by any other provision of law, and in support of this proposition, he relies on *Lekhraj v Dy Custodian, Bombay*, AIR 1966 SC 334 (336). This proposition

is well settled The Supreme Court in this case observed

'that when an authority passes an order which is within its competence it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other rule and the validity of the impugned order should be judged on a consideration of its substance and not of its form. The principle is that we must ascribe the act of a public servant to an actual existing authority under which it would have validity rather than to one under which it would be void (see *Balakotaiah v Union of India* 1958 SCR 1032 at page 1059 = (AIR 1958 SC 232 at page 236)) Section 4 contains 2 sub-sections. Sub-section (1) provides that any law in force in this territory or any area thereof corresponding to any Act referred to in Section 3 or any part thereof shall stand repealed as from the coming into force of such Act or such area as the case may be. Sub-section (2) is a saving clause on the usual lines of Section 6 of the General Clauses Act 1897. Now the Portuguese Code of Criminal Procedure was the law in force in this territory corresponding to the Indian Code of Criminal Procedure which came into force with effect from 1st November 1963. The effect of sub-section (1) is that the Portuguese Code of Criminal Procedure stood repealed from that date. The effect of sub-section (2) broadly speaking is that the action taken under the Portuguese Code of Criminal Procedure is saved notwithstanding its repeal. It is not clear to me how Section 4 can be invoked to save the order dated 6th November 1963. This order is not relatable to the said Section 4. The State does not rely on this section and for good reasons. Mr Sorabji in addition, relies on Section 10 (1) of the 1962 Act in support of its validity but this section also is not attracted. It corresponds to Section 8 (1) of the Ordinance. The Order dated 6th November 1963 is not relatable to this section. One thing more. The law is well settled that no person has a vested right in any course of procedure (*Anant Gopal Sheorey v State of Bombay* AIR 1958 SC 915 917). The Indian Code of Criminal Procedure is procedural law and the directive in sweeping terms in the order dated 6th November 1963 appears to disregard this principle. It also includes within its sweep offences under the law other than the Acts specified in the Schedule appended to the 1962 Regulation and for this there is no legislative sanction. Section 7 provides that until the relevant provisions of the Indian Code of Criminal Procedure are brought into force in this Territory all offences under any Act shall be investigated inquired into tried and otherwise dealt with according to the cor-

responding law in force in this Territory. The application of the Indian Code of Criminal Procedure was barred in relation to the offences under the Acts specified in the Schedule appended to the 1962 Regulation before 1st November 1963 but thereafter this bar was lifted. The expression 'until' is not without significance. This is understandable for the offences under the Indian Penal Code and other Acts specified in the Schedule cannot be investigated etc both under the Portuguese Code of Criminal Procedure and the Indian Code of Criminal Procedure. The principle is well established that the legislature does not intend conflict between two statutes. The scheme of Section 7 also is an effective answer to the view taken by the learned Sessions Judge. It may be added that the Defence of India Act 1962 is not one of the statutes specified in the Schedule appended to the 1962 Regulation. The alleged offence is to be tried and otherwise dealt with according to the provisions of the Indian Code of Criminal Procedure and not the Portuguese Code of Criminal Procedure which stood repealed with effect from 1st November 1963. The alleged offence cannot be tried under the law which is not in existence. The view taken by the learned Sessions Judge that it is to be tried according to the Portuguese Code of Criminal Procedure is an erroneous view and therefore cannot be accepted.

The further view that Rule 126-P(4) was inapplicable to the prosecution is also erroneous. This rule provides that notwithstanding anything contained in the Indian Code of Criminal Procedure, an offence under this rule committed after the date of commencement of the Defence of India (Seventh Amendment) Rules 1963 shall be tried summarily by a Magistrate. The use of the non obstante clause in this rule is also not without significance. Section 43 of the Defence of India Act provides that the provisions of that Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than that Act or in any instrument having effect by virtue of any enactment other than that Act. The Defence of India Rules 1962 relating to control of gold were inserted as Part XIA by GSR 89 dated 9th January 1963 in exercise of the powers conferred by Section 3 of the Defence of India Act. These rules were further amended by the Defence of India (Seventh Amendment) Rules 1963 on 24th June 1963. By these Rules Rule 126-P(4) was added. The alleged offence having taken place on 25th June 1962 is thus triable by the learned Magistrate in accordance with the procedure mentioned in Chapter XXII of the Indian Code of Criminal Procedure. The object of these rules is speedy

trial in a summary way of the offences relating to contravention for which penalties are provided in Rule 126-P. The learned Sessions Judge was wrong when he overruled the contention of the State that the prosecution was governed by the Indian Code of Criminal Procedure and not by the Portuguese Code of Criminal Procedure.

5. I shall next deal with the objections urged before the learned Magistrate which were not accepted by him. The Defence of India Act was enacted by Parliament on 12th December, 1962. The Defence of India Rules, 1962, including Rule 126-P were made in exercise of the powers conferred by Section 3. This Act was extended to the whole of India including this territory. The Defence of India Rules made thereunder are applicable to this territory, as rightly held by the learned Magistrate. This territory became part of India with effect from 20th December, 1961, in accordance with Section 2 of the Constitution (Twelfth Amendment) Act, 1962. The argument that this Act and also the Rules made thereunder had to be expressly extended as in the case of pre-liberation laws in force in other parts of India is devoid of substance.

Mr Sorabji does not press the objection regarding violation of Article 14 of the Constitution, and for valid reasons. The respondent has not been able to show that in the matter of prosecution he has been treated differently from the offenders similarly situated. The further objection that the respondent is exempted from the prosecution because of having subscribed to the Gold Bond Scheme need not be decided by this Court. It is open to the respondent to convince the learned Magistrate that he is so exempted. The learned Magistrate was right when he stated that the question of a pending appeal before the Administrator appointed under Rule 126-J has no bearing on the validity of the prosecution. There was Proclamation of Emergency on 26th October, 1962 under Article 352(1) of the Constitution. This Proclamation was revoked on 10th January, 1968 by GSR 93. This action was taken in exercise of the powers conferred by sub-clause (a) of clause 2 of the said Article 352. Sub-section (3) of Section 1 of the Defence of India Act provides that it shall remain in force during the period of operation of the Proclamation of Emergency issued on 26th October, 1962, and for a period of six months thereafter, but its expiry under the operation of this sub-section shall not affect the previous operation of, or anything duly done or suffered under this Act or any rule made thereunder etc. The prosecution launched in April 1966 in relation to the alleged offence is not in any way affected by the expiry of

the Defence of India Act. There is nothing more to be discussed.

6. In the view taken by this Court of the objections urged before the learned Magistrate and also of the plea of lack of jurisdiction raised by the learned Sessions Judge the application for revision filed on behalf of the State is allowed. The learned Sessions Judge need not have relied on the order dated 6th November, 1963, in support of the view taken by him. The record and proceedings should be sent back to the Civil Judge, Senior Division, and First Class Magistrate, Madgaon, with directions to dispose of the case in accordance with the provisions of law. The prosecution has been pending for a long period. The learned Magistrate is advised to accord priority to this case. Order accordingly.

Revision allowed.

1970 CRI. L. J. 425 (Vol. 76, C. N. 96)

(GUJARAT HIGH COURT)*

N. G. SHELAT, J.

Dahya Revla and another, Appellants
v. Reva Chhita and others, Respondents

Criminal Appeal No 855 of 1966, D/-16-1-1968, against Judgment of S. J. Broach in Sessions Case No 20 of 1965.

(A) Criminal P. C. (1898), Ss. 479-A (6) and 476 — Application under S. 476 for taking proceeding in regard to offence under S. 195 of Penal Code cannot be availed of: AIR 1963 SC 816 & AIR 1964 SC 725, Foll. (Para 4)

(B) Criminal P. C. (1898), Ss. 476(1) and 195 — Offence falling under S. 182 of Penal Code — Application under S. 476(1) cannot lie. (Para 5)

(C) Criminal P. C. (1898), S. 476 — Sanction for prosecution — Conditions to be satisfied.

Before sanctioning prosecution by any Court under S. 476 of the Criminal Procedure Code, two conditions are essential to be established. The first is that the Court should be satisfied that there is a reasonable probability of establishing the charge sought to be levelled and secondly, that it should be of the opinion that it is expedient in the interests of justice to grant any such sanction. The Court should not only feel that an offence has been committed, but that there exists a reasonable probability and not mere possibility of conviction. While considering the question of expediency of interests of justice, the Court should always see that it does not become a handle in the hands of the parties who move in the matter out of

* Only portions approved by the High Court for reporting are reported here

LL/BM/G571/68/RSK/B

spite or grudge that they bear against the other persons (1910) 11 Cri LJ 37 (Cal) Rel. on. (Para 6)

Cases Referred Chronological Paras

(1964) AIR 1964 SC 725 (V 51) —

1964 (1) Cri L J 555 Babu Lal v State of U P 4

(1963) AIR 1963 SC 816 (V 50) =

1963 (1) Cri L J 803 Shabir Hussain Bholu v State of Maha

rashtra 4

(1910) ILR 37 Cal 250 = 11 Cri L J

37 Jadu Nandan Singh v Emperor 6

R M Vin, for Appellants P D Desai for Respondents A H Thakar for State

JUDGMENT — x x x x

3 Mr Vin, the learned advocate for the appellants urged that the respondent No 1 Revla had in his own evidence admitted about the falsity of the material statements made in his complaint Ex 17 and that the same were even actually found by the learned Sessions Judge to be false and imaginary. He therefore contended that as a result of such a false information given to the Police Patel they had to face a trial in the Court of Sessions and that too in regard to a very serious charge such as of robbery punishable under Section 392 read with Section 397 of the Indian Penal Code. In those circumstances, there would not arise any question of pity on the mere ground that he was an illiterate and stupid person acting under the guidance of respondents Nos 2 and 3 as observed by the learned Sessions Judge. He also contended that in the interest of justice such a person should have been brought to book and that the learned Sessions Judge was wrong in not taking any action whatever against him. So far as respondents Nos 2 and 3 are concerned he contended that they knew full well about the falsity of the complaint for the reason that respondent No 1 accompanied by respondent No 2 had gone to give information about the incident to respondent No 3 on the previous day and that though respondent No 1 was asked not to file any such complaint on the trivial grounds, on the next day the complaint came to be recorded in respect of the same incident and that way they are said to have abetted the commission of the crime said to have been committed by respondent No 1. He therefore urged that action should be taken against them as well and the interests of justice demand the same.

4 Now in the first place it was pointed out by Mr Desai, the learned advocate for the respondents that of the three charges sought to be levelled against the respondents, the question of prosecuting them for offences under Sections 182 and 193 of the Indian Penal Code would not arise in view of sub-section (6) of Section 474-A of the Criminal Procedure Code. In support thereof he invited a

reference to the decision in the case of Shabir Hussain Bholu v State of Maharashtra AIR 1963 SC 816 and that the matter would then require to be considered only in relation to the offence under Section 211 of the Indian Penal Code. Apart from authority, it appears clear from Section 479 A and sub-section (6) thereof that no proceedings can be taken under Section 476 against a person for giving or fabricating false evidence if in respect of such a person proceedings can be taken under Section 479 A of the Code. Section 193 of the Indian Penal Code relates to a person giving or fabricating false evidence intending thereby to cause or knowing it to be likely that he will thereby cause any person to be convicted of an offence. Thus in respect of an offence falling under Section 193 of the Indian Penal Code no proceeding can be taken under Sec. 476 since the learned Sessions Judge has declined to take any action under Section 479 A of the Criminal Procedure Code. The case referred to by Mr Desai lay down that bearing in mind the non-obstante clause at the commencement of Section 479 A and the provisions of sub-section (6) it would follow that only the provisions of sub-section (1) of Section 479 A must be resorted to by the Court for the purpose of making a complaint against a person for intentionally giving false evidence or for intentionally fabricating false evidence at any stage of the proceeding before it. Besides it has been observed that the provisions of Section 476 to Section 479 are to all excluded where an offence is of the kind specified in Section 479-A of the Criminal Procedure Code. It is therefore clear that the application under Section 476 for taking any proceeding against the respondents in regard to an offence falling under Section 193 of the Indian Penal Code cannot be availed of. The same view has been repeated by the Supreme Court in a subsequent decision in the case of Babu Lal v State of Uttar Pradesh, AIR 1964 SC 725 except in respect of an offence falling under Section 471 of the Indian Penal Code.

5 As to the other offence under Section 182 of the Indian Penal Code it would be necessary to refer to Sec. 476 and Section 193 of the Criminal Procedure Code. Section 476 of the Criminal Procedure Code provides —

476 (1) When any Civil Revenue or Criminal Court is whether on application made to it in this behalf or otherwise of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Section 193 sub-section (1) clause (b) or clause (c) which appears to have been committed in or in relation to a proceeding in that Court, such Court may after

such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of that Court

In other words, the action contemplated under Section 476(1) of the Criminal Procedure Code is in relation to offences referred to in Section 195, sub-section (1), clause (b) or clause (c). If we then turn to Section 195 of the Criminal Procedure Code, it appears that, as provided in sub-section (1), clause (a), no Court shall take cognizance of any offence punishable under Sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. Then come clauses (b) and (c) which have been referred to in Section 476 of the Criminal Procedure Code. Section 476 does not refer to an offence contemplated in Section 195(1) (a) of the Code and it follows therefrom that the offences such as under Sections 172 to 188 of the Indian Penal Code are excluded from any such inquiry to be made under Section 476 of the Code. No application can, therefore, lie under S. 476(1) of the Criminal Procedure Code for taking any action in regard to any offence falling under Section 182 of the Indian Penal Code.

6. That leaves the offence under Section 211 of Indian Penal Code said to have been committed by respondent No. 1, inasmuch as he caused any criminal proceeding being instituted with intent to cause injury to the applicants, or about having falsely charged them for having committed an offence of robbery, by lodging a first information report Ex. 17 before the Police Patel, and in that respondents Nos. 2 and 3 are said to have abetted the commission thereof and that way liable under Section 211 read with Section 114 of the Indian Penal Code. There is obviously no bar in law to proceed against them. Before sanctioning any such prosecution by any Court under Section 476 of the Criminal Procedure Code, two conditions are essential to be established. The first is that the Court should be satisfied that there is a reasonable probability of establishing the charge sought to be levelled against these persons and secondly, that it should be of the opinion that it is expedient in the interests of justice to grant any such sanction. In this respect, Mr. Desai invited a reference to certain observations made in the case of *Jadu Nandan Singh v. Emperor*, ILR 37 Cal. 250. They run thus —

"The principle which should guide Courts in taking action under Sec. 195 or 476 is now well settled. No sanction should be granted unless there is a reasonable probability of conviction. It

would be an abuse of the powers vested in a Court of Justice if sanction were given or upheld on the principle that, though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be thrashed out, so that it may be decided whether or not an offence has been committed. No doubt the authority which is called upon to grant a sanction under Section 195, or to take action under Section 476, need not, and should not, decide the question of guilt or innocence of the party against whom proceedings are to be instituted, but great care and caution are required before the Criminal law is set in motion, and there must be reasonable foundation for the charge in respect of which prosecution is sanctioned or directed."

In other words, not only it should feel that an offence has been committed, but that there exists a reasonable probability and not a mere possibility of his conviction. While considering the question of expediency of interests of justice, the Court should always see that it does not become a handle in the hands of the parties who move in the matter out of spite or grudge that they bear against the other persons. With these principles we have to consider in the first place as to whether there is a reasonable probability of having the respondents convicted in respect of the offence for which they are sought to be made liable, and secondly, as to whether interests of justice require the action to be taken against all or any of them.

Appeal dismissed

1970 CRI. L. J. 427 (Vol. 76, C. N. 97)

(MADHYA PRADESH HIGH COURT)

P. K. TARE AND H. R. KRISHNAN, JJ.

State of Madhya Pradesh, Appellant
v. Ambalal Premchand, Respondent

Criminal Appeal No. 291 of 1964, D/- 6-9-1965, against Judgment of Addl. S. J. Jhabua, D/- 21-4-1964

(A) Criminal P. C. (1898), Ss. 423, 439 and 190(1) (a) — Prevention of Food Adulteration Act (1954), Ss. 7(1) and 16(1) — Conviction under S. 7(1) read with S. 16(1) — Appeal — Appeal allowed and case remanded — Appeal by State against appellate order — Held, as a matter of form proceeding was appeal and not proceeding in revision, though in substance it made no difference whatever view was taken of the matter — Appeal by State was competent. (Paras 7 and 10)

(B) Criminal P. C. (1898), Ss. 221(7) and 537(b) — Though particulars requir-

IM/JM/D338/69/AKJ/D

ed by S 221(7) have not been mentioned in the charge they were explicitly put to accused who in his turn admitted their correctness and defect in the charge was cured by S 537(b) (Para 11)

Baliantsingh Govt Advocate for Appellant L. S. Shukla for Crown.

KRISHNAN J — This is an appeal under Section 417(1) Criminal Procedure Code by State of Madhya Pradesh from the appellate order of the Additional Sessions Judge Jhabua (in Criminal Appeal No 29 of 1964) setting aside the conviction of the respondent under Section 7(1) read with Section 16(1) of the Prevention of Food Adulteration Act 1954 and the sentence (in view of a previous conviction) of rigorous imprisonment for one year and a fine of Rs 2000/- with further rigorous imprisonment in default of six months recorded by the First Class Magistrate of Thandla in Criminal Case No 519 of 1963. Actually the Sessions Court has after thus setting aside the conviction and sentence remanded the case for a retrial in accordance with certain directions set out in its judgment.

2 The allegations that the respondent was offering to sell milk had actually sold a sample to the Food Inspector and that the sample sent for analysis in the prescribed manner was found to be below standard and to be adulterated with water were all admitted by the respondent who stated in his examination under Section 342 Criminal Procedure Code

"Yes I did add water to the milk which I was selling to my customers and a portion of which I sold to the Food Inspector I plead guilty but I am a poor cultivator

Similarly the factum of earlier conviction on 4-2-1963 for a similar offence was proved by the exhibition of a copy of that judgment and a confronting of the accused which also he admitted —

"Yes On that occasion (on 4-2-1963 in Case No 39 of 1963) I was convicted for the same offence and sentenced to a fine of Rs 30/- This is my second offence

3 However in this appeal a number of points (all unrelated to merits) have been urged on behalf of the respondent why this Court should not interfere in appeal and should let the order of the Sessions Court take effect. The more important of these grounds are firstly that in view of the acquittal by the — Sessions Court being incomplete or provisional no appeal under Section 417 Cr P C is competent, and the appropriate course of the aggrieved party is an application in revision, secondly that as the prosecution under the Prevention of Food Adulteration Act, is one under Section 100 (1) (a) and not under Section 100 (1) (b) Cr P C the Government is not competent to

file an appeal under Section 417 (1) Cr P C the local authority or the Food Inspector may seek special leave under Section 417(3) Cr P C. The argument in other words is that these two sub-sections are mutually exclusive. Thirdly that apart from other errors it is urged the trial Court had contravened the provisions of Sections 221 (7) 255 A and 256 Cr P C. As these do not seem to have been fully examined by any of the High Courts it would be convenient to deal with them at some length.

4 The facts themselves are simple. The respondent is a milk vendor with a set of regular customers among whom he was distributing milk on the morning of 28-6-1963 within the municipality of Maghnagar. The Food Inspector stopped him and took a sample. There was no indication on the container as to the kind of milk he was selling and naturally the standard applied was that laid down for buffalo-milk. This incidentally is in accordance with one of the statutory rules which prevents the seller of milk pleading without an express indication on the container itself that it was milk from a cow or a goat and not from a buffalo. It was sent for analysis and turned out to be adulterated. The analyst has in his report calculated from the shortage that about 75 per cent of water had been superadded. Our calculation from his own data would give a higher percentage of the superadded water but that is immaterial because even on the most charitable view the milk had been adulterated.

5 In this Court a suggestion was made that the addition of preservatives which is usually formalin, had not been established and it was possible that during the few days between the same taking and the analysis the milk might have got decomposed. Actually the Panchnama which was exhibited mentions the addition of 16 drops of formalin and the Food Inspector who was offered for cross-examination was not asked anything about it. In fact from the line the respondent was taken and in view of the express admission this question did not arise. We will have to assume that the milk that was offered for sale and was actually sold to the Food Inspector was below standard. Similarly the previous convictions were put to the accused proved by documentary evidence and admitted by him.

6 Still the Sessions Court allowed his appeal because the Magistrate before whom the accused pleaded guilty did not straight away convict him but called upon him to enter into defence and when he said he had no defence then convicted him. It is a confusing argument but the idea seems to be that having called upon him to enter into defence the Magistrate should have considered it and not merely the plea of guilty though it is not clear

what exactly he was to consider, because there was no defence evidence. A second error which according to the Sessions Court was fatal to the conviction was that a separate charge was not framed in regard to the previous conviction though it was expressly put to the accused and admitted by him. This according to the Sessions Court is a contravention of the "mandatory" provisions in Section 221(7). Similarly he feels that there was a breach of requirement of Section 255-A, in that the Magistrate had not recorded a conviction under the current charge before proceeding to prove the previous conviction. He has also indicated that there was a breach under Section 256, Cr P C. What exactly it was, is not clear, but apparently the Sessions Court's idea is that having called upon the accused to enter into defence, he should have placed the prosecution witnesses once again before the accused even though he did not want them, so that he could cross-examine them after the charge. For these reasons, in spite of the express admission of the adulteration as well as of the previous conviction, the Sessions Court set aside the conviction and remanded the case for a retrial.

7. Ground No 1.— Actually it makes little practical difference in the instant case whether the present proceedings are treated as an appeal from an order of acquittal or as an application in revision directed against the legality or the propriety of the order of the Sessions Court. In the instant case, the result would be the same whether we set aside the judgment of acquittal and restore the conviction and the sentence recorded by the Magistrate, or whether we set aside the order of the Sessions Court on the ground of illegality, when that order is washed out, the judgment of conviction and the sentence awarded by the Magistrate would automatically be revived.

Still it is urged that the Sessions Court has acquitted the respondent but has only directed a retrial. An acquittal properly so called would attract Section 403, Cr P. C., and be a bar to retrial. Arguing backwards, it is urged that we have an order of remand which makes no acquittal for purposes of Section 417, Cr. P. C. It is difficult to agree, because the very process of setting aside the judgment of the Magistrate amounts to an acquittal though there is the further condition about retrial. Such an acquittal ipso facto attracts Section 417, Cr P.C. Thus we would hold as a matter of form that this is an appeal and not a proceeding in revision, though in substance it makes no difference whatever view we take of the matter.

8. Ground No 2.— If this is a revision, it would be unnecessary to demarcate the fields covered respectively by

sub-sections (1) and (3) of Section 417, Cr. P. C. This is because the revisional power is ultimately exercised by the High Court in its own discretion whatever the manner in which the illegality or impropriety is brought to its notice. But assuming this is an appeal, then certainly the question arises whether in a complaint case, such as the present one, a State Government can file an appeal. It is urged on behalf of the Government that sub-section (1) speaks of "an original or appellate order of acquittal passed in any case by any Court other than a High Court." The words "in any case" are comprehensive and include all the three types of cases mentioned in Section 190, Cr. P. C. Certainly there is one exception; but that is not of all complaint cases, but only of cases that come under sub-section (5) of Section 417, Cr. P. C.

Sub-section (5) — "If, in any case, the application, under sub-section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1)."

In other words, it is not every case that might come under sub-section (3) that is excluded, but only such of them as come under it and in which the special leave having been sought, has been refused by the High Court.

9. As against it, it is urged on behalf of the respondent that our Criminal Procedure Code provides for two patterns of criminal trial. The one started by police challan is tried in a manner materially different from that started on a private complaint. Till 1955, appeal from acquittal in a case started on complaint was not specially provided for. But it was open to the aggrieved complainant, whether he was an individual or a local authority, to persuade the Government to direct the Public Prosecutor to present an appeal; but if the Government refused to do so, the complainant was helpless. In the amendment of 1956, a complainant is afforded an opportunity of approaching the High Court direct. The respondent's position is that the scheme of the Code is such that this new right automatically bars the invoking of the powers of the State Government to direct the Public Prosecutor to present an appeal from an acquittal in a complaint case.

10. While considering this question, which may be of great importance in a large number of cases, we have to be guided by the provisions of Section 417, Cr P. C. treating it a complete Code on this subject, rather than speculate upon what may be a symmetrical pattern. Simply because the procedures for complaint cases and police report cases are different in certain particulars, there is no reason why appeals against acquittal in the two types should be compart-

mentalised in a water-tight manner As long as there is no confusion we can have an option to the complainant whether to move the State Government in the manner in which he would have had to do before 1956 or to avail of the new remedy afforded by sub-section (3) For this we have to be guided by the wording of the three sub-sections already referred to

It is obvious that the complainant can after 1956 seek leave in the High Court of presenting an appeal to it. The real question is whether this right has restricted the competency of the State Government to direct the Public Prosecutor to present an appeal from an order of acquittal in any case. As the section now stands it is difficult to resist the inference that it does not because any case includes one instituted on a complaint. It would thus be open to the complainant to choose one of the two courses open to him. However once he has sought leave and it has been refused the Public Prosecutor cannot present the appeal at the instance of the State Government. There is nothing complicated about it because the High Court having examined the merits of the acquittal in one connection should not be again troubled with the same problem by another agency. Thus unless the complainant has sought special leave and it has been refused it is open to the Public Prosecutor on the direction of the State Government to present the appeal from an acquittal even in a case instituted on a complaint. Certainly when the complainant has obtained leave there would be no occasion for the State Government to direct the Public Prosecutor but even if there is the High Court will take note of the fact that the special leave has already been granted and declined to admit the appeal presented by the Public Prosecutor await that by the complainant himself.

11 Other grounds — All of these relate to matters of procedure as are covered by irregularity provisions in Section 537 Criminal Procedure Code. For example the appellate Court finds that there has been a breach of the requirement of Section 221(7) Cr P C. Under that section it is necessary for the Court to state in the charge at any time before the sentence is passed the facts, date and place of the previous conviction. Certainly in the instant case this has not been done but we do not agree with the result derived by the appellate Court from this omission. After recording the statement of the accused in regard to the fact of the charge the trial Court proceeded —

Question — In Case No 30 of 1963 you were convicted on 4-2-1963 under charges of the same nature as the present one and sentenced to a fine of Rs 30/-?

Answer — Yes. On that occasion also I was convicted for the offence of adding water to milk and sentenced to a fine. This is my second offence.

Question — Have you anything else to say?

Answer — I am a poor cultivator.

In this manner though the particulars required by Section 221(7) Cr P C have not been mentioned in the charge they were explicitly put to the accused who in his turn admitted their correctness. If this a defect in the charge it is one cured by Section 537(b).

Any error omission or irregularity in the charge which has not occasioned a failure of justice.

Whether it is mentioned in the charge itself or is separately put to the accused the point is that he should be confronted and he should be in a position if he can, to show that he had not been really convicted or the conviction was for another offence or the punishment different. In the instant case this has been done clearly enough and there has been no miscarriage of justice. It is difficult to see how this omission can at all justify the setting aside of the conviction.

12 The learned appellate Court has referred to Section 255-A Cr P C also. That section does not come into operation because the accused has admitted the previous conviction but any way the best evidence in that regard viz a certified copy of the previous judgment has been filed. It is of course not the case of the respondent that the judgment related to somebody else.

13 The discussion in the judgment of the Additional Sessions Judge regarding Sections 255 and 256 Cr P C is obscure. What he apparently means is that having made up his mind to call upon the accused to enter into his defence the trial Magistrate should not have convicted on a plea of guilty. In this Court it has been argued on behalf of the respondent that having the plea of guilty before him the Magistrate should not have asked the accused if he wanted to adduce defence evidence. Section 255(b) Cr P C empowers the Magistrate in the event of the plea of guilty at his discretion to convict the accused straightway but if he is so minded then the Magistrate can still call upon the accused if he has got anything further in defence. This would enable the latter to bring out points in his favour as might mitigate the sentence. What actually happened in this case was that the accused had nothing to put up by way of defence except possibly the excuse that he was a poor cultivator. So that even when the Magistrate was minded to give an opportunity to the accused to defend himself in spite of his plea of guilt, he had nothing else before him.

14 In this Court it is pointed out that

the prosecution witnesses were not called a second time for cross-examination after charge. In case of this kind, the oral evidence is very simple. There will always be the Food Inspector who gives oral evidence, and in addition, proves his report. Then there is a report of the Public Analyst which goes in without his examination unless for special reasons the Court summons him. Sometimes one of the Panchas or local witnesses to the taking of the sample is also examined, but where the manner of the sample taking is not in controversy, the Panch is not called. In the instant case, for example, the Food Inspector was called and, after examination in chief, was offered for cross-examination before charge which was declined. The analyst's report was exhibited and a charge framed. It was conceivable that in the event of the accused person challenging the fact or the regularity of the sample-taking, the Panch would have been called. Similarly in the event of his wanting the analyst to be called, he might have been summoned as well. Actually, the accused admitted all these things and there was no occasion to call any more witnesses. Nor did the accused want the Food Inspector himself for further cross-examination. It is suggested that he was unrepresented by a lawyer, but we fail to see what difference this could make. Actually his statement under Section 342, Cr P C, shows that there could possibly be no occasion for his asking for further cross-examination for defence witnesses.

15. In these circumstances we are quite unable to accept the reasons given by the Sessions Court for setting aside the conviction and sentence in spite of the respondent's clear admissions. It is likely that he had hoped, by making a clean breast of the whole thing, to earn the sympathy of the Court and get away with a light sentence: but such sympathy, if shown at all, would have been quite misplaced. Actually, this being the second offence, the Court itself had no choice, in view of Section 16(1) (a) (ii) of the Prevention of Food Adulteration Act, under which the minimum sentence for the second offence is rigorous imprisonment for one year and a fine of Rs 2000/- except where there are special and adequate reasons to the contrary, which are not available in the instant case.

16. The result of the foregoing discussion is that the (State) appeal is allowed, the judgment of the Sessions Court is set aside and that of the trial Magistrate is revived. The respondent shall surrender his bail and shall be remanded to serve the unexpired portion of the rigorous imprisonment and pay the fine of Rs 2000/- (Rupees two thousand) or suffer further rigorous imprisonment for six months in default.

Appeal allowed

1970 CRI. L. J. 431 (Vol. 76, C. N. 98)

(MADRAS HIGH COURT)

K N. MUDALIYAR, J

M. Kuppuswami Chettiar, Petitioner v. State, Respondent

Criminal Revn Case No 600 of 1967 (Cri Revn Petn No 592 of 1967), D/- 5-3-1969, against judgment of the Court of Session, North Arcot Dn. at Vellore, D/- 22-4-1967.

Penal Code (1860), S. 53 — Convictions and sentences under Ss. 467, 471, 477-A and 409 of Code — Revision — Held, ends of justice would be met by reducing sentence of imprisonment to period already undergone by accused because (1) he was first offender (2) was likely to be weeded out of co-operative institution, wherein he was the President, the position which was used by him for committing offences and (3) was pretty old man of 62 or 63 years— (Criminal P. C. (1898), Ss. 439 and 32 — Reduction of sentence). (Para 4)

Cases Referred: Chronological Paras

(1941) AIR 1941 Mad 551 (V 28) =

42 Cri LJ 696, Crown Prosecutor v Gopal

3

N T. Vanamamalai, R Shanmugham & V Gopinath, for Petitioner, Calvin Jacob, for Public Prosecutor, for State

ORDER: The substance of the prosecution is that the petitioner himself using his position as President and Treasurer of the society had made false entry in the consolidated loan application dated 2-9-1961, Ex. P 8, as though a loan for Rs 500 had been applied for by one Munsif Chinnappa Mudali and in that application affixed his left hand thumb impression as though it is the thumb impression of Munsif Chinnappa Mudali and then further in the solvency certificate relating thereto namely, Ex P 7, he had affixed his own thumb impression as though it was the thumb impression of Chinnappa Mudali, P. W. 1. He had also falsely endorsed in his own handwriting that those thumb impressions were the impressions of P W 1. The petitioner after getting the funds from the Co-operative Central Bank showed a false disbursement in favour of P W 1 by himself falsely affixing the left hand thumb impression of P. W. 1 in Exs A 16 and A 17 which are the loan disbursement sheet and a copy thereof dated 27-9-1961. In doing so, the petitioner has dishonestly misappropriated a sum of Rs 500 for which he has falsely applied in the name of P W 1, thereby the petitioner has committed various offences punishable under Ss 467, 471, 477-A and 409 I. P C.

2. The appellate Sessions Judge exercised great caution in appreciating the

JM/LM/E775/69/AKJ/D

evidence of P Ws 2 and 4 the Supervisor and the Secretary respectively of the said Bank and ultimately acted on their evidence for the learned Judge found corroboration from the other evidence in the case. It is true that the learned Sessions Judge has given the findings that it is very difficult for him putting two and two together to swallow the stand taken by P Ws 2 and 4. The learned Judge further observes that if any weight is to be given to their version it either shows gross negligence or dereliction of duty on their part or some complicity in the fraud itself along with the petitioner or with others. The learned Judge as observed earlier has sought to find corroborative evidence in support of the evidence of P Ws 2 and 4. The learned Judge also states that P W 3 also identified the handwriting of the petitioner in Exs P 7 P 8 P 16 and P 17 as against the alleged thumb impressions of P W 1. The Secretary P W 4 would submit that he had signed Ex P 7 P 8 P 16 and P 17 but he did not witness P W 1 affixing his thumb impression. The President asked him to sign and so he signed. P W 4 also identified the handwriting of the petitioner as against the alleged thumb impressions of P W 1 in Exs P 7 P 8 P 16 and P 17. The learned Judge while dealing with the evidence of P W 13 the finger print expert ultimately finds that the ten points of tallying given by the finger print expert in support are there. 'One could see the above are characteristics well known to finger print science. He finally holds that the thumb impressions in question should have been made by the petitioner and he seeks corroboration from the evidence of P W 1 and also from P Ws 2, 3 & 4. Learned Sessions Judge had no hesitation in accepting the evidence of P W 3 who stated that the endorsements around these disputed thumb impressions are in the handwriting of the petitioner himself. On these findings the learned Sessions Judge confirmed the convictions and sentences passed under Sections 467 471 477-A and 409 I P C.

3 Mr Vanamamalai urged before me that in view of the probable complicity of P Ws 2 and 4 about which the learned Judge has mentioned it is not safe to act on the testimony of P Ws 2 and 4 and the remaining evidence may not be sufficient to sustain the conviction. Although it is a matter of appreciation of evidence purely I would like to deal with the evidence in a brief summary. P W 1 states that he did not put thumb impression on any application for loan or any paper 41 years back. Certainly not on the disputed documents in question. There was no attack made on the acceptability of the evidence of P W 1. So far P W 2 is concerned I have noticed the

evidence of P W 2 to the following effect: 'Ex P 7 is the solvency certificate relating to P W 1. The petitioner has signed it. The petitioner has written adjacent to the thumb impression 'Munsif Chinnappa Mudali in Tamil. The petitioner has signed Ex P 7 as President. Ex P 8 is consolidated loan application dated 19-9-1961. The petitioner has signed it as President. In this application one of the items is alleged to be that of P W 1. L T I of Munsif Chinnappa Mudali. I have not seen P W 1 putting his thumb impression to any of the documents. His further evidence is that he did not sign Ex P 17. Only the petitioner P W 4 and the Panchayatdars have signed Exs P 16 and P 17. The scoring and writing adjacent to the thumb impression in Ex P 17 is that of the petitioner.

Mr Vanamamalai argues that the witness ought not to be believed in view of his testimony in cross-examination to the effect that P W 2 did not see the petitioner describe the thumb impression in Exs P 16 and P 17 and he did not see the petitioner writing Exs P 7 and P 8 and that A-1 writes the minutes book. I am not able to accept the argument of the counsel for the petitioner in view of the further important piece of evidence of P W 2 that he knew the handwriting of the petitioner P W 4's evidence is that he knew the handwriting and signature of the President (A-1 petitioner) and that the petitioner (accused) has described the thumb impression as that of Chinnappa Mudali and signed in Exs P 7 P 8 P 16 and P 17. The criticism of the learned counsel for the petitioner is that in view of the material in cross-examination of P W 4 his evidence ought not to be believed. The material portion of the evidence of P W 4 is that he did not see the petitioner (accused) writing the name of P W 1 in Exs P 7 P 8 P 16 and P 17. He had not seen the documents or letters written by him. He knew his handwriting. He cannot compare handwriting any say whether they tally. This evidence is not of such sufficient strength that one is inclined to disbelieve the evidence of P W 4. We are left with the evidence of P W 3 who says that he knew the accused for the past 25 years. The accused petitioner was his neighbour. This witness knew the signature and handwriting of the petitioner. In Ex. P 7 the accused has signed and he has also written the description of the L T I. In Ex. P 8 the accused has described the thumb impression. In Exs P 16 and P 17 the accused has written the description of the thumb impression and signed. He cannot identify the signatures and handwriting. In his

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- 6 Objecting to insufficiency of stamp is professional misconduct
- 7 *Acting Chief Justice Shah observed* Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A tax payer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality but on the operation of the Income-Tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty be violated but it may lawfully be circumvented. (1968) 67 I. T. R 11 (17) (S C)

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—Pre. — Interpretation of Statutes — Object of Act, achieved by giving reasonable interpretation — Court must do it — See Prevention of Food Adulteration Act (1954), S. 14 S C 599 (C N 141)

—Preamble—Interpretation of Statutes — Ambiguous provision of law — Interpreted in favour of subject — See Penal Code (1860), S. 161 Guj 679A (C N 166)

CIVIL SERVICES

—BOMBAY CIVIL SERVICES (CONDUCT AND DISCIPLINE) RULES

—R. 21—Lecturer of a Government College—University appointing him as an examiner—Government, held, could have no control over him as an examiner — Fact that disciplinary action

CIVIL SERVICES—BOMBAY CIVIL SERVICES (CONDUCT AND DISCIPLINE) RULES (contd.) could be taken for his conduct as an examiner, no criterion—See Penal Code (1860) S 161

Guj 879A (C N 166)

CONSTITUTION OF INDIA

—Art 14—Vires—Provision of Section 23 (1) (b) of Foreign Exchange Regulation Act (1947) does not violate Article 14 of the Constitution—See Foreign Exchange Regulation Act (1947) Ss 23 (1) (b) 23 (1) (a) S C 588A (C N 140)

—Art 245—Iron and Steel (Control) Order 1956 under S 3 Essential Commodities Act—Direction contained in notification issued under para 14 (2) of Order—Direction does not relate back to the Order or form part of Order because this would involve double delegation of legislative power not authorised by Parliament—See Essential Commodities Act (1955) S 3 Cal 571 (C N 133)

CRIMINAL PROCEDURE CODE (5 of 1898)

—S 4 (1) (v)—Order of discharge held really one of acquittal—See Criminal Procedure Code (1898) S 245 Andh Pra 650B (C N 160)

—S 2—Principles of punishment—Duty of Court—Enhancement of sentence—See Criminal P C (1898) S 439 (1) Goa 577B (C N 136)

—S 94—Production of documents—Stage for Andh Pra 618A (C N 147)

—Ss 94 and 439—Power under S 94 when can be exercised—Nature of satisfaction required—Enquiry going on—Stage for entering upon defence not come—Court cannot be compelled to call for production of documents

—S 107—Order drawing up proceeding under section—Substance of information received not indicated—Order is bad—See Criminal P C (1898) S 112 Pat 586A (C N 139)

—S 107—Order drawing up proceeding under S 107 and calling on party to show cause—Specification required under law not mentioned in order—Order is revisible Cri Rev No 351 of 1954 (1st) D/ 18-11-1954 not followed—See Criminal P C (1898) S 439 Pat 586B (C N 139)

—S 107—Order to show cause why party should not execute bond for peace for one year—No direction in order that the period of one year should commence from any particular date—Expiry of period—Order need not be set aside in revision AIR 1947 All 21 Dissented from—See Criminal P C (1898) S 439 Pat 586C (C N 139)

—Ss 112 and 107—Substance of the information—Order of the Magistrate not indicating the nature of the information received which induced him to take action under section 107 of the Code is bad AIR 1943 Cal 491 1st on

—S 112—Order drawing up proceeding under S 107 and calling on party to show cause—Specification required under law not mentioned in order—Order is revisible Cri Rev No 351 of 1954 D/ 18-11-1954 (1st) not followed—See Criminal P C (1898) S 439 Pat 586B (C N 139)

—S 112—Order to show cause why party should not execute bond for peace for one year—No direction in order that the period of one year should commence from any particular date—Expiry of period—Order need not be set aside in revision AIR 1949 All 21 Dissented from—See Criminal P C (1898) S 439 Pat 586C (C N 139)

—S 117 (1)—Magistrate may consider matters

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not mentioned in notice, while ordering security—See Criminal P C (1898) S 118

—Ss 118 117 (1)—Magistrate may consider matters not mentioned in notice while ordering security Orissa 611 (C N 154)

—Ss 133 and 192—S 133 does not exclude provisions of transfer of cases contained in S 192 after the party has shown cause against the conditional order AIR 1949 Cal 837 held Overruled by AIR 1956 Cal 24 AIR 1956 Cal 220 Not foll AIR 1960 All 244 & AIR 1958 Rat 248, Dissented from Cal 573 (C N 134)

—Ss 145 and 148—Proceedings under S 145—Should be decided by Magistrate before whom they are initiated—Only in extreme cases, advantage of S 148 to be taken All 614 (C N 144)

—S 148—Proceedings under S 145—Should be decided by Magistrate before whom they are initiated—Only in extreme cases, advantage of S 148 to be taken—See Criminal P C (1898) S 145 All 614 (C N 144)

—S 164—Impropriety of recording confession in Jail pointed out—But held on facts that the Courts could still hold that the confession was voluntary if after properly appreciating the importance and significance of the circumstances, they found that there were other facts and circumstances which completely assured its voluntariness—See Evidence Act (1872) S 25 All 603C (C N 143)

—Ss 164 and 367—Retracted confession of accused—Extent of corroboration required—Case of an accomplice is different—Variation between confessional statement and evidence in case—Variation held not material—{Evidence Act (1872) Ss 24 133, 114 illus (b)}

—S 192—S 133 Criminal P C does not exclude provisions of transfer contained in S 192—See Criminal P C (1898) S 133 Cal 573 (C N 134)

—S 196A—Accused charged under Ss 120 B, 161 162, 163 of Penal Code 1860—Sanction obtained in respect of offences under Section 120B and S 161 P C but not in respect of offences under S 120 B and Ss 162 and 163—Conviction for offences under Ss 120B and 161 P C can still be maintained Delhi 674C (C N 185)

—S 197—Commission of offence by public servant—Sanction—Act of servant must be within the range of his official duty Pat 642B (C N 155)

—S 198—Person aggrieved—Defamation of a spiritual head of certain community—Individual person of that community is not a person aggrieved—Cognizance of offence taken on a complaint by such individual is illegal Cal 682A (C N 162)

—Ss 245 4 (v) 262 and 417—Order of discharge, held really one of acquittal—(Andhra Pradesh Motor Vehicles Taxation Rules 17)

—S 262—Order of discharge held really one of acquittal—See Criminal P C (1878) S 245 Andh Pra 650B (C N 160)

—S 342—Object—Use of extra judicial confession for convicting accused—Question giving opportunity to explain must be asked All 617 (C N 144)

—Ss 342 367—Murder case—Court can act upon prosecution evidence or confession of accused or both—Statement made under S 342 partly inculpatory and partly exculpatory—Court however, cannot act upon such statement Bom 821A (C N 145)

—S 367—See also Evidence Act (1872) S 3—Seven accused persons—Three accused given benefit of

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doubt by reason of their names being not mentioned in F. I. R.—That cannot lead to conclusion that other accused persons named in F. I. R. which furnished valuable corroboration to evidence of complainant and the witness should also be acquitted Andh Pra 660B (C N 161)

—S. 367—Murder case—Court can act upon prosecution evidence or confession of accused or both—Statement made under S. 342 partly inculpatory and partly exculpatory—Court, however, cannot act upon such statement—See Criminal P. C. (1898), S. 342 Bom 621A (C N 148)

—S. 367—Retracted confession of accused—Extent of corroboration required—Case of an accomplice is different—Variation between confessional statement and evidence in case—Variation held not material—See Criminal P. C. (1898), S. 164 Orissa 580B (C N 137)

—S. 367—Appreciation of evidence—Murder—Child witness, the only eye witness—Victim of tutoring—Two different versions, one before committing Court and another before Sessions Judge—No corroborating evidence to connect accused with murder—No reliance can be placed on such evidence—Conviction cannot stand—Court of fact can examine both versions—But when two conflicting versions are given and on evidence witness stands as condemned liar Court needs corroboration in support of statement on which conviction is to be sustained—See Evidence Act (1872), S. 3 Orissa 637 (C N 152)

—S. 417—Order of discharge held, really one of acquittal—See Criminal P. C. (1898), S. 245

Andh Pra 659B (C N 160)
—S. 423—Appreciation of evidence—Murder case—Powers of appellate Court—Appellants found guilty having shared common intention with other acquitted accused persons—Acquittal of these accused held bad—There was nothing to prevent appellate Court from expressing this view Bom 621E (C N 148)

—S. 423—Judgment affirming conviction—No finding regarding necessary ingredient constituting offence—Order is vitiated Pat 583A (C N 138)

—S. 423—Appreciation of evidence by trial Court—Interference by appellate Court—Evidence Act (1872), S. 3 Raj 653B (C N 159)

—S. 439—Power under S. 94 when can be exercised—Nature of satisfaction required—Enquiry going on—Stage for entering upon defence not come—Court cannot be compelled to call for production of documents—See Criminal P. C. (1898), S. 94 Andh Pra 618B (C N 147)

—S. 439 (1) and (4)—Accused charged under Section 307, I. P. C. but convicted under Section 326—No appeal against acquittal under Section 307—High Court in revision cannot convert acquittal into a conviction but may enhance sentence in respect of offence under Section 326—Having regard to all circumstances of case and nature of injury inflicted by accused sentence of 18 months enhanced to five years Ker 688B (C N 167)

—Ss. 439, 112 and 107—Revision of orders in proceedings under Ch. 8—Initial order drawing up proceeding under S. 107 and calling on other side to show cause—Specification required under law not mentioned in order—Revision against order is not premature and it can be entertained—Cri. Rev. No. 351 of 1954, D/- 18-11-1954 (Pat). Not followed Pat 586B (C N 139)

—Ss. 439, 112 and 107—Revision of orders in proceedings under Ch. 8—Order asking party to show cause why he should not execute bond for keeping peace for one year—Order not directing

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that the period of one year should commence from any particular date—Fact that the period of one year from date of passing the order had already elapsed by the time revision is heard does not mean that the order has to be set aside. AIR 1949 All 21. Dissented from

Pat 586C (C N 139)
—Ss. 439 (1) and 32—Principles of punishment Duty of Court—Enhancement of sentence—Penal Code (1860), S. 53 Goa 577B (C N 136)

—S. 488—Scheme and object—Section serves a social purpose and enables discarded wives and helpless deserted children to secure urgent relief of maintenance through Magistrate's Court—Proceedings are relatively summary and cannot be equated to civil suit for maintenance—Orders passed being tentative are subject to final determination of rights of parties by Civil Court and are also liable to be varied with change of circumstances Delhi 670A (C N 164)

—S. 488—Right of minor child to maintenance—Neglect or refusal to maintain—Can be inferred from conduct—Fact that child is in mother's custody and that mother cannot live with her husband are not material so far as right of child is concerned Delhi 670B (C N 164)

—S. 488 (1)—Amount of maintenance—Has to be fixed after taking into consideration all circumstances of case Delhi 670C (C N 164)

—S. 488 (6), Proviso—Applicability—Husband served with notice of petition under S. 488—Husband filing written statement but later not appearing—Ex parte order made—Proviso not applicable—His petition for setting aside order rejected—Rejection correct Cal 634 (C N 150)

DEFENCE OF INDIA (AMENDMENT) RULES (1965)

See Defence of India Rules (1962), R. 132A S C 707A (C N 170)

DEFENCE OF INDIA RULES (1962)

—R. 126-1 (v) (b)—See Defence of India Rules (1962), R. 126-P (2) (iv) Delhi 635A (C N 151)

—R. 126-P (2) (iv) (as amended in 1963)—Expression 'custody of police'—Meaning of—Confession made to Excise Officer in presence of Police Officer is inadmissible—Conviction solely on basis of such confession is illegal—See Evidence Act (1872), S. 26 Delhi 635B (C N 151)

—R. 126 P (2) (iv) (as amended in 1963), R. 126-1 (v) (b)—Mere possession of gold in excess of permissible limit is not offence—It is acquisition in excess of such limit which constitutes offence Delhi 635A (C N 151)

—R. 132A (since repealed by Defence of India (Amendment) Rules, 1965)—Prosecution for offence under Rule cannot be launched subsequent to its repeal as there is no saving provision under the Defence of India (Amendment) Rules (1965) S C 707A (C N 170)

—Rr. 132-A (2) and 132-A (4)—Violation of R. 132 A (2)—Prosecution launched on 17-3-1968 after Rule 132-A (2) was omitted by Defence of India Amendment Rules, 1965—Prosecution is illegal. 1969 Mad L W (Cr) 98, Reversed S C 588C (C N 140)

ESSENTIAL COMMODITIES ACT (10 of 1955)

—Ss. 3, 7, 5—Iron and Steel (Control) Order (1956), Para. 14 (2)—Order under S. 3—Contravention of direction contained in notification issued under para. 14 (2) of Order—It is not contravention of provisions of Order and so not punishable under S. 7 Cal 571 (C N 133)

ESSENTIAL COMMODITIES ACT (contd.)

—S 5—Iron and Steel (Control) Order 1958 under S 3—Contravention of direction contained in notification issued under para 14 (2) of Order—It is not contravention of provisions of Order and so not punishable under section 7—See Essential Commodities Act (1955) S 3

Cal 571 (C N 133)

—S 7—U P Food Grains Dealers Licensing Order (1964), Cls 3 and 5—Mens rea—On facts held that applicants were under bona fide belief that they could deal in food grains and hence they could not be charged under S 7 for contravention of 1964 Order

All 615 (C N 145)

—S 7—Iron and Steel (Control) Order 1958 under S 3—Contravention of direction contained in notification issued under Para 14 (2) of Order—It is not contravention of provisions of Order and so not punishable under Section 7—See Essential Commodities Act (1955) S 3

Cal 571 (C N 133)

EVIDENCE ACT (1 of 1872)

—Ss 3 21—Confessional statement of accused believed and forming main evidence against accused—Rest of evidence not sufficient in itself to convict accused treated as corroborating confession—This is the correct estimate of probative force of other evidence

All 603A (C N 143)

—S 3—Circumstantial evidence—Appreciation

All 603H (C N 143)

—S 3—Murder case—One prosecution witness servant of accused at time of incident and at time of giving evidence in Sessions Court—Relationship between witness and accused (his employer) not strained—Witness held to be an independent and disinterested witness

Bom 621B (C N 148)

—S 3—Murder case—Three prosecution witnesses relations of deceased—Witnesses present near scene of offence and in a position to see assailants—Besides them there was one disinterested and independent witness—Evidence of these witnesses held to be natural piece of evidence and accepted—Fact that individual act was not described could not be considered to be infirmity

Bom 621C (C N 148)

—S 3—Appreciation of evidence—Non examination of some prosecution witnesses—See Evidence Act (1872) S 14 Illus (g)

Bom 660A (C N 161)

—S 3—Seven accused persons—Three accused given benefit of doubt by reason of their names being not mentioned in F I R—Other accused also need not be acquitted on that ground—See Criminal P C. (1898) S 367

Bom 660B (C N 161)

—Ss 3 and 118—Criminal P C. (1898) S 367—Appreciation of evidence—Murder—Child witness the only eye-witness—Victim of twirling—Two different versions one before committing Court and another before Sessions Judge—No corroborating evidence to connect accused with murder—No reliance can be placed on such evidence—Conviction cannot stand—Court of fact can examine both versions—But when two conflicting versions are given and on evidence witness stands as condemned liar Court needs corroboration in support of statement on which conviction is to be sustained—Penal Code (1860) S 302

Orissa 637 (C N 152)

—S 3—Appreciation of evidence—Fact that a witness has a close interest in complainant's party or is a distant relation cannot detract from value of his evidence—His evidence cannot be discarded on that ground especially when no enmity has

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been proved to exist between him and the accused as would induce him to give false evidence

Raj 653A (C N 159)

—S 3—Appreciation of evidence by trial Court—Interference by appellate Court—See Criminal P C. (1898) S 423

Raj 653B (C N 159)

—S 8 illus (i)—Accused absconding from village after commission of offence—Fact of absconding is an incriminating circumstance and is relevant

Orissa 580A (C N 137)

—S 24—Confessional statement of accused, believed and forming main evidence against accused—Rest of evidence not sufficient in itself to convict accused treated as corroborating confession—This is the correct estimate of probative force of other evidence—See Evidence Act (1872) S 3

All 603A (C N 143)

—S 24—Retracted confession of accused—Extent of corroboration required—Case of an accomplice is different—Variation between confessional statement and evidence in case—Variation held not material—See Criminal P C. (1898) S 164

Orissa 580B (C N 137)

—S 25—Criminal P C. (1898) S 164—Improperity of recording confession in jail pointed out—The Courts can however hold that the confession is voluntary if after properly appreciating the importance and significance of the circumstances, they find that there are other facts and circumstances which completely assure its voluntariness

All 603C (C N 143)

—S 25—Expression custody of police—Meaning of—Confession made to Excise Officer in presence of Police Officer is inadmissible—Conviction solely on basis of such confession is illegal—See Evidence Act (1872) S 26

Delhi 635B (C N 151)

—S 26—Accused in police custody for 10 days before being sent to jail custody—Confession in jail—Prolonged detention in police custody unless satisfactorily explained, is a circumstance strongly mitigating against voluntariness of confession—Prolonged detention held satisfactorily explained and the confession held voluntary

All 603B (C N 143)

—Ss 26 25—Expression 'Custody of Police'—Meaning of—Confession made to Excise Officer in presence of Police Officer is inadmissible—Conviction solely on basis of such confession is illegal

Delhi 635B (C N 151)

—S 27—Statement leading to discovery—Scope of information cannot be extended by reading possible implications in it

All 603E (C N 143)

—S 27—Statement by accused that he had kept the stone on which he ground Dhatura in a corner inside the pit in the motor garage—Statement to the effect that the accused had ground Dhatura on the stone related to the past user of the stone and did not lead to any discovery and accordingly was inadmissible—The remaining part of the statement was admissible

All 603F (C N 143)

—S 27—Prosecution must establish connection between fact discovered and the crime—Held that there was total absence of evidence direct or circumstantial to connect the recovered objects with the crime

All 603G (C N 143)

—S 30—Confession of co-accused can only be used to strengthen evidence against accused—It does not supplement evidence against accused which is otherwise insufficient—Other evidence should not only be worthy of reliance but must also be by itself and unaided by confession sufficient for finding of guilt of accused

All 603D (C N 143)

EVIDENCE ACT (contd.)

—S. 106—'Liquor'—Offence under S. 4 for consuming liquor—Burden of proof—State of drunkenness established by prosecution—Presumption under S. 3A (1963) can be invoked—Presumption rebuttable—Accused not submitting any explanation—He must be held guilty of offence—Effect of introduction of S. 3A, (1956) and S. 3A, (1963) stated—See Prohibition—Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963), S. 4 Assam 563 (C N 132)

—S. 114—Officer according sanction not examined as witness—His signature proved but no evidence to establish that he had applied his mind to the case—Held, presumption was that sanction was duly accorded in absence of evidence to the contrary—See Prevention of Corruption Act (1947), S. 6 Delhi 674F (C N 165)

—S. 114, Illustration (a)—Recovery of stolen goods in dacoity from accused three days after occurrence—Possible presumptions are that (1) he took part in dacoity, or (2) received goods knowing them to be stolen in dacoity, or (3) received goods knowing them to be stolen—Choice must depend on facts of each case—See Penal Code (1860), S. 411 SC 601 (C N 142)

—S. 114, Illus. (b)—Retracted confession of accused—Extent of corroboration required—Case of an accomplice is different—Variation between confessional statement and evidence in case—Variation held not material—See Criminal P. C. (1898), S. 164 Orissa 580B (C N 137)

—Ss. 114, Illus. (g) and 3—Non-examination of some of the prosecution witnesses—Adverse inference, when can be drawn—Appreciation of evidence Bom 660A (C N 161)

—S. 118—Appreciation of evidence—Murder—Child witness, the only eye witness—Victim of tutoring—Two different versions, one before committing Court and another before Sessions Judge—No corroborating evidence to connect accused with murder—No reliance can be placed on such evidence—Conviction cannot stand—Court of fact can examine both versions—But when two conflicting versions are given and on evidence witness stands as condemned liar Court needs corroboration in support of statement on which conviction is to be sustained—See Evidence Act (1872), S. 3 Orissa 637 (C N 152)

—S. 133—Retracted confession of accused—Extent of corroboration required—Case of an accomplice is different—Variation between confessional statement and evidence in case—Variation held not material—See Criminal P. C. (1898), S. 164 Orissa 580B (C N 137)

FATAL ACCIDENTS ACT (13 of 1855)

—S. 1A—Motor accident—Negligence—Accident taking place on off-side of road—Presumption—Principle of *res ipsa loquitur*—Applicability Madh Pra 699A (C N 168)

—S. 1A—Damages—Quantum of—Factors to be considered Madh Pra 699B (C N 168)

FOREIGN EXCHANGE REGULATION ACT (7 of 1947)

—Ss. 4 (1), 5 (1), 9, 23D (1) and proviso, and 23 (3)—Contravention of Ss. 4 (1), 5 (1) and 9—Enquiry under S. 23D (1) instituted by issue of show cause notice—Complaint made to the Court without having any material which could lead to the opinion that Director of Enforcement will not be in a position to impose adequate penalty—Complaint, held was filed without complying with the proviso and was invalid—1969 Mad L W (Cri) 98, Reversed SC 588B (C N 140)

FOREIGN EXCHANGE REGULATION ACT (contd.)

—S. 5 (1)—See Foreign Exchange Regulation Act (1947), S. 4 (1) SC 588B (C N 140)

—S. 9—See Foreign Exchange Regulation Act (1947), S. 4 (1) SC 588B (C N 140)

—S. 21 (1)—Penal Code (1860), Ss. 120A, 120B—Contract contemplated under S. 21 (1)—Nature—S. 21 (1) does not cover criminal conspiracy similar to S. 120B—Complaint in respect of illegal acquisition of Foreign Exchange—Allegation therein that two accused agreed to obtain foreign exchange illegally—Framing of charge under S. 120B—Maintainability—See Penal Code (1860), S. 120B SC 707B (C N 170)

—Ss. 23 (1) (b), 23 (1) (a) and 23D—Vires—Provision of S. 23 (1) (b) does not violate Art. 14 of the Constitution S C 588A (C N 140)

—S. 23 (3)—Contravention of Ss. 4 (1), 5 (1) and 9—Enquiry under S. 23D (1) instituted by issue of show cause notice—Complaint made to the Court without having any material which could lead to the opinion that Director of Enforcement will not be in a position to impose adequate penalty—Complaint, held was filed without complying with the proviso and was invalid—See Foreign Exchange Regulation Act (1947), S. 4 (1) SC 588B (C N 140)

—S. 23D—Vires—Provision of S. 23 (1) (b) does not violate Art. 14 of the Constitution—See Foreign Exchange Regulation Act (1947), S. 23 (1) (b) SC 588A (C N 140)

—S. 23D (1)—See Foreign Exchange Regulation Act (1947), S. 4 (1) SC 588B (C N 140)

FOREIGNERS ACT (2 of 1946)

—S. 3 (2) (c)—See Foreigners Act (1946), S. 14 Goa 577A (C N 136)

—Ss. 14 and 3 (2) (c)—Sentence—Accused though born and brought up in Goa choosing to retain his Portuguese nationality after Goa became part of India—Accused deliberately disobeying order under S. 3 (2) (c) for second time—Accused contending that in spite of *de facto* occupation of Government of India, Goa continued *de jure* as Portuguese territory and by exercising option to continue as Portuguese national he did not become foreigner—Held, sentence of simple imprisonment for three months and fine of Rs. 100/- or, in default further imprisonment for 20 days was unduly lenient and manifestly inadequate when accused had been wilfully disregarding law and challenging territorial integrity of India; sufficiently deterrent sentence was called for in the ends of justice—Sentence enhanced in exercise of powers under S. 439 (2) of Criminal P. C. (1898) to 12 months simple imprisonment and fine of Rs. 1,000 and in default, further imprisonment for six months Goa 577A (C N 136)

GENERAL CLAUSES ACT (10 of 1897)

—S. 24—Notification under section as it stood before its substitution by new section—Violation of, is punishable—See Shops and Establishments—Punjab Shops and Commercial Establishments Act (15 of 1958), S. 9 Punj 651 (C N 158)

HINDU MARRIAGE ACT (25 of 1955)

—S. 24—Interim maintenance to wife whether includes needs of minor child living with her—See Criminal P. C. (1898), S. 488 (1) Delhi 670C (C N 164)

IRON AND STEEL (CONTROL) ORDER (1956)

—R. 14 (2)—See Essential Commodities Act (1955), S. 3 Cal 571 (C N 133)

MOTOR VEHICLES ACT (4 of 1939)

—S 90(2)(b)—Liability of Insurance Company
 —Bus involved in accident insured against third party risks — Both the parents of claimant travelling in bus and meeting death — Insurance Company held liable under S 95(2)(b) second part to pay Rs 9000/ as compensation for each of the two passengers Madh Pra 699C (C N 168)

PENAL CODE (45 of 1860)

—Ss 21(9) and 21(1^a) — Senior Lecturer of a Government College—Appointment by University as an Examiner — Acceptance of bribe for giving more marks to a candidate — Accused not guilty either under S 161 Penal Code or under S 5(1)(d) of Prevention of Corruption Act — See Penal Code (1860) S 161 Guj 679A (C N 166)

—S 21(12) — In the pry of means in the employment of — (Words and Phrases — In the pay of) Guj 679C (C N 166)

—Ss 34 and 300 thirdly — Murder case — Accused persons A B and C brothers and accused D son of accused A — Accused A B and C divided and resided in separate houses — A B C and D seen coming together and gathering near disputed land at one and same time — They carried with them deadly weapons such as iron bar axe and spear and stick — Accused persons rushing together with such weapons and causing as many as 15 injuries on vital part of the body of deceased — Their intention held to be nothing but to commit murder — Injuries sufficient in ordinary course of nature to cause death — All four accused could be convicted under S 302 read with S 34 in the absence of any legal infirmity Bom 621D (C N 148)

—S 34 — Common intention — Meaning of — Burden of proof is on prosecution — Inference of common intention is a question depending on facts of each case Raj 630C (C N 159)

—S 40 — Offence — Mens rea — Intention and knowledge required — See Penal Code (1860) S 307 Ker 688A (C N 167)

—S 53 — Principles of punishment — Duty of Court—Enhancement of sentence — See Criminal P C (1898) S 439(1) Goa 677B (C N 136)

—S 88 — Offence—Intention and knowledge — Proof of—See Penal Code (1860) S 307 Ker 688A (C N 167)

—S 104 — Foreign Exchange Regulation Act (1947) Section 21(1) — Contract contemplated under Section 21(1) — Nature—Section 2(1) does not cover criminal conspiracy similar to Section 120B — Complaint in respect of illegal acquisition of Foreign Exchange—Allegation therein that two accused agreed to obtain Foreign Exchange illegally — Framing of charge under Section 120B — Maintainability—See Penal Code (1860) Section 10B S C 707B (C N 170)

—Ss 120A 120B — Agreement to do illegal act — Acts not amounting to offence done by one conspirator in furtherance of that agreement — He is still liable to be convicted under Section 120B S C 707C (C N 170)

—S 120A — Essentials of offence — Agreement between two or more persons—When constitutes conspiracy—Continuance of agreement—Effect S C 707D (C N 170)

—Ss 10B 104 — Foreign Exchange Regulation Act (1947) Section 21(1) — Contract contemplated under Section 21(1) — Nature — Section 121(1) does not cover criminal conspiracy similar to Section 120B — Complaint in respect of illegal acquisition of foreign exchange — Allegation therein that two accused agreed to

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obtain foreign exchange illegally — Framing of charge under Section 10B—Maintainability S C 707B (C N 170)

—S 120B—See Penal Code (1860) S 120A S C 707C (C N 170)

—S 120B — Accused not entitled to protection of S 197 Criminal P C charged under Ss 10B 161 162 and 163 I P C — Sanction obtained under S 6(1)(c) — Offences under S 120B and S 163 I P C outside scope of S 6 — No bar to prosecution of accused under those sections — See Prevention of Corruption Act (2 of 1947) S 6 Delhi 674D (C N 165)

—S 161—Offence under Section 5(2) read with Section 5(1)(d) Prevention of Corruption Act and Section 161 Penal Code — Held on facts that presumption under Section 4(1) Prevention of Corruption Act applied to the case and guilt of the accused had been established beyond reasonable doubt — See Prevention of Corruption Act (1947) Section 4(1) Delhi 667 (C N 163)

—Ss 161 21(9) and 21(1^a) (before amendment in 1964) — Senior Lecturer of a Government College — Appointment by University as an Examiner — Acceptance of bribe for giving more marks to a candidate — Accused not guilty either under Section 161 Penal Code or under Section 5(1)(d) of Prevention of Corruption Act — (Civil Services — Bombay Civil Services Conduct and Discipline Rules Rule 21—Lecturer of a Government College — University appointing him as an examiner — Government held could have no control over him as an examiner — Fact that disciplinary action could be taken for his conduct as an examiner no criterion)—(Civil P C (1908) Preamble—Interpretation of Statutes—Ambiguous provision of law — Interpreted in favour of subject)—(Words and Phrases — Otherwise — (Officer — Meaning) — (Prevention of Corruption Act (1947) S 5(1)(d)) Guj 679A (C N 166)

—S 163 — See Prevention of Corruption Act (2 of 1947) S 6 Delhi 674D (C N 165)

—S 290 — Accused a layman putting up a building employing masons — Masons constructed it negligently — Collapse of building resulting in the death of several inmates — Accused held could not be convicted — See Penal Code (1860) S 304A Mad 703 (C N 163)

—S 300 thirdly — Murder case—Accused persons A B and C brothers and accused D son of accused A — Accused A B and C divided and resided in separate houses — A B C and D seen coming together and gathering near disputed land at one and same time — They carried with them deadly weapons such as iron bar axe and spear and stick—Accused persons rushing together with such weapons and causing as many as 15 injuries on vital part of the body of deceased — Their intention held to be nothing but to commit murder — Injuries sufficient in ordinary course of nature to cause death — Under S 300 thirdly offence committed was one of murder — All four accused could be convicted under S 302 read with S 34 provided there was no legal infirmity — See Penal Code (1860) S 34 Bom 621D (C N 149)

—S 302 — Appreciation of evidence—Murder—Child witness the only eye witness — Victim of tutoring—Two different versions one before committing Court and another before Sessions Judge — No corroborating evidence to connect accused with murder—No reliance can be placed on such evidence — Conviction cannot stand — Court of fact can examine both versions — But when two conflicting versions are given and on evidence

PENAL CODE (contd.)

witness stands as condemned liar Court needs corroboration in support of statement on which conviction is to be sustained — See Evidence Act (1872), S. 3

Orissa 637 (C N 152)

—Ss. 304A, 337, 338 and 290 — Accused, a layman, putting up a building employing masons — Masons constructing it negligently — Collapse of building resulting in the death of several inmates — Accused held could not be convicted — (Tort — Negligence — Collapse of building)

Mad 705 (C N 169)

—Ss. 307, 40, 88—Offence under Section 307 — Intention and knowledge, required — Mental element described in any of the four clauses of Section 300, I. P. C. is sufficient — Maxim that every man is presumed to intend the natural and probable consequences of his act, discussed — 1967 Ker L T 223 and 1967 Ker L T 689 & 1968 Ker L T 929, Overruled

Ker 688A (C N 167)

—S. 307 — Attempt to commit murder— Use of firearm—Person firing a gun at another—Intention to kill may be inferred — Fact that person fired at escaped unhurt or received minor injuries cannot negative intention to kill — Prosecution has still to discharge its burden of proving intention contemplated by S. 300

Raj 653D (C N 159)

—S. 337 — Accused a layman, putting up a building employing masons — Masons constructing it negligently — Collapse of building resulting in the death of several inmates — Accused held could not be convicted — See Penal Code (1860), Section 304A

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—S. 338 — Accused a layman, putting up a building employing masons—Masons constructing it negligently — Collapse of building resulting in the death of several inmates—Accused held could not be convicted—See Penal Code (1860), S. 304A

Mad 705 (C N 169)

—S. 379—Plots in low-lying area demarcated by ridges — Single sheet of water covering such plots—Fish in such water cannot be subject-matter of theft

Orissa 638 (C N 153)

—S. 386 — Extortion — What amounts to

Pat 647A (C N 156)

—S. 390 — Robbery — Commission of assault and theft in same transaction — When amounts to robbery — (Penal Code (1860), S. 391 — Theft independent act of same members of unlawful assembly — No offence of dacoity)

Pat 647B (C N 156)

—S. 391 — Theft independent act of some members of unlawful assembly — No offence of dacoity — See Penal Code (1860), S. 390

Pat 647B (C N 156)

—S. 396 — Recovery of goods stolen in dacoity from accused three days after occurrence — Only presumption deducible from facts being that accused knew articles as stolen but not as stolen in dacoity — His conviction is proper under S. 411 and not under S. 396 — See Penal Code (1860), S. 411

S C 601 (C N 142)

—S. 406 — Proceedings under — Suit filed in civil court long before institution of proceedings over the same subject-matter and decreed — Continuance of proceedings in criminal court would be unwarranted and untenable

Cal 632 (C N 149)

—Ss. 411, 396 — Recovery of cloth, stolen in dacoity, from accused, a cloth merchant, three days after occurrence — Other stolen articles not recovered from him — His name not mentioned as one of the participants in dacoity, either by any eye-witnesses or in dying declaration of person killed in dacoity — No evidence to show that in village in which accused lived, it was known that dacoity took place and goods stolen—Held, only presumption that could be drawn was

PENAL CODE (contd.)

that accused knew that goods were stolen but he did not know that they were stolen in dacoity — He could be convicted only under S. 411 and not under S. 396 — Decision of All H. C., Reversed — Evidence Act (1872), S. 114, Illustration (a)

S C 601 (C N 142)

—S. 499 — Defamation of a spiritual head of certain community — Individual person of that community is not a person aggrieved—Cognizance of offence taken on a complaint by such individual is illegal — See Criminal P. C. (1878) S. 198

Cal 662A (C N 162)

—Ss. 499 and 500 — Defamation — Essentials

Cal 662C (C N 162)

—S. 500 — See Criminal P. C (1898), S. 198

Cal 662A (C N 162)

—S. 500 — Complaint for alleged defamation in respect of an Ashram, an incorporated body — Complainant an individual claiming to be a member bringing complaint — Allegations not disclosing any defamation of the Ashram thereby touching complainant as a member thereof — No action under S. 500 lies

Cal 662B (C N 162)

—S. 500 — See Penal Code (1860), S. 499

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POLICE ACT (5 of 1861)

—S. 34 — Scope and applicability — Notification of State Government extending provisions of S. 34 to whole of territory is not in conformity with requirements of S. 34 — Expression 'whole of territory' would not take within its sweep a town for purpose of S. 34—"Town", meaning of — In absence of notification specially extending scheme of S. 34 to a town, prosecution for offences under S. 34 committed in that town is not maintainable

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PREVENTION OF CORRUPTION ACT (2 of 1947)

—Ss. 4 (1), 5 (2), and 5 (1) (d) — Offence under S. 5 (2) read with S. 5 (1) (d) and S. 161, Penal Code — Presumption under S. 4 (1) when can be drawn, indicated — Held on facts that presumption under S. 4 (1) applied to the case and guilt of the accused had been established beyond reasonable doubt — (Penal Code (1860), S. 161)

Delhi 667 (C N 163)

—S. 5 — "In the discharge of his duties" — Interpretation—Ingredients of S. 5 (1) (d) — (Words and Phrases)

Guj 679B (C N 166)

—S. 5 (1) (d) — Senior lecturer of a Government College — Appointment by University as an Examiner—Acceptance of bribe for giving more marks to a candidate—Accused not guilty either under S. 161 Penal Code or under S. 5 (1) (d) of Prevention of Corruption Act — See Penal Code (1860), S. 161

Guj 679A (C N 166)

—Ss. 5 (2) and 5 (1) (d)—Offence under Ss. 5 (2) read with S. 5 (1) (d) and S. 161, Penal Code — Presumption under S. 4 (1), when can be drawn indicated — Held on facts that presumption under S. 4 (1) applied to the case and guilt of the accused had been established beyond reasonable doubt — See Prevention of Corruption Act (1947), S. 4 (1)

Delhi 667 (C N 163)

—S. 5-A — Prosecution for offences under Ss. 120-B and 161, I. P. C. — Investigation by officer below rank of officers mentioned in S. 5-A — Held it could not be said that because sanction was not necessary under S. 197, Criminal P. C. it was also not necessary under S. 198-A, Criminal P. C. because position in so far as offence under S. 161, I. P. C. was concerned was same notwithstanding amendment of Act in 1952 by introduc-

PREVENTION OF CORRUPTION ACT (cont'd.)
tion of S 5 A as offence under that section when so investigated would still remain non-cognizable
Delhi 674E (C N 165)

—S 6 — Purpose of sanction
Delhi 674A (C N 165)

—S 6 — Sanctioning authority—Public servant employed by Provincial Government loaned to Central Government — Sanctioning authority would be the loaning government and not borrowing government
Delhi 674B (C N 165)

—S 6—Penal Code (1860) Ss 120 B and 163—Accused who was not entitled to protection of S 197 Criminal P C charged under Ss 120 B, 161 1C2 and 163 I P C — Sanction obtained under S 6 (1) (c) — Held if offences under S 120 B and S 163 I P C were outside scope of S 6 of the Act there could be no bar to prosecution of accused under those sections
Delhi 674D (C N 165)

—S 6 — Officer according sanction not examined as witness — His signature proved but there was no evidence to establish that sanctioning officer had applied his mind to the case—Held presumption was that sanction was duly accorded in absence of evidence to contrary — (Evidence Act (1872) S 114)
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—S 10 — Section does not create obligation on person mentioned therein to actively co-operate with Food Inspector in taking sample by handing it over to him — See Prevention of Food Adulteration Act (1954) S 16 (1) (b) Pat 583B (C N 138)

—Ss 14 19 (2) — Prevention of Food Adulteration Rules (1955) R 12A proviso — Object underlying Act achieved by giving reasonable interpretation — Court must do so — Warranty as required by proviso to Rule 12A — Use of popular language therein—Object of Act is not defeated — I L R (1967) 2 Ker 676 Reversed — (Civil P C (1908) Pre — Interpretation of Statutes)
S C 599 (C N 141)

—S 16 (1) (a) — Prosecution under — Prevention of Food Adulteration Rules (1955) R 18 7 (1) — Specimen impression of seal not sent to analyst — There was nothing with which Public Analyst could perform his duty of comparing seal on packet of black pepper forwarded to him for analysis — Total non compliance with R 18 and 7 (1) — It is fatal to prosecution case
Pat 649 (C N 157)

—Ss 18 (1) (b) and 10 — Expression to prevent — Mere refusal to sell article does not amount to prevention
Pat 583B (C N 138)

—S 19 (2) — Warranty as required by proviso to Rule 12A — Use of popular language therein — Object of Act is not defeated — See Prevention of Food Adulteration Act (1954) S 14
S C 599 (C N 141)

PREVENTION OF FOOD ADULTERATION RULES (1955)

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Pat 649 (C N 157)

—R 12A Proviso — Warranty as required by proviso to Rule 12A — Use of popular language therein—Object of Act is not defeated — See Prevention of Food Adulteration Act (1954) S 14
S C 599 (C N 141)

PREVENTION OF FOOD ADULTERATION RULES (cont'd.)

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Assam 563 (C N 132)

—S 3A (1956) (as amended in 1956 and 1963) — Liquor — Offence under S 4 for consuming liquor — Burden of proof—State of drunkenness established by prosecution — Presumption under S 3A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence—Effect of introduction of S 3A (1956) and S 3A (1963) stated—See Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963) S 4
Assam 563 (C N 132)

—S 3A (1963) (as amended in 1956 and 1963) — 'Liquor' — Offence under S 4 for consuming liquor — Burden of proof — State of drunkenness established by prosecution — Presumption under S 3A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of S 3A (1956) and S 3A (1963) stated — See Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963) S 4
Assam 563 (C N 132)

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Assam 563 (C N 132)

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—S 22 — Notification under section as it stood before its substitution by new section — Violation of is punishable — See Shops and Establishments — Punjab Shops and Commercial Establishments Act (15 of 1955) S 9
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PUNJAB SHOPS AND COMMERCIAL ESTABLISHMENTS ACT (15 of 1955)

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—S 20 (3) — Accused Hawildar commanded to assistant Railway Officer in checking ticketless

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travellers—Railway Officer and accused assaulting complainant a ticket collector — Requirement of S. 20 (3) not complied with—Held his prosecution as instituted without compliance of the provision of S. 20 (3) was not valid Pat 642A (C N 155)

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—Negligence—Damage — See Fatal Accidents Act (1855), S. 1-A Madh-Pra 699B (C N 168)

U. P. FOOD GRAINS DEALERS LICENSING ORDER (1964)

—Cl. 3—Mens rea—On facts held that applicants were under bona fide belief that they could deal in food grains and hence they could not be charged under S. 7 for contravention of 1964 Order—See Essential Commodities Act (1955), S. 7 All 615 (C N 145)

—Cl. 5—Mens rea—On facts held that applicants were under bona fide belief that they could deal in food grains and hence they could not be charged under S. 7 for contravention of 1964 Order—See Essential Commodities Act (1955), S. 7 All 615 (C N 145)

WORDS AND PHRASES—"In the discharge of his duties,"—See Prevention of Corruption Act (2 of 1947), S. 5 Guj 679 B (C N 166)

—"In the pay of" means "in the employment" of—See Penal Code (1860), S. 21 (12)

Guj 679C (C N 166)
—"Officer"—Meaning — See Penal Code (1860), S. 161 Guj 679A (C N 166)

—"Otherwise"—Meaning of — See Penal Code (1860), S. 161 Guj 679A (C N 166)

—"Town"—See Police Act (1861), S. 34 Goa 574 (C N 135)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN 1970 CRI. L. J. MAY

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; Revers.=Reversed in.

CRIMINAL PROCEDURE CODE (5 of 1898)

—S. 107—AIR 1949 All 21—DISS. 1970 Cri L J 586C (C N 139) (Pat),
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—S. 112—AIR 1949 All 21—DISS. 1970 Cri L J 586C (C N 139) (Pat).
—S. 112—('54) Cri. Rev. No. 351 of 1954, D/- 18-11-1954 (Pat)—NOT F. 1970 Cri L J 586B (C N 139) (Pat)
—S. 133—AIR 1960 All 244—DISS. 1970 Cri L J 573 (C N 134) (Cal).
—S. 133—AIR 1949 Cal 637—HELD OVERRULED by AIR 1956 Cal 24 as Interpreted. 1970 Cri L J 570 (C N 134) (Cal).
—S. 133—AIR 1956 Cal 220—NOT F. 1970 Cri L J 573 (C N 134) (Cal).
—S. 133—AIR 1958 Raj 248—DISS. 1970 Cri L J 573 (C N 134) (Cal).
—S. 192—AIR 1960 All 244—DISS. 1970 Cri L J 573 (C N 134) (Cal).
—S. 192—AIR 1949 Cal 637—HELD OVERRULED by AIR 1956 Cal 24 as Interpreted. 1970 Cri L J 573 (C N 134) (Cal).
—S. 192—AIR 1956 Cal 220—NOT F. 1970 Cri L J 573 (C N 134) (Cal).
—S. 192—AIR 1958 Raj 248—DISS. 1970 Cri L J 573 (C N 134) (Cal).
—S. 439—AIR 1949 All 21—DISS. 1970 Cri L J 586C (C N 139) (Pat).

CRIMINAL P. C. (contd.)

—S. 439—('54) Cri. Rev. No. 351 of 1954, D/- 18-11-1954 (Pat)—NOT F. 1970 Cri L J 586B (C N 139) (Pat).

PENAL CODE (45 of 1860)

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—S. 40—1967 Ker L T 689—OVER. 1970 Cri L J 688A (C N 167) (Ker).
—S. 40—1968 Ker L T 929—OVER. 1970 Cri L J 688A (C N 167) (Ker).
—S. 88—1967 Ker L T 223 — OVER. 1970 Cri L J 688A (C N 167) (Ker).
—S. 88—1967 Ker L T 689—OVER. 1970 Cri L J 688A (C N 167) (Ker).
—S. 88—1968 Ker L T 929—OVER. 1970 Cri L J 688A (C N 167) (Ker).
—S. 307—1967 Ker L T 223—OVER. 1970 Cri L J 688A (C N 167) (Ker).
—S. 307—1967 Ker L T 689—OVER. 1970 Cri L J 688A (C N 167) (Ker).
—S. 307—1968 Ker L T 929—OVER. 1970 Cri L J 688A (C N 167) (Ker).

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

—S. 14—ILR (1967) 2 Ker 676—REVERS. 1970 Cri L J 599 (C N 141) (S C).
—S. 19 (2)—ILR (1967) 2 Ker 676—REVERS. 1970 Cri L J 599 (C N 141) (S C).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC. IN 1970 CRI L J MAY

DISS = Dissented from in NOT F = Not followed in, OVER = Overruled in REVERS = Reversed in

Allahabad

AIR 1919 All 21 = 50 Cri L J 78 Baburam v Rex
— DISS 1970 Cri L J 580C (C N 130) (Pat)
AIR 1940 All 241 = 1080 Cri L J 450 Kishorilal v
State — DISS 1970 Cri L J 573 (C N 134)
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Patna

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**THE CRIMINAL AND ELECTION
LAWS AMENDMENT ACT, 1969**
(Act 35 of 1969)*

[4th September, 1969]

An Act further to amend the Indian Penal Code, the Code of Criminal Procedure, 1898 and the Representation of the People Act, 1951 and to provide against printing and publication of certain objectionable matters.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

1. Short title.

This Act may be called the Criminal and Election Laws Amendment Act, 1969.

2. Substitution of new section for section 153A.

In the Indian Penal Code (hereinafter referred to as the Penal Code), for section 153A, the following section shall be substituted, namely:—

Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

"153A. (1) Whoever—

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

* Received the assent of the President on 4.9.69. Act published in Gaz. of Ind., 5.9.1969, Pt. II-S 1, Ext. p. 361.

For Statement of Objects and Reasons, see Gaz. of Ind., 2.8.1968, Pt. II S. 2, Ext. p. 1051 and for Joint Committee Report, see Gaz. of Ind., 13.12.1968, Pt. II-S. 3, Ext. p. 1585/4.

Offence committed in place of worship, etc.

(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine."

3. Amendment of section 505.

Section 505 of the Penal Code shall be re-numbered as sub-section (1) of that section, and—

(i) after sub-section (1) as so re-numbered but before the Exception, the following sub-sections shall be inserted, namely:—

Statements creating or promoting enmity, hatred or ill-will between classes.

"(2) Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Offence under sub-section (2) committed in place of worship, etc.

(3) Whoever commits an offence specified in sub-section (2) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine."

(u) in the Exception, after the words "circulates it," the words "in good faith and" shall be inserted.

4. Amendment of Act 5 of 1898.

In the Code of Criminal Procedure, 1898,—

(a) in section 196, for the words "the State Government or some officer empowered by the State Government in this behalf," the words "the State Government or District Magistrate or such other officer as may be empowered by the State Government in this behalf" shall be substituted;

(b) in Schedule II,—

(i) for the entries in columns 1 to 8 relating to section 153A, the following entries shall be substituted namely:—

1	2	3	4	5	6	7	8
"158A(1)	Promoting enmity between classes	May arrest without warrant	Warrant	Not bailable	Ditto	Imprisonment of either description for three years, or fine, or both	Presidency Magistrate or Magistrate of the first class
158A(2)	Promoting enmity between classes in place of worship etc	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for five years and fine	Ditto "

(ii) for the entry in column 8 relating to section 151 the entry 'Shall not arrest without warrant' shall be substituted

(iii) for the entries in columns 1 to 8 relating to section 505 the following entries shall be substituted, namely —

1	2	3	4	5	6	7	8
, 505(1)	False statement, rumour etc with intent to cause mutiny or offence against the public peace	Ditto	Ditto	Not bailable	Not compoundable	Imprisonment of either description for three years or fine or both.	Presidency Magistrate or Magistrate of the first class.
505(2)	False statement, rumour etc, with intent to create enmity, hatred or ill will between different classes.	May arrest without warrant	Ditto	Ditto	Ditto	Imprisonment of either description for three years or fine or both.	Ditto
505(3)	False statement, rumour, etc, made in place of worship etc., with intent to create enmity, hatred or ill will	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for five years and fine	Ditto "

(iv) for the entries in columns 3 and 7 relating to section 506 as applicable to "Criminal intimidation" (first paragraph), the entries "Shall not arrest without warrant" and "Imprisonment of either description for 2 years, or fine, or both" shall, respectively, be substituted.

5. Amendment of section 8.

In section 8 of the Representation of the People Act, 1951, in sub-section (1), for the words, figures and letters "section 171E or section 171F of the Indian Penal Code," the words, figures and letters "section 153A or section 171E or section 171F or sub-section (2) or sub-section (3) of section 505 of the Indian Penal Code" shall be substituted.

6. Power to control prejudicial publications.

(1) The Central Government or State Government or any authority so authorised by the Central Government in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony and affecting or likely to affect public order, may, by order in writing addressed to the printer, publisher or editor, prohibit the printing or publication of any document or any class of documents of any matter relating to a particular subject or class of subjects for a specified period or in a particular issue or issues of a newspaper or periodical:

Provided that no such order shall remain in force for more than two months from the making thereof:

Provided further that the person against whom the order has been made may, within ten days of the communication of the order, make a representation,—

(i) to the Central Government, where such order is made by the Central Government or any authority authorised by it; and

(ii) to the State Government, where such order is made by the State Government, and the Central Government or the State Government, as the case may be, may, after consultation with a Committee, to be known as Press Consultative Committee, dispose of the matter, modifying, confirming or rescinding the order.

(2) In the event of disobedience of an order made under sub-section (1), the Central Government or the State Government or the authority issuing the order, as the case may be, may, without prejudice to any other penalty to which the person guilty of the disobedience is liable under this Act or under any other law for the time being in force, direct

that copies of the publication made in violation of an order made under sub-section (1) be seized, and that any printing press or other instrument or apparatus used in the publication be closed down for the period such order is in operation

7. Penalty.

Whoever contravenes, disobeys or neglects to comply with any order made under section 8 of this Act, shall, on conviction, be punished with imprisonment of either description which may extend to one year, or with fine up to one thousand rupees, or with both.

8. Composition of the Press Consultative Committee and rules in respect thereof.

(1) A Press Consultative Committee referred to in the second proviso to sub-section (1) of section 6, shall consist of such number of persons, being editors, publishers and journalists, as may be prescribed by rules made under this section.

(2) The Central Government may make rules for the constitution of Press Consultative Committees, the term of office of the members of such Committees, the allowances, if any, to be paid to such members for attending the meetings of the Committee and the manner of filling casual vacancies among them, and for all matters connected therewith or incidental thereto.

(3) In particular, and without prejudice to the generality of the foregoing power under sub-section (2), such rules may provide for all or any of the following matters, namely:—

(a) the number of persons who may be appointed as members of a Press Consultative Committee and the class or category of persons from whom such members are to be appointed;

(b) the authority or authorities which may make such appointments;

(c) the procedure to be followed by the Central Government or the State Government, as the case may be, in consulting the Press Consultative Committee;

(d) the procedure to be followed by the Press Consultative Committee;

(e) any other matter for which rules have to be made for enabling the Press Consultative Committee to function

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days, which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses

agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect as the case may so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule

THE INDIAN PENAL CODE (AMENDMENT) ACT, 1969 (Act 36 of 1969)*

[7th September, 1969]

An Act further to amend the Indian Penal Code and to provide for matters incidental thereto

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

1 Short title

This Act may be called the Indian Penal Code (Amendment) Act 1969

2 Amendment of section 292 of Act 45 of 1860

In the Indian Penal Code,—

(a) section 292 shall be re-numbered as sub-section (2) thereof and before sub-section (2), as so re-numbered, the following sub-section shall be inserted namely:—

“(1) For the purposes of sub-section (2) a book, pamphlet paper writing drawing, painting representation, figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items is if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances to read see or hear the matter contained or embodied in it”.

(b) in sub-section (2) of section 292 as so re-numbered—

(i) for the words “with imprisonment of either description for a term which may extend to three months or with fine or with both” the words “on first conviction with imprisonment of either description for a term which may extend to two years and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five

years, and also with fine which may extend to five thousand rupees” shall be substituted

(ii) for the *Exception* the following *Exception* shall be substituted namely:—

‘*Exception*—This section does not extend to—

(a) any book, pamphlet, paper writing drawing, painting, representation or figure—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book pamphlet paper, writing, drawing painting, representation or figure is in the interest of science literature art or learning or other objects of general concern or

(ii) which is kept or used *bona fide* for religious purposes,

(b) any representation sculptured engraved, painted or otherwise represented on or in—

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act 1958, or

(ii) any temple, or on any car used for the conveyance of idols or kept or used for any religious purpose”.

(c) in section 298, for the words ‘with imprisonment of either description for a term which may extend to six months or with fine, or with both’ the words ‘on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to five thousand rupees’ shall be substituted

3 Amendment of sections 99A, 108 and Schedule II of Act 5 of 1898

In the Code of Criminal Procedure 1898—

(a) in sub-section (1) of section 99A—

(i) for the words “seditious matter” the words “seditious or obscene matter, and

(ii) for the words “punishable under section 124A or section 153A or section 295A” the words “punishable under section 124A or section 158A or section 292 or section 293 or section 295A” shall be substituted

(b) in section 103—

(i) after the words ‘who within or without such limits’ the brackets and figure ‘(i)’ shall be inserted,

(2) after clause (c), the following shall be inserted, namely:—

(ii) makes produces publishes or keeps for sale imports exports conveys sells lets to hire distributes publicly exhibits or in any other manner puts into circulation any obscene

* Received the assent of the President on 7.9.1969 Act published in Gaz. of Ind., 8.9.1969 Pt. II S. 1 Ext. p. 667

matter such as is referred to in section 292 of the Indian Penal Code,";

to sections 292 and 293 of the Indian Penal Code, the following entries shall be substituted, namely:—

1	2	3	4	5	6	7	8
"292	Sale, etc., of obscene books, etc.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	On first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.	Court of Session
293	Sale, etc., of obscene objects to young persons.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	On first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees.	Court of Session."

THE CONSTITUTION (TWENTY-SECOND AMENDMENT)

ACT, 1969*

[25th September 1969]

An Act further to amend the Constitution of India

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows—

1 Short title

This Act may be called the Constitution (Twenty second Amendment) Act 1969

2 Insertion of new article 244A

In Part X of the Constitution after article 244, the following article shall be inserted, namely—

Formation of an autonomous State comprising certain tribal areas in Assam and creation of local Legislature or Council of Ministers or both therefor

244A (1) Notwithstanding anything in this Constitution Parliament may, by law form within the State of Assam an autonomous State comprising (whether wholly or in part) all or any of the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule and create therefor—

(a) a body whether elected or partly nominated and partly elected to function as a Legislature for the autonomous State or

(b) a Council of Ministers or both with such constitution powers and functions, in each case as may be specified in the law

(2) Any such law as is referred to in clause (1) may in particular—

(a) specify the matters enumerated in the State List or the Concurrent List with respect to which the Legislature of the autonomous State shall have power to make laws for the whole or any part thereof whether to the exclusion of the Legislature of the State of Assam or otherwise

(b) define the matters with respect to which the executive power of the autonomous State shall extend

(c) provide that any tax levied by the State of Assam shall be assigned to the autonomous State in so far as the proceeds thereof are attributable to the autonomous State,

(d) provide that any reference to a State in any article of this Constitution shall be construed as including a reference to the autonomous State and

(e) make such supplemental incidental and consequential provisions as may be deemed necessary

(8) An amendment of any such law as aforesaid in so far as such amendment relates to any of the matters specified in sub clause (a) or sub clause (b) of clause (2) shall have no effect unless the amendment is passed in each House of Parliament by not less than two thirds of the members present and voting

(4) Any such law as is referred to in the article shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution

3 Amendment of article 275

In article 275 of the Constitution after clause (1), the following clause shall be inserted namely—

"(1A) On and from the formation of the autonomous State under article 244A,—

(i) any sums payable under clause (a) of the second proviso to clause (1) shall if the autonomous State comprises all the tribal areas referred to therein be paid to the autonomous State, and if the autonomous State comprises only some of those tribal areas, be apportioned between the State of Assam and the autonomous State as the President may, by order, specify

(ii) there shall be paid out of the Consolidated Fund of India as grants in aid of the revenues of the autonomous State sums capital and recurring equivalent to the costs of such schemes of development as may be undertaken by the autonomous State with the approval of the Government of India for the purpose of raising the level of administration of that State to that of the administration of the rest of the State of Assam"

4 Insertion of new article 371B

After article 371A of the Constitution the following article shall be inserted, namely—
Special provision with respect to the State of Assam

'371B Notwithstanding anything in this Constitution the President may by order made with respect to the State of Assam, provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule and such number of other members of that Assembly as may be specified in the order and for the modifications to be made in the rules of procedure of that Assembly for the constitution and proper functioning of such committee

* Passed the Assent of the President on 25.9.1969 A. C. published in Gaz of Ind 28.9.1969 Pt II S 1 Extra 878

For Statement of Objects and Reasons see Gaz of Ind 10.11.69 Pt II S 2 Extra, p 406

THE OATHS ACT, 1969

(ACT 44 OF 1969) [*]

[26th December, 1969].

An Act to consolidate and amend the law relating to judicial oaths and for certain other purposes.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows —

1. Short title and extent.

(1) This Act may be called the Oaths Act, 1969

(2) It extends to the whole of India except the State of Jammu and Kashmir

2. Saving of certain oaths and affirmations.

Nothing in this Act shall apply to proceedings before courts martial or to oaths, affirmations or declarations prescribed by the Central Government with respect to members of the Armed Forces of the Union

3. Power to administer oaths.

(1) The following courts and persons shall have power to administer, by themselves or, subject to the provisions of sub-sec (2) of Sec. 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely —

(a) all courts and persons having by law or consent of parties authority to receive evidence,

(b) the commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or affirmation is administered within the limits of the station

(2) Without prejudice to the powers conferred by sub-section (1) or by or under any other law for the time being in force, any court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf —

(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or

(b) by the State Government, in respect of other affidavits.

4. Oaths or affirmations to be made by witnesses, interpreters and jurors.

(1) Oaths or affirmations shall be made by the following persons, namely —

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses, and

(c) jurors*

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties

5. Affirmation by persons desiring to affirm.

A witness, interpreter or juror may, instead of making an oath, make an affirmation

6. Forms of oaths and affirmations.

(1) All oaths and affirmations made under Section 4 shall be administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case

Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the class to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation

(2) All such oaths and affirmations shall, in the case of all courts other than the Supreme Court and the High Courts, be administered by the presiding officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may be

7. Proceedings and evidence not invalidated by omission of oath or irregularity.

No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect

* Received the assent of the President on 26-12-1969 Act published in Gaz of Ind, 26-12-1969, Pt II-S 1, Ext. p 407

For Statement of Objects and Reasons, see Gaz of Ind 27-11-1967, Pt II-S. 2, Ext p. 1161.

the obligation of a witness to state the truth

8 Persons giving evidence bound to state the truth

Every person giving evidence on any subject before any court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject

9 Repeal and saving

(1) The Indian Oaths Act 1873 is hereby repealed

(2) Where in any proceeding pending at the commencement of this Act the parties have agreed to be bound by any such oath or affirmation as is specified in Section 8 of the said Act then notwithstanding the repeal of the said Act the provisions of sections 9 to 12 of the said Act shall continue to apply in relation to such agreement as if this Act had not been passed

THE SCHEDULE

(See Section 6)

Forms Of Oaths Or Affirmations

Form No 1 (Witnesses) —

I do swear in the name of God that I do solemnly affirm what I shall state shall be the truth the whole truth and nothing but the truth

Form No 2 (Jurors) —

I do swear in the name of God that I do solemnly affirm I will well and truly try and true deliverance make between the State and the Prisoner (s) at the bar whom I shall have in charge and a true verdict give according to the evidence

Form No 3 (Interpreters) —

I do swear in the name of God that I do solemnly affirm I will well and truly interpret and explain all questions put to and evidence given by witnesses and translate correctly and accurately all documents given to me for translation

Form No 4 (Affidavits) —

I do swear in the name of God that I do solemnly affirm this is my name and signature (or mark) and that the contents of this my affidavit are true

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

(ACT 54 OF 1969)*

[27th December 1969]

An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows —

CHAPTER I

Preliminary

1 Short title, extent and commencement
(1) This Act may be called the Monopolies and Restrictive Trade Practices Act 1969

(2) It extends to the whole of India except the State of Jammu and Kashmir

(3) It shall come into force on such date as the Central Government may by notification in the Official Gazette appoint

3 Act not to apply in certain cases

Unless the Central Government by notification in the Official Gazette otherwise directs this Act shall not apply to —

(a) any undertaking, owned or controlled by a Government company

(b) any undertaking owned or controlled by the Government

(c) any undertaking owned or controlled by a corporation (not being a company) established by or under any Central Provincial or State Act

(d) any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees

(e) any undertaking engaged in an industry the management of which has been taken over by any person or body of persons in pursuance of any authorisation made by the Central Government under any law for the time being in force

4 Application of other laws not barred

(1) Save as otherwise provided in sub-section (2) or elsewhere in this Act the provisions of this Act shall be in addition to and not in derogation of any other law for the time being in force

(2) Notwithstanding anything contained in Section 3 or elsewhere in this Act so much of the provisions of this Act as relate to matters in respect of which specific provisions exist in the —

(i) Reserve Bank of India Act 1931 or the Banking Regulation Act 1919 or

* Received the assent of the President on 27 12 1969 Act published in Gaz of Ind., 27 12 1969 Pt II S 1 Ext p 427

For Statement of Objects and Reasons see Gaz of Ind 18 8 1967 Pt II S 2 Ext p 240 And for joint Committee Report see Gaz of Ind 26 2 1969 Pt II S 2 Ext p 110

(ii) State Bank of India Act, 1955, or the State Bank of India (Subsidiary Banks) Act, 1959, or,

(iii) Insurance Act, 1938, shall not apply to a banking company, the State Bank of India or a subsidiary bank, as defined in the State Bank of India (Subsidiary Banks) Act, 1959, or an insurer, as the case may be.

* * * * *

CHAPTER III

Concentration of Economic Power

PART A

20. Undertakings to which this Part applies.

This Part shall apply to —

(a) an undertaking if the total value of—

(i) its own assets, or

(ii) its own assets together with the assets of its inter-connected undertakings, is not less than twenty crores of rupees,

(b) a dominant undertaking —

(i) where it is a single undertaking, the value of its assets or

(ii) where it consists of more than one undertaking, the sum-total of the value of the assets of all the inter-connected undertakings constituting the dominant undertaking,

is not less than one crore of rupees

Explanation — The value referred to in this section shall be,

(i) in the case of an undertaking referred to in clause (a) or clause (b), as the case may be, the value of its assets on the last day of its financial year which closes during the calendar year immediately preceding the calendar year in which the question arises as to whether this Part does or does not apply to such undertaking, and

(ii) in the case of an inter-connected undertaking, the value of its assets on the last day of its financial year which closes during the calendar year immediately preceding the calendar year in which the question arises as to whether this Part does or does not apply to the undertaking referred to in clause (a) or clause (b)

21. Expansion of undertakings.

(1) Subject to the provisions of Section 23, where an undertaking to which this Part applies proposes to substantially expand its activities by the issue of fresh capital or by the installation of new machinery or other equipment or in any other manner, it shall, before taking any action to give effect to the proposal for such expansion, give to the Central Government notice, in the prescribed form, of its intention to make such expansion, stating therein the scheme of finance with regard to the proposed expansion, whether it is connected with any other undertaking or undertakings and if so, giving particulars relating to all the inter-connected undertakings and such other information as may be prescribed.

(2) Notwithstanding anything contained in any other law for the time being in force, no undertaking shall give effect to any proposal for its substantial ex-

pansion unless such proposal has been approved by the Central Government

Explanation — For the purpose of this section, an undertaking shall be deemed to expand substantially if, after such expansion, —

(a) in the case of an undertaking to which clause (a) of section 20 applies,—

(i) the value of its assets, before the expansion, would result in an increase by not less than twenty-five per cent of such value, or

(ii) the production, supply or distribution of any goods or the provision of any services by it before the expansion, would result in an increase by not less than twenty-five per cent of the goods produced, supplied, distributed or controlled, or services provided, by it,

(b) in the case of an undertaking to which clause (b) of section 20 applies, the production, supply, distribution or control of any goods or the provision of any services by it would result in an increase by not less than twenty-five per cent of the goods produced, supplied, distributed or controlled, or services provided, by it before the expansion

(3) (a) The Central Government may call upon the undertaking concerned to satisfy it that the proposed expansion or the scheme of finance with regard to such expansion is not likely to lead to the concentration of economic power to the common detriment or is not likely to be prejudicial to the public interest in any other manner and thereupon the Central Government may, if it is satisfied that it is expedient in the public interest so to do, by order accord approval to the proposal for such expansion

(b) If the Central Government is of opinion that no such order as is referred to in cl (a) can be made without a further inquiry, it may refer the application to the Commission for an inquiry and the Commission may, after such hearing as it thinks fit, report to the Central Government its opinion thereon

(c) Upon receipt of the report of the Commission, the Central Government may pass such orders with regard to the proposal for the expansion of the undertaking as it may think fit

(d) No scheme of any expansion approved by the Central Government and no scheme of finance with regard to such expansion shall be modified except with the previous approval of the Central Government.

(4) Nothing in this section shall apply to any industrial undertaking (which is not a dominant undertaking) to which Section 13 of the Industries (Development and Regulation) Act, 1951, applies, in so far as the expansion relates to production of the same or similar type of goods.

22. Establishment of new undertakings.

(1) No person or authority, other than Government, shall, after the commencement of this Act, establish any new undertaking which, when established would become an inter-connected undertaking of an undertaking to which clause (a) of Section 20 applies, except under, and in

accordance with the previous permission of the Central Government

(2) Any person or authority intending to establish a new undertaking referred to in sub-section (1) shall before taking any action for the establishment of such undertaking make an application to the Central Government in the prescribed form for that Government's approval to the proposal of establishing any undertaking and shall set out in such application information with regard to the interconnection if any of the new undertaking (which is intended to be established) with every other undertaking the scheme of finance for the establishment of the new undertaking and such other information as may be prescribed

(3) (a) The Central Government may call upon the person or authority to satisfy it that the proposal to establish a new undertaking or the scheme of finance with regard to such proposal is not likely to lead to the concentration of economic power to the common detriment or is not likely to be prejudicial to the public interest in any other manner and thereupon the Central Government may if it is satisfied that it is expedient in the public interest so to do by order accord approval to the proposal

(1) If the Central Government is of opinion that no such approval as is referred to in cl (a) can be made without further inquiry it may refer the application to the Commission for an inquiry and the Commission may after such hearing as it thinks fit report to the Central Government its opinion thereon

(c) Upon receipt of the report of the Commission the Central Government may pass such order with regard to the proposal for the establishment of a new undertaking as it may think fit

(d) A scheme of finance on the strength of which the establishment of a new undertaking has been approved by the Central Government shall be modified except with previous approval of that Government

22. Merger, amalgamation and take over

(1) Notwithstanding anything contained in any other law for the time being in force—

(a) no scheme of merger or amalgamation of an undertaking to which this Part applies with any other undertaking

(1) no scheme of merger or amalgamation of two or more undertakings which would have the effect of bringing into existence an undertaking to which clause (a) or clause (b) of S 20 would apply shall be sanctioned by any Court or be recognised for any purpose or be given effect to unless the scheme for such merger or amalgamation has been approved by the Central Government under this Act

(2) If any undertaking to which this Part applies frames a scheme of merger or amalgamation with any other undertaking or a scheme of merger or amalgamation is proposed between two or more undertakings and if as a result of such

merger or amalgamation an undertaking would come into existence to which clause (a) or clause (b) of Section 20 would apply it shall before taking any action to give effect to the proposed scheme make an application to the Central Government in the prescribed form with a copy of the scheme annexed thereto for the approval of the scheme

(3) Nothing in sub-section (1) or sub-section (2) shall apply to the scheme of merger or amalgamation of such interconnected undertakings as are not dominant undertakings and as produce the same goods

(4) If an undertaking to which this Part applies proposes to acquire by purchase take over or otherwise the whole or part of an undertaking which will or may result either—

(a) in the creation of an undertaking to which this Part would apply or

(b) in the undertaking becoming an interconnected undertaking of an undertaking to which this Part applies it shall before any effect to its proposals make an application in writing to the Central Government in the prescribed form of its intention to make such acquisition taking therein information regarding its interconnection with other undertakings the scheme of finance with regard to the proposed acquisition and such other information as may be prescribed

(1) No proposal referred to in sub-section (4) which has been approved by the Central Government and no scheme of finance with regard to such proposal shall be modified except with the previous approval of the Central Government

(8) On receipt of an application under sub-section (2) or sub-section (4) the Central Government may if it thinks fit refer the matter to the Commission for an inquiry and the Commission may after such hearing as it thinks fit report to the Central Government its opinion thereon

(7) On receipt of the Commission's report the Central Government may pass such orders as it may think fit

(8) Notwithstanding anything contained in any other law for the time being in force no proposal to acquire by purchase take over or otherwise of an undertaking to which this Part applies shall be given effect to unless the Central Government has made an order according its approval to the proposal

(9) Nothing in sub-section (4) shall apply to the acquisition by an undertaking which is not a dominant undertaking of another undertaking which is not also a dominant undertaking if both such undertakings produce the same goods

Provided that nothing in this sub-section shall apply if as a result of such acquisition an undertaking comes into existence to which clause (a) or clause (b) of Section 20 would apply

24. Merger, amalgamation or take over in contravention of Section 22

Where any merger, amalgamation or take over is being or has been effected

in contravention of the provisions of Section 23, the Central Government may, after such consultation with the Commission as it may consider necessary, direct, without prejudice to any penalty which may be imposed under this Act for such contravention, the undertaking concerned to cease and desist from such contravention, to divest itself of the stock or other share capital or assets so acquired and to carry out such further directions as the Central Government may, in all the circumstances of the case, issue

25. Directors of undertakings not to be appointed directors of other undertakings.

(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no person, who is a director of an undertaking to which this Part applies, shall be appointed, after the commencement of this Act, as a director, of any other undertaking except with the prior approval of the Central Government and any appointment contrary to the provisions of this section shall be void

Provided that the approval of the Central Government shall not be necessary to the appointment of a person as a director of an undertaking unless he holds such office in more than ten inter-connected undertakings

(2) Notwithstanding anything contained in sub-section (1), no act done by a person as a director shall be invalid merely on the ground that his appointment was void by reason of this section or of any provision of this Part.

Provided that nothing in this section shall be deemed to give validity to any act done by a director after his appointment has been shown to the undertaking and the director concerned to be void

(3) Notwithstanding anything to the contrary contained in any other law for the time being in force, every director holding such directorship as is not consistent with the provisions of this section shall, unless his appointment expires earlier, obtain within a period of one year from the commencement of this Act, the approval of the Central Government to such appointment and if he fails to do so, his appointment shall, on the expiry of the said period, become void

(4) The provisions of sub-sections (1), (2) and (3) shall, as far as may be, apply to partners of any firm which is an undertaking within the meaning of this Act, as they apply to directors of companies

26. Registration of undertakings to which Part A applies.

(1) Every undertaking to which this Part applies at the commencement of this Act or to which the provisions of that Part become applicable thereafter, shall, within sixty days from such commencement or the date on which that Part becomes first applicable to it, or within such further time as the Central Government may, on sufficient cause being shown, allow, make an application (in such form and containing such particulars

as may be prescribed) to the Central Government for its registration, as such undertaking

(2) The Central Government shall, on receipt of the application referred to in sub-section (1), forthwith enter the name of the undertaking in a register to be maintained for the purpose and issue to the undertaking concerned a certificate of registration containing such particulars as may be prescribed

(3) Any undertaking which has ceased to be an undertaking to which this Part applies may, at any time after such cesser, apply to the Central Government for cancellation of the registration and the Central Government may, after making such inquiry as it may think fit, cancel the registration of such undertaking and notify such cancellation in the Official Gazette.

PART B

27. Division of undertakings.

(1) Notwithstanding anything contained in this Act or in any other law for the time being in force, the Central Government may, if it is of opinion that the working of an undertaking to which Part A of this Chapter applies, is prejudicial to the public interest, or has led, or is leading, or is likely to lead, to the adoption of any monopolistic or restrictive trade practices refer the matter to the Commission for an inquiry as to whether it is expedient in the public interest to make an order,—

(a) for the division of any trade of the undertaking by the sale of any part of the undertaking or assets thereof, or,

(b) for the division of any undertaking or inter-connected undertakings into such number of undertakings as the circumstances of the case may justify, and the Commission may, after such hearing as it thinks fit, report to the Central Government its opinion thereon and shall, where it is of opinion that a division ought to be made, specify the manner of the division and compensation, if any, payable for such division

Explanation — For the purposes of this section all activities carried on by way of trade by an undertaking or two or more interconnected undertakings may be treated as a single trade.

(2) If the Commission so recommends, the Central Government may, notwithstanding anything contained in any other law for the time being in force by an order in writing direct the division of any trade of the undertaking or of the undertaking or interconnected undertakings

(3) Notwithstanding anything contained in any other law for the time being in force, the order referred to in sub-section (2) may provide for all such matters as may be necessary to give effect to the division of any trade of the undertaking or of the undertaking or interconnected undertakings, including,—

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts either by the discharge or reduction of any liability or obligation or otherwise;

(c) the creation allotment surrender or cancellation of any shares stock or securities

(d) the payment of compensation

(e) the formation or winding up of an undertaking or the amendment of the memorandum and articles of association or any other instruments regulating the business of any undertaking

(f) the extent to which and the circumstances in which provisions of the order affecting an undertaking may be altered by the undertaking and the registration thereof

(g) the continuation with such changes as may be necessary of parties to any legal proceeding

(4) Where the Central Government makes or intends to make an order for any purpose mentioned in sub section (3) it may with a view to achieving that purpose prohibit or restrict the doing of anything that might impede the operation or making of the order and may impose on any person such obligations as to the carrying on of any activities or the safe guarding of any assets as it may think fit or it may by order provide for the carrying on of any activities or safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any such activities or in any other manner

(5) Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association of an officer of a company who ceases to hold office as such in consequence of the division of an undertaking or interconnected undertakings shall not be entitled to claim any compensation for such cesser

CHAPTER IV

Monopolistic Trade Practices

31 Investigation by Commission of monopolistic trade practices

(1) Where it appears to the Central Government that one or more monopolistic undertakings are indulging in any monopolistic trade practice or that monopolistic trade practices prevail in respect of any goods or services that Government may refer the matter to the Commission for an inquiry and the Commission shall after such hearing as it thinks fit report to the Central Government its findings thereon

(2) If as a result of such inquiry the Commission makes a finding to the effect that having regard to the economic conditions prevailing in the country and to all other matters which appear in particular circumstances to be relevant the trade practice operates or is likely to operate against the public interest the Central Government may notwithstanding anything contained in any other law for the time being in force pass such orders as it may think fit to remedy or prevent any mischiefs which result or may result from such trade practice

(3) Any order made by the Central

Government under this section may include an order—

(a) regulating the production supply distribution or control of any goods by the undertaking or the control or supply of any service by it and fixing the terms of sale (including prices) or supply thereof

(b) prohibiting the undertaking from resorting to any act or practice or from pursuing any commercial policy which prevents or lessens or is likely to prevent or lessen competition in the production supply or distribution of any goods or provision of any services

(c) fixing standards for the goods used or produced by the undertakings

(d) declaring unlawful, except to such extent and in such circumstances as may be provided by or under the order the making or carrying out of any such agreement as may be specified or described in the order

(e) requiring any party to any such agreement as may be so specified or described to determine the agreement within such time as may be so specified either wholly or to such extent as may be so specified

32 Monopolistic trade practice when to be deemed to be prejudicial to public interest

For the purposes of this Chapter a monopolistic trade practice shall be deemed to be prejudicial to public interest if having regard to the economic conditions prevailing in the country and to all other matters which are relevant in the particular circumstances the effect of the trade practice is or would be—

(a) to increase unreasonably the cost relating to the production supply or distribution of goods or the performance of any service

(b) to increase unreasonably—
(i) the prices at which goods are sold or

(ii) the profits derived from the production supply or distribution of goods or from the performance of any service

(c) to reduce or limit unreasonably competition in the production supply or distribution of any goods (including their sale or purchase) or the provision of any service

(d) to limit or prevent unreasonably the supply of goods to consumers or the provision of any service

(e) to result in a deterioration in the quality of any goods or in the performance of any service

CHAPTER V

Registration of Agreement Relating to Restrictive Trade Practices

33 Registrable agreements relating to restrictive trade practices

(1) Any agreement relating to a restrictive trade practice falling within one or more of the following categories shall be subject to registration in accordance with the provisions of this Chapter namely—

(a) any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(b) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(c) any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person,

(d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers,

(e) any agreement to grant or allow concessions or benefits, including allowances, discount, rebates or credit in connection with, or by reason of, dealings,

(f) any agreement to sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

(g) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods,

(h) any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods,

(i) any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;

(j) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor,

(k) any agreement not hereinbefore referred to in this section which the Central Government may, by notification in the Official Gazette, specify for the time being as being one relating to a restrictive trade practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf;

(l) any agreement to enforce the carrying out of any such agreement as is referred to in this sub-section

(2) The provisions of this section shall apply, so far as may be, in relation to agreements making provision for services as they apply in relation to agreements connected with the production, supply, distribution or control of goods

(3) No agreement falling within this section shall be subject to registration in accordance with the provisions of this Chapter if it is expressly authorised by or under any law for the time being in force or has the approval of

the Central Government or if the Government is a party to such agreement

* * * *

CHAPTER VI

Control of Certain Restrictive Trade Practices

37. Investigation into restrictive trade practices by Commission.

(1) The Commission may inquire into any restrictive trade practice, whether the agreement, if any, relating thereto has been registered under Section 35 or not, which may come before it for inquiry and, if after such inquiry it is of opinion that the practice is prejudicial to the public interest, the Commission may, by order, direct that—

(a) the practice shall be discontinued or shall not be repeated;

(b) the agreement relating thereto shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order.

(2) The Commission may, instead of making any order under this section, permit the party to any restrictive trade practice, if he so applies to take such steps within the time specified in this behalf by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest, and, in any such case, if the Commission is satisfied that the necessary steps have been taken within the time specified, it may decide not to make any order under this section in respect of that trade practice

(3) No order shall be made under sub-section (1) in respect of—

(a) any agreement between buyers relating to goods which are bought by the buyers for consumption and not for ultimate re-sale whether in the same or different form, type or specie or as constituent of some other goods;

(b) a trade practice which is expressly authorised by any law for the time being in force

(4) Notwithstanding anything contained in this Act, if the Commission, during the course of an inquiry under sub-section (1), finds that a monopolistic undertaking is indulging in restrictive trade practices, it may, after passing such orders under sub-section (1) or sub-section (2) with respect to the restrictive trade practices as it may consider necessary, submit the case along with its findings thereon to the Central Government with regard to any monopolistic trade practice for such action as that Government may take under Section 31

38. Presumption as to the public interest.

(1) For the purposes of any proceedings before the Commission under Section 37, a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is

satisfied of any one or more of the following circumstances that is to say —

(a) that the restriction is reasonably necessary having regard to the character of the goods to which it applies to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods

(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;

(c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;

(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to or the acquisition of goods from any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who either alone or in combination with any other such persons controls a preponderant part of the market for such goods

(e) that having regard to the conditions actually obtaining or reasonably foreseen at the time of the application the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together in which a substantial proportion of the trade or industry to which the agreement relates is situated;

(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of India or in relation to the whole business (including export business) of the said trade or industry

(g) that the restriction is reasonably required for purposes in connection with the maintenance of any other restriction accepted by the parties whether under the same agreement or under any other agreement between them being a restriction which is found by the Commission not to be contrary to the public interest upon grounds other than those specified in this paragraph or has been so found in previous proceedings before the Commission or

(h) that the restriction does not directly or indirectly restrict or discourage competition to any material de-

gree in any relevant trade or industry and is not likely to do so

and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction

(2) In this section purchasers, consumers and users include persons purchasing, consuming or using for the purpose or in course of trade or business or for public purposes and references in this section to any one person include references to any two or more persons being interconnected under takings or individuals carrying on business in partnership with each other

39 Special conditions for avoidance of conditions for maintaining resale prices

(1) Without prejudice to the provisions of this Act with respect to registration and to any of the powers of the Commission or of the Central Government under this Act any term or condition of a contract for the sale of goods by a person to a wholesaler or retailer or any agreement between a person and a wholesaler or retailer relating to such sale shall be void in so far as it purports to establish or provide for the establishment of minimum prices to be charged on the resale of goods in India

(2) After the commencement of this Act no supplier of goods whether directly or through any person or as a association of persons acting on his behalf shall notify to dealers or other who publish on or in relation to any goods a price stated or calculated to be undercosted as the minimum price which may be charged on the resale of the goods in India

(3) This section shall apply to patented articles (including articles made by a patented process and articles made under any trade mark) as it applies to other goods and notice of any term or condition which is void by virtue of this section or which would be so void if included in a contract of sale or agreement relating to the sale of such article shall be of no effect for the purpose of limiting the right of a dealer to dispose of that article without infringement of the patent or trade mark as the case may be

Provided that nothing in this section shall affect the validity as between the parties and their successors of any term or condition of a licence granted by the proprietor of a patent or trade mark by a licensee under any such licence or of any assignment of a patent or trade mark so far as it regulates the price at which articles produced or

processed by the licensee or the assignee may be sold by him

Explanation — In this section and in Section 40, the term "supplier", in relation to supply of any goods, means a person who supplies goods to any person for the ultimate purpose of re-sale and includes a wholesaler, and the term "dealer" includes a supplier and a retailer

40. Prohibition of other measures for maintaining re-sale prices.

(1) Without prejudice to the provisions of this Act with respect to registration and to any of the powers of the Commission or of the Central Government under this Act, no supplier shall withhold supplies of any goods from any wholesaler or retailer seeking to obtain them for re-sale in India on the ground that the wholesaler or retailer—

(a) has sold in India at a price below re-sale price, goods obtained, either directly or indirectly, from that supplier, or has supplied such goods, either directly or indirectly, to a third party who had done so; or

(b) is likely if the goods are supplied to him to sell them in India at a price below that price or supply them, either directly or indirectly, to a third party who would be likely to do so.

(2) Nothing contained in sub-section (1) shall render it unlawful for a supplier to withhold supplies of goods from any wholesaler or retailer or to cause or procure another supplier to do so if he has reasonable cause to believe that the wholesaler or the retailer, as the case may be, has been using as loss leaders any goods of the same or a similar description whether obtained from that supplier or not

(3) A supplier of goods shall be deemed to be withholding supplies of goods from a dealer if he—

(a) refuses or fails to supply those goods to the order of the dealer,

(b) refuses to supply those goods to the dealer except at prices, or on terms or conditions as to credit, discount or other matters which are less favourable than those at or on which he normally supplies those goods to other dealers carrying on business in similar circumstances; or

(c) treats a dealer, in spite of a contract with such dealer for the supply of goods, in a manner less favourable than that in which he normally treats other dealers in respect of time or methods of delivery or other matters arising in the performance of the contract

(4) A supplier shall not be deemed to be withholding supplies of goods on any of the grounds mentioned in sub-section (1), if, in addition to that ground, he has any other ground which alone would entitle him to withhold such supplies

Explanation I — "Re-sale price", in relation to sale of goods of any description, means any price notified to the dealer or otherwise published by or on behalf of the supplier of the goods in question (whether lawfully or not) as

the price or minimum price which is to be charged on, or is recommended as appropriate for, a sale of that description or any price prescribed or purporting to be prescribed for that purpose by any contract or agreement between the wholesaler or retailer and any such supplier.

Explanation II — A wholesaler or retailer is said to use goods as loss leaders when he re-sells them otherwise than in a genuine seasonal or clearance sale not for the purpose of making a profit on the re-sale but for the purpose of attracting to the establishment at which the goods are sold, customers likely to purchase other goods or otherwise for the purpose of advertising his business.

* * * * *

CHAPTER VII

Power to Obtain Information And Appoint Inspectors

42. Power of Registrar to obtain information.

(1) If the Registrar has reasonable cause to believe that any person is a party to an agreement subject to registration under Section 35, he may give notice to that person requiring him within such time, not less than thirty days, as may be specified in the notice, to notify to the Registrar whether he is a party to any such agreement, and, if so, to furnish to the Registrar such particulars of the agreement as may be specified in the requisition

(2) The Registrar may give notice to any person by whom particulars are furnished under Section 35 in respect of an agreement or to any other person being a party to the agreement requiring him to furnish to the Registrar such further documents or information in his possession or control as the Registrar may consider expedient for the purpose of, or in connection with, the registration of the agreement

(3) Where a notice under this section is given to a trade association, the notice may be given to the secretary, manager or other similar officer of the association and for the purposes of this section any such association shall be treated as a party to an agreement to which members of the association, or persons represented on the association by those members, are parties as such

(4) If the particulars called for under sub-section (1) or sub-section (2) are not furnished, the Commission may, on the application of the Registrar,—

(a) order the person or, as the case may be, the association to furnish those particulars to the Registrar within such time as may be specified in the order, or

(b) authorise the Registrar to treat the particulars contained in any document or information in his possession as the particulars relating to the agreement, or

(c) in case the Commission is satisfied that the failure to furnish the particulars is wilful, make an order restraining wholly or partly the parties to the agree-

ment from acting on such agreement and from making any other agreement to the like effect

43 Power to call for information

Notwithstanding anything contained in any other law for the time being in force the Central Government may by a general or special order call upon any undertaking to furnish to that Government periodically or as and when required any information concerning the activities carried on by the undertaking the connection between it and any other undertaking including such other information relating to its organisation business cost of production conduct trade practice or management as may be prescribed to enable that Government to carry out the purposes of this Act.

CHAPTER VIII

Offences And Penalties

45 Penalty for contravention of Section 21

If any person contravenes the provisions of Section 21 or any order made thereunder he shall be punishable with fine which may extend to rupees one lakh

46 Penalty for contravention of Section 22 or Section 23 or Section 27

If any person contravenes the provisions of Section 22 or Section 23 or Section 27 he will be punishable with fine which may extend to rupees one lakh and where the offence is a continuing one with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues

47 Penalty for contravention of Section 25

If any person contravenes without any reasonable excuse the provisions of Section 25 he shall be punishable with fine which may extend to two thousand rupees and where the offence is a continuing one with a further fine which may extend to two hundred rupees for every day after the first during which such contravention continues

48. Penalty for failure to register agreements.

(1) If any person fails without any reasonable excuse to register an agreement which is subject to registration under this Act he shall be punishable with fine which may extend to five thousand rupees and where the offence is a continuing one with a further fine which may extend to five hundred rupees for every day after the first during which such failure continues

(2) If any undertaking to which Part A of Chapter III applies fails without any reasonable excuse to make an application under Section 25 to register itself as an undertaking to which that Part applies then—

(a) the undertaking where it is a company or

(b) every partner of the undertaking where it is a firm or

(c) where it is not a company or a firm every person who owns or controls the undertaking shall be punishable with fine which may extend to one thousand rupees and where the offence is a continuing one with a further fine which may extend to fifty rupees for every day after the first during which such failure continues

49 Penalty for offences in relation to furnishing of information

(1) If any person fails without any reasonable excuse to furnish any information required under Section 43 or to comply with any notice duly given to him under Section 42 he shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to two thousand rupees or with both and where the offence is a continuing one with a further fine which may extend to one hundred rupees for every day after the first during which such failure continues

(2) If any person who furnishes or is required to furnish any particulars documents or any information—

(a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular or

(b) omits to state any material fact knowing it to be material or

(c) wilfully alters suppresses or destroys any document which is required to be furnished as aforesaid he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five thousand rupees or with both

50 Penalty for offences in relation to orders under the Act

If any person contravenes any order made under Section 13 or section 31 or Section 37 he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five thousand rupees or with both and where the offence is a continuing one with a further fine which may extend to five hundred rupees for every day after the first during which such contravention continues

51 Penalty for offences in relation to resale price maintenance

If any person contravenes the provisions of Section 39 or Section 40 he shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five thousand rupees or with both

52. Penalty for wrongful disclosure of information

If any person discloses an information in contravention of Section 60 he shall

be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

53. Offences by companies.

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation — For the purposes of this section —

(a) "company" means a body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm, means a partner in the firm

CHAPTER IX Miscellaneous

54. Power of Central Government to impose conditions, limitations and restrictions on approvals etc., given under the Act.

(1) The Central Government may, while —

(a) according any approval, sanction, permission, confirmation or recognition, or

(b) giving any direction or issuing any order, or

(c) granting any exemption, under this Act in relation to any matter, impose such conditions, limitations or restrictions as it may think fit

(2) The Central Government shall have the power to modify any scheme of finance submitted to it under this Act in such manner as it thinks fit

(3) If any condition, limitation or restriction imposed by the Central Government under sub-section (1) or any term of a scheme of finance, as modified under sub-section (2), is contravened, the Central Government may rescind or withdraw the approval, sanction, permission, confirmation, recognition, direction, order or exemption made or granted by it.

55. Appeals.

Any person aggrieved by any order made by the Central Government under Chapter III or Chapter IV, or, as the case may be, or the Commission under Section 13 or Section 37, may within sixty days from the date of the order, prefer an appeal to the Supreme Court on one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908

56. Jurisdiction of courts to try offences.

No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act

57. Cognizance of offences.

No court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code

58. Magistrates' power to impose enhanced penalties.

Notwithstanding anything contained in Section 32 of the Code of Criminal Procedure, 1898, it shall be lawful for any Presidency Magistrate or any Magistrate of the first class to pass any sentence authorised by this Act in excess of his powers under Section 32 of the said Code

59. Protection regarding statements made to the Commission.

No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statements

Provided that the statement—

(a) is made in respect to a question which he is required by the Commission to answer, and

(b) is relevant to the subject-matter of the inquiry.

60. Restriction on disclosure of information.

(1) No information relating to any undertaking, being an information which has been obtained by or on behalf of the Commission for the purposes of this Act, shall, without the previous permission in writing of the owner for the time being of the undertaking, be disclosed otherwise than in compliance with or for the purposes of this Act

(2) Nothing contained in sub-section (1) shall apply to a disclosure of an information made for the purpose of any legal proceeding pursuant to this Act or of any criminal proceeding which may be taken, whether pursuant to this Act or otherwise, or for the purposes of any report relating to any such proceeding.

61 Protection of action taken in good faith

(1) No suit prosecution or other legal proceedings shall lie against the Commission or any member officer or servants of the Commission the Director the Registrar or any member of the staff of the Director or the Registrar in respect of anything which is in good faith done or intended to be done under this Act.

(2) No suit shall be maintainable in any civil court against the Central Government or any officer or employee of that Government for any damage caused by anything done under or in pursuance of any provisions of this Act.

THE ASSAM REORGANISATION (MEGHALAYA) ACT 1969

(Act 55 of 1969)*

[29th December 1969]

An Act to provide for the formation within the State of Assam of an autonomous State to be known as Meghalaya and for matters connected therewith.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows —

PART I

Preliminary

1 Short title and commencement

(1) This Act may be called the Assam Reorganisation (Meghalaya) Act 1969.

(2) It shall come into force on such date as the Central Government may by notification in the Official Gazette appoint.

Provided that different dates may be appointed for different provisions of this Act.

PART II

Formation of the Autonomous State of Meghalaya

3 Formation of Meghalaya

(1) On and from the appointed day there shall be formed within the State of Assam an autonomous State to be known as Meghalaya which shall subject to the provisions of subsection (2) comprise the following tribal areas namely —

(i) The United Khasi Jaintia Hills District as described in sub paragraph (2) of paragraph 20 of the Sixth Schedule to the Constitution (exclusive of the proviso thereto) but excluding the areas transferred to the Mikir Hills autonomous district by the notification

* Received the assent of the President on 29.12.1969. Act published in Gazette of India 30.12.1969 Pt II S 1 Ext. p 405.

† The date appointed for Sections 2 and 3 is 12.1.1970 — See Gazette of India 12.1.70 Pt II S 3 (1) Ext. p 17.

of the Government of Assam No TAD/R/31/50/113 dated the 13th April 1951 and

(ii) the Garo Hills District specified in Part A of the table appended to paragraph 20 aforesaid.

(2) If before such date as the Central Government may by notification in the Official Gazette fix for the purpose not being a date later than the appointed day the District Council for the autonomous district of the North Cachar Hills or the Mikir Hills or both as the case may be has or have by resolution passed by a majority of not less than two thirds of the members thereof expressed a desire that the said autonomous district or districts shall form part of Meghalaya the President may by order make a declaration to that effect and accordingly on and from the appointed day the North Cachar Hills District or the Mikir Hills District or both as the case may be shall also form part of Meghalaya.

4 Executive power of Meghalaya

(1) The executive power of Meghalaya shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Act.

(2) Nothing in this section shall—

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority or

(b) prevent Parliament or the Legislature of the State of Assam or Meghalaya from conferring by law functions on any authority subordinate to the Governor.

5 Extent of executive power of Meghalaya

(1) Subject to the provisions of this Act the executive power of Meghalaya shall extend to the matters with respect to which the Legislature of Meghalaya has power to make laws.

Provided that in any matter with respect to which the Legislature of Meghalaya the Legislature of the State of Assam and Parliament have power to make laws the executive power of Meghalaya shall be subject to and limited by the executive power expressly conferred by this Act or by any law made by Parliament upon the Union or the State of Assam or the authorities thereof or as the case may be by the Legislature of the State of Assam upon the State of Assam or authorities thereof.

(2) On and from the appointed day the executive power of the State of Assam shall not extend in relation to Meghalaya to the matters with respect to which the Legislature of Meghalaya has exclusive power to make laws under this Act.

(3) For the removal of doubts it is hereby declared that save as aforesaid provided in this Act the executive power of the State of Assam shall in relation to Meghalaya continue to extend to the matters with respect to which the Legislature of Meghalaya has no power to make laws.

6. Council of Ministers.

(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions in relation to Meghalaya.

(2) The question whether any, and if so, what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court

7. Other provisions as to Ministers.

(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the form set out for this purpose in the First Schedule

(4) A Minister who for any period of six consecutive months is not a member of the Legislative Assembly shall at the expiration of that period cease to be a Minister

(5) The salaries and allowances of Ministers shall be such as the Legislature of Meghalaya may from time to time by law determine and, until the Legislature so determines, shall be determined by the Governor.

8. Advocate-General for Meghalaya.

(1) The Governor may, if he thinks fit to do so, appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for Meghalaya

(2) It shall be the duty of the Advocate-General to give advice to the Government of Meghalaya upon such legal matters, and to perform such other duties of a legal character as may, from time to time, be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Act or any other law for the time being in force

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine

9. Conduct of business.

(1) All executive action of the Government of Meghalaya shall be expressed to be taken in the name of the Governor

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of Meghalaya and for the allocation among Ministers of the said business.

10. Duties of Chief Minister as respects the furnishing of information to Governor, etc.

It shall be the duty of the Chief Minister of Meghalaya—

(a) to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of Meghalaya and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of Meghalaya and proposals for legislation as the Governor may call for; and

(c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council

* * * * *

PART VIII**Miscellaneous provisions****63. Special committee for development of Shillong.**

The Central Government may, in consultation with the Governments of Assam and Meghalaya, by order, constitute a committee consisting of such number of persons as it may think fit for advising the two Governments on matters of common interest with respect to Shillong in the field of education and water supply in particular, and with respect to its development and administration in general

Explanation—In this section, Shillong shall mean the areas comprised within the cantonment and municipality of Shillong and include such other areas adjoining the said cantonment or municipality as may be agreed upon by the Governments of Assam and Meghalaya in this behalf

64. Provisions as to continuance of courts.

All Courts and tribunals and all authorities discharging lawful functions throughout Meghalaya or any part thereof immediately before the appointed day shall, unless their continuance is inconsistent with the provisions of this Act or until other provision is made by a competent authority, continue to exercise their respective functions

65. Provisions relating to services.

(1) Every person who being a member of an All-India Service is for the time being borne on the Assam State Cadre of that Service or is otherwise serving in connection with the affairs of the State of Assam as a member of Class I service of that State may be required by the Government of that State to serve in connection with the affairs of Meghalaya for such period

or periods as the Government of Assam may by order direct

Provided that no such order shall be made—

(a) before the appointed day except with the approval of the Central Government and

(b) on or after the appointed day except in accordance with such rules as may be made by the Central Government after consultation with the Governments of Assam and Meghalaya

(2) Subject to any general or special order which the Central Government may make in this behalf the control over any such person as is referred to in subsection (1) shall for so long as he is required to serve in connection with the affairs of Meghalaya be vested in the Government of Meghalaya

(3) Such persons serving in connection with the affairs of the State of Assam immediately before the appointed day not being a person referred to in subsection (1) as may be determined by agreement between the Government of Assam and the Government of Meghalaya or in default of agreement by the Central Government may not withstanding anything in the terms of their appointments or their conditions of service be required to serve in connection with the affairs of the autonomous State

(4) All previous service rendered by a person referred to in subsection (3) in connection with the affairs of the State of Assam shall be deemed to have been rendered in connection with the affairs of the autonomous State for the purposes of the rules regulating his conditions of service

(5) Nothing in subsections (3) and (4) shall be deemed to affect the power of the Legislature of Meghalaya or the Governor to determine the conditions of service of persons serving in connection with the affairs of Meghalaya

Provided that the conditions of service applicable immediately before the appointed day to any person referred to in subsection (3) shall not be varied to his disadvantage except with the previous approval of the Government of Assam

66 Continuance of existing laws and their adaptations

(1) All laws in force immediately before the appointed day in the autonomous State shall continue to be in force therein until altered, repealed or amended by a competent legislature or other competent authority

(2) For the purpose of facilitating the application in relation to the autonomous State of any law made before the appointed day the appropriate Government may within two years from that day by order make such adaptations or modifications of the law whether by way of repeal or amendment as may be necessary or expedient and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered re-

pealed or amended by a competent legislature or other competent authority

Explanation—In this section the expression 'appropriate Government' means as respects any law relating to a matter enumerated in the Union List in the Seventh Schedule to the Constitution the Central Government as respects any law relating to a matter in the Second Schedule the Government of Meghalaya and as respects any other law the Government of Assam

67 Autonomous State to be a State for certain purposes of the Constitution

Subject to the other provisions contained in this Act reference to a State (by whatever form of words) in any of the following articles of the Constitution shall be construed as including a reference to the autonomous State namely—

Articles 12 to 15 (inclusive) 18 [except clause (3) thereof] 18 19 23 25 28 to 31 (inclusive) 31A 34 to 51 (inclusive) 58 59 66 73 102 110 (1) (f) 131 138 149 150 151 161 209 210 233 234 235 237 251 252 256 to 258A (inclusive) 261 262 263 268 269 270 272 274 to 280 (inclusive) 282 283 289 293 296 298 to 305 (inclusive) 308 to 311 (inclusive) 320 323 (2) 324 to 329 (inclusive) 339 to 342 (inclusive) 343 to 348 (inclusive) 350 350A 350B 353 355 to 358 (inclusive) 360 361 364 to 367 (inclusive)

Explanation—Reference in any of the articles above specified to the High Court or to the State Public Service Commission shall be construed as reference to the High Court of Assam or the Public Service Commission of the State of Assam as the case may be

68 Power of Governments of Assam and Meghalaya to carry on trade etc., in Meghalaya

(1) The executive power which the Government of Assam may exercise under Article 293 in Meghalaya for the carrying on of any trade or business and for the acquisition holding and disposal of property and the making of contracts for any purpose shall in so far as such trade or business or such purpose is not one with respect to which the Legislature of the State of Assam may make laws be subject to legislation by the Legislature of Meghalaya

(2) The executive power which the Government of Meghalaya may exercise under Article 293 in Meghalaya for the carrying on of any trade or business and for the acquisition holding and disposal of property and the making of contracts for any purpose shall in so far as such trade or business or such purpose is not one with respect to which the Legislature of Meghalaya may make laws be subject also to legislation by the Legislature of the State of Assam

69 Power to suspend provisions of this Act in case of failure of constitutional machinery

Where a Proclamation is issued under Article 355 in respect of Meghalaya the

President may, by the same Proclamation or a subsequent Proclamation varying it, suspend also, in whole or in part, the operation of any of the provisions of this Act

70. Construction of references to "State" and "State Government" in other laws in relation to Meghalaya.

Without prejudice to the provisions of Sections 66 and 71 the Central Government may, after consulting the Government of Assam, by notification in the Official Gazette, declare that any reference to a "State" in a Central Act specified in the notification shall, in its application to Meghalaya, be construed as a reference to the whole or any part of Meghalaya and any reference to "State Government" in a Central Act specified in the notification shall in its application to Meghalaya be construed as a reference to the Central Government

71. Power to construe laws.

Notwithstanding that no provision or insufficient provision has been made under Section 66 for the adaptation of a law made before the appointed day, any court, tribunal or authority required or empowered to enforce such law may for the purpose of facilitating its application in relation to the autonomous State construe the law in such manner not affecting the substance as may be necessary or proper in regard to the matter before the Court, tribunal or authority, as the case may be

72. Effect of provisions of Act inconsistent with other laws.

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law

73. Power to remove difficulties.

(1) If any difficulty arises in giving effect to the provisions of this Act the President may, by order, do anything not inconsistent with such provisions which appears to him to be necessary or expedient for the purpose of removing the difficulty

(2) Every order made under this section shall be laid before both Houses of Parliament as soon as may be after it is made

THE MOTOR VEHICLES (AMENDMENT) ACT, 1969

(ACT 56 OF 1969) [*]

[29th December, 1969]

An Act further to amend the Motor Vehicles Act, 1939.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows —

1. Short title and commencement.

(1) This Act may be called the Motor Vehicles (Amendment) Act, 1969

* Received the assent to the President on 29-12-1969 Act published in Gaz of Ind 30-12-1969, Pt II-S 1, Ext p 507

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act.

* * * * *

65. Insertion of new Section 113-A.

After Section 113 of the principal Act, the following section shall be inserted, namely —

Allowing unauthorised persons to drive vehicles.

"113-A Whoever, being the owner or person in charge of a motor vehicle, causes, or permits, any person who does not satisfy the provisions of Section 3 or Section 4, to drive the vehicle shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees, or with both".

66. Amendment of Section 115.

In Section 115 of the principal Act,—

(i) in sub-section (1), for the words 'one hundred rupees' the following words shall be substituted, namely —

"two hundred rupees, or, if having been previously convicted of an offence under this sub-section is again convicted of an offence under this sub-section, with fine which may extend to five hundred rupees";

(ii) in sub-section (2), for the words "two hundred rupees" the following words shall be substituted, namely —

"three hundred rupees, or, if having been previously convicted of an offence under this sub-section is again convicted of an offence under this sub-section, with fine which may extend to five hundred rupees".

67. Amendment of Section 123.

In Section 123 of the principal Act, in sub-section (1),—

(i) after the words "for which the vehicle may be used", the words "or to the maximum number of passengers and maximum weight of luggage that may be carried on the vehicle" shall be inserted,

(ii) for the words "a subsequent offences if committed within three years of the commission of a previous similar offence", the words "any second or subsequent offence" shall be substituted,

(iii) in the proviso after the words "any such", the words "second or" shall be inserted

68. Insertion of new Section 123-A.

After Section 123 of the principal Act, the following section shall be inserted, namely —

Punishment of agents and canvassers without proper authority.

"123-A Whoever engages himself as an agent or canvasser in contravention of the provisions of Section 66-A or any rules made thereunder shall be punish-

able for the first offence with fine which may extend to one thousand rupees and for any second or subsequent offence with imprisonment which may extend to six months or with fine which may extend to two thousand rupees or with both.

Provided that no Court shall except for reasons to be recorded by it in writing impose a fine of less than five hundred rupees for any such second or subsequent offence."

69 Amendment of Section 124

In Section 124 of the principal Act for the words and figures Section 72 or of the conditions of any permit issued thereunder or in contravention of any prohibition or restriction imposed under Section 74 shall be punishable the words and figures Section 72 or of the conditions prescribed under that section or in contravention of any prohibition or restriction imposed under Section 72 or Section 74 shall be punishable shall be substituted

70 Amendment of Section 129 A

To Section 129 A of the principal Act the following proviso shall be added namely —

Provided that where any such officer or person has reason to believe that a motor vehicle has been or is being used without the permit required by section 11 of Section 4 he may instead of seizing the vehicle seize the certificate of registration of the vehicle and shall issue an acknowledgment in respect thereof

71 Amendment of Section 130

In Section 130 of the principal Act for sub-section (1) the following sub-section shall be substituted namely —

(1) The Court taking cognizance of an offence under this Act —

(i) may if the offence is an offence punishable with imprisonment under this Act and

(ii) shall in any other case state upon the summons to be served on the accused person that it —

(a) may appear by pleader and not in person or

(b) may by a specified date prior to the hearing of the charge plead guilty to the charge by registered letter and remit to the court such sum (not exceeding the maximum fine that may be imposed for the offence as the Court may specify

Provided that no fine in this sub-section shall apply to any offence specified in Part A of the Fifth Schedule

72 Insertion of new Section 131 A

After Section 131 of the principal Act the following section shall be inserted namely —

Courts to send intimations about conviction

131 A Every Court by which any person is a driving licence is convicted

of an offence under this Act or of an offence in the commission of which a motor vehicle was used shall send intimation to—

(a) the licensing authority which issued the driving licence and

(b) the licensing authority by whom the licence was last renewed and every such intimation shall state the name and address of the holder of the licence the licence number the date of issue and renewal of the same the nature of the offence the punishment awarded for the same and such other particulars as may be prescribed

THE CONSTITUTION (TWENTY THIRD AMENDMENT) ACT 1969 [A]

[23rd January 1970]

An Act further to amend the Constitution of India

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows —

1 Short title

This Act may be called the Constitution (Twenty third Amendment) Act 1969

2 Amendment of Article 330

In article 330 of the Constitution in sub-clause (b) of clause (1) for the words except the Scheduled Tribes in the tribal areas of Assam the words except the Scheduled Tribes in the tribal areas of Assam and in Nagaland shall be substituted

3 Amendment of Article 332

In article 332 of the Constitution in clause (1) for the words except the Scheduled Tribes in the tribal areas of Assam the words except the Scheduled Tribes in the tribal areas of Assam and in Nagaland shall be substituted

4 Amendment of Article 333

(1) In article 333 of the Constitution for the words nominate such number of members of the community to the Assembly as he considers appropriate the words nominate one member of that community to the Assembly shall be substituted

(2) Nothing contained in sub-section (1) shall affect any representation of the Anglo Indian community in the Legislative Assembly of any State existing at the commencement of this Act until the dissolution of that Assembly

5 Amendment of Article 331

In article 334 of the Constitution for the words twenty years the words thirty years shall be substituted

* Received the assent of the President on 23.1.1970. Act published in Gaz of Ind 23.1.1970 Pt II S 1 Ext p 1

For Statement of Objects and Reasons see Gaz of Ind 21.8.1969 Pt II S 2 Ext p 831

**VIOLATION OF S. 130 OF THE MOTOR VEHICLES ACT, 1939 AND
THE IMPACT OF A. I. R. 1969 S C 381 = 1969 CRI. L. J. 654 ON IT.**

(By G. V. R. PATNAIK, B.A., B.L., Advocate, P O Gunupur Dist. Koraput (Orissa)).

1. The rulling of the Hon'ble Supreme Court reported in AIR 1965 S C 1583 = 1965 (2) Cri L J 547 sets at rest the conflicting opinions of many a High Court regarding the interpretation of S. 130 (1) (a) and (b) of the Motor Vehicles Act, 1939 and it has said that the choice between S. 130 (1) (a) and S. 130 (1) (b) to be inserted in the notice lay with the court but not for the accused and the Magistrate is not bound to give both the alternatives in the notice to the accused for his choice and it went further that even in respect of offences not included in part A of Sch. 5 of the Act, notice need not be in S. 130 (1) (b) if the offence is a serious one for which a higher penalty than Rs. 25/- is deemed necessary. But this ruling imperatively lays down, that notice under S. 130 (1) (a) should invariably be given to the accused or alternatively under S. 130 (1) (b), if the offence is a minor one and not included in Part A. of Sch. 5 of the Act.

In consonance with this ruling, the Orissa High Court in AIR 1967 Orissa 66 = 1967 Cri L J 797 (by Justice R K Das) and in (1967) 33 Cut L T 9 (by Justice Misra as he then was) ruled that notice, under S. 130 (1) (a) invariably and notice under S. 130 (1) (b), if the offence is a minor one and not included in Part A. of Sch. 5 of the Act should be given to the accused, as otherwise, further proceedings would be illegal.

But the lower courts are seldom following the mandatory provision in the section and in the rulings and are issuing notices in general form, directing the accused persons to appear in person, as otherwise, the other consequences would follow. Some Magistrates after issuing notices in general form are insisting on the presence of the accused to furnish bail bonds, besides requiring them to appear to give statements under S. 342, Criminal P. C., after the SC judgment reported in AIR 1969 S C 381 = 1969 Cri L J 654, as the said ruling did not except the Motor Vehicles Act, 1939 specifically.

The ruling AIR 1969 S C 381 = 1969 Cri L J 654 did not give a long list of Acts under which the accused can be represented by a lawyer and the cases in which he can be examined under S. 342, Criminal P. C. but by using the general words, 'Exceptional Cases apart' (Para 11) it

left the door open for the examination of the lawyer under S. 342, Criminal P. C. in cases of trivial nature and definitely laid down that the personal examination of the accused is also not necessary, where there is no incriminating evidence, requiring him to explain personally. Even in that very ruling, the examination of the lawyer for the accused was approved as such examination did not prejudice the accused.

All that this ruling emphasises is that in serious cases, the accused only can be examined under S. 342, Criminal P. C. to explain the incriminating circumstances appearing in evidence against him. This is no doubt highly essential in cases of serious type.

As far back as in 1953 C. J. Lingaraj Panigrahi of the Orissa High Court laid down that if the personal attendance of the accused is dispensed with under S. 205, Criminal P. C. his lawyer representing him can be examined under S. 342, Criminal P. C. (Vide 19 Cut L T 397 = A I R 1954 Orissa 65 = 1954 Cri L J 360).

The ruling reported in AIR 1968 Delhi 202 also goes to show that in summons case, where personal appearance of the accused is dispensed with, his personal examination is not necessary and the examination of the accused's lawyer is permissible.

It is most unfortunate that the attention of the S C Justices was not drawn to these rulings, when the phrase 'Exceptional cases apart' would have been amplified to exempt specifically many of the minor cases for examination of the accused personally.

The Motor Vehicles Act, 1939 being a special Act, prescribing special procedure of representation, with the omission of provision to compel the presence of the accused later on under S. 130 (1) of the Act, it overrides the general procedure laid down in Ss. 205 and 510(A) of the Criminal P. C. which is a general Act. Hence if clarification of the ruling AIR 1969 S C 381 = 1969 Cri L J 654 is made thereby excluding many minor cases from its purview regarding permission to the accused's lawyer for examination on his behalf under S. 342, Criminal P. C. and if

the lower courts are directed to issue notices in terms of the S 130 (1) of the Motor Vehicles Act 1939, as notices that are being issued are illegal and contrary to the law laid down much of the delay in the disposal of the cases under Motor Vehicles Act 1939 can be minimised. As the representation of the lawyer on behalf of the accused continues till the end he can safely be examined under S 312 Criminal P C in place of the accused specially in summons cases and in case of fine or acquittal the law permits the re-

presenting lawyer to hear Judgment and take further steps and in case it is a case of committal to jail substantively or in default of payment of fine the accused personally can be made amenable to the processes of the Court. Much of the confusion that arose after the pronouncement of the Judgment reported in AIR 1969 SC 331=1969 Cri L J 654 can be banished if instructions clearing the position of the law correctly are issued to the lower courts as they feel bound to apply the said ruling even in trifling prosecutions.

REPLY TO QUESTIONNAIRE ON INDIAN PENAL CODE

Issued by the Joint Secretary and Legal Advisor Government of India New Delhi and published in A I R January 70 Journal Section and also in 1970 Cri L J January

(By B N CHORZ Senior Advocate S C Hyderabad)

1 Yes This is outstanding weakness of the Code Section 4 shall be framed so as to include Government employees of alien races outside India

2 Not those enumerated in the draft whipping should be re-introduced For all Ministers and other Officers confiscation of property should be the normal necessary punishment

3 No change

4 Life imprisonment is understood as (30) years until it was explained by the Supreme Court The old 30 year maximum should be restored

5 Offences against life and property due to negligence of Government employees should be visited with double amount of punishment now prescribed

6 Yes And confiscation

7 Yes That was the law in Ancient India.

When any one threatens to fast to death or immolate himself and breach of communal peace is threatened the man should be immediately removed from the State to be tried and sentenced to death

8 No

9 (a) No

(b) No

10 No

11 No Sections 52-53 are sufficient

12 (a) No

(c) He deserves punishment all the same.

13 No change is necessary

14 No change is necessary

15 Yes If for political purposes the abettor should get a death sentence

16 Yes

17 Yes Loss or destruction of public property communal disturbances general strikes

18 No

19 No

20 Yes

21 (a) Yes

(b) Yes for fourteen years R I

22 No If committed in public places the punishment should be double

23 (a) No

(b) No exception can be made

24 (a) Yes

(b) men and women are both liable under Hindu Law The British changed it with drastic effect

25 (a) Yes

(b) No

26 The society is undergoing change No uniform law could be enforced at this stage without creating further trouble

27 None

28 Sections 197 197A 195B Criminal P C should be repealed

from the possession of Sardara Singh established an important link, connecting him with the alleged crime. Learned Deputy Government Advocate also urged that the statements of the eye-witnesses Mst Punjab Kaur, P.W. 2, and Mukhtiar Singh, P.W. 4, get support from the post-mortem report of Lal Singh, Ex. P-17, and that of Jagtar Singh, Ex. P-18, proved by Dr G S Grewal, P.W. 3, as also from the first information report Ex. P-1 lodged by P.W. 2 soon after the occurrence and that evidence ought to have been held enough for the conviction of the accused.

(Their Lordships after discussing evidence in Paras 5 and 6 proceeded)

7. Here we may also point out that contradictory statements at various stages of the case not only affect reliability, but also create serious difficulties for the court to arrive at the truth. If the contradictory statements are not explained in a reasonable manner and have been made deliberately and motivated by improper and ulterior consideration, they run the risk of being completely ignored. In the instant case we do not find any reasonable explanation for the varying and inconsistent versions given by the two eye-witnesses as mentioned above. Their mere denial that they did not make such statements is not enough. Thus, considering the contradictory statements of the two eye-witnesses, we do not feel safe in arriving at the conclusion that the two witnesses did actually see the happening. In our opinion, the trial Court was perfectly justified in brushing aside the testimony of the two witnesses, who apparently were not truthful, besides being inimically disposed towards the accused. It is, no doubt, a matter of regret that foul cold-blooded and cruel murders of two persons have taken place. There may be an element of truth in the prosecution story against the accused persons. But considering as a whole, the prosecution story may be true, but unless there is a definite, positive, legal, unimpeachable and reliable evidence, the accused, in a serious case like this, cannot be convicted. In a criminal case, mere suspicion, however strong, cannot take the place of proof.

8. There is another very strong reason why the statements of the aforesaid two witnesses should not be considered as unimpeachable. Both the eye-witnesses have admitted that their statements were recorded not only by the Investigating Officer but by a senior police officer Deputy Superintendent of Police. In the course of cross-examination learned counsel for the accused prayed that copies of such statements be supplied to him, but that was not done. The provisions relating to recording of statement of witnesses and supplying of the copies provide a

valuable safeguard to the accused, so that they may be utilised at the trial for preparing effective defence. Such a request cannot be normally whittled down. Where the circumstances are such that the court may reasonably infer that prejudice has resulted to the accused from the failure of supplying of the copies of the statements recorded under S 161, Cr. P.C., the court is justified in directing that the conviction should be set aside. In this connection a reference is made to *Noor Khan v State of Rajasthan*, AIR 1964 SC 286. The object of Ss 162, 173(4) and 207-A (3), Cr. P. C., is to enable the accused to obtain a clear picture of the case against him. The sections impose an obligation upon the prosecution agency to supply copies of the statements of witnesses who are intended to be examined at the trial to enable the accused to utilise them in the course of cross-examination to establish such defence as may be desired to put up and also to shake the testimony of the witnesses. The object, in other words, is to give to the accused fullest information in possession of the prosecution on which its case is based. In the instant case, keeping in view the nature of the testimony of the two material witnesses, we feel that refusal to supply copies of their statements, recorded by the Deputy Superintendent of Police, has naturally caused prejudice to the accused.

9. Two blood-stained clothes, shirt Ex. 1 and Gamcha Ex. 2, were recovered from the possession of the accused Sardara Singh under the memo Ex. P-9. According to the Chemical Examiner's report they were positive for blood vide Ex. P-26. The Serologist and Chemical Examiner to the Government of India has also reported (Ex. P-27) that these clothes were stained with human blood. The clothes were seized by the Police on June 18, 1964. The articles were received by the Chemical Examiner through Meghram, Constable No. 997, Police Station, Kesharsinghpura, with letter No. 7431 dated August 18, 1964, on October 12, 1964, that is about 4 months after the occurrence. No reasonable explanation is forthcoming why such an inordinate delay was caused in despatching the articles to the Chemical Examiner. It has also not been explained that when the forwarding letter for sending the articles had been prepared on August 18, 1964, why it was not actually sent upto October 11, 1964. We have already examined the material evidence produced by the prosecution and have come to the same conclusion as the trial Court as regards the credibility of the eye-witnesses.

We have already held that the contradictions and discrepancies in the statements of the two witnesses are so glaring and so significant that it is almost impos-

sible to believe that the two witnesses saw anything of importance. The only point that remains to be considered is as to whether in evidence of recovery of the blood stained articles is enough by itself to justify the conviction of the accused. We do not think it is. The recovery of the blood stained articles can be used to corroborate other evidence. It cannot by itself prove the case of the prosecution. It is possible to imagine on many an occasion whether the mere discovery of a blood stained article is due to something other than murder for instance concealing the dead body, or receiving from the real murderer a blood stained article and so on. It is therefore impossible to say that mere discovery of a blood stained article is enough by itself to justify a conviction for murder.

10 Learned counsel for the accused pointed out that the reports of the Chemical Examiner and the Serologist were not read to the accused Sardara Singh in the course of his examination under Section 342 Cr P C and that has caused a serious prejudice to him. In this connection, it may be stated that a specific question was put to the accused Sardara Singh in regard to the clothes Exs 1 and 2 to which his answer was that the clothes no doubt belonged to him but he had nothing to say in regard to the blood stains on them. Where the accused is represented by a counsel at the trial and in an appeal it is upto the accused or his counsel in such cases to satisfy the court that such inadequate examination has resulted in the miscarriage of justice. If the counsel is unable to say how his client had been prejudiced and if all that he could urge is that there was a possibility of prejudice having been caused to his client that alone is not enough. It cannot be said as a matter of law that the non examination or inadequate examination under S 342 Cr P C must be presumed to have caused prejudice. The question of prejudice is a matter of inference based on facts and the surrounding circumstances in each case. Learned counsel before us could not bring out a clear prejudice.

In this case Sardara Singh knew what the accusation against him was. He also knew that blood stained clothes were produced by the prosecution in the trial Court. He offered an explanation in regard to the blood stain marks. There is therefore no justification for supposing that there had been any prejudice caused to Sardara Singh on account of improper or insufficient recording of his statement by the Sessions Judge under S 342 Cr P C. The examination of the accused person under S 342 Cr P C is intended to give him opportunity to explain any circumstance appearing in the evidence again. It is the ultimate test in deter-

mining whether or not the accused has been fairly examined under S 342 Cr P C is to infer whether having regard to all the questions put to him he had had an opportunity to say what he wanted to say in respect of the prosecution case against him. Here the accused was given an opportunity to explain how blood stain marks appeared on his clothes and therefore omission of the specific question in the examination of the accused under S 342 Cr P C in regard to Chemical Examiner's report and the Serologist's test to our minds has not resulted in causing any prejudice to the accused. A reference in this connection may be made to *Moeb Kafa Chowdhury v State of West Bengal* AIR 1956 SC 536.

11 The statements of the two eyewitnesses Mst Punjab Kaur PW 2 and Mukhtiar Singh PW 4 elicit that Arjun Singh arrived at the scene of the occurrence at the time of or soon after the crime. So was the case with Sohan Singh and Sukina. Mst Punjab Kaur has also deposed that she mentioned the names of the accused to Mulha Singh soon after the occurrence. None of these witnesses has been produced by the prosecution. In murder case the prosecutor is expected to act fairly and honestly and must not withhold material witnesses simply for the reason that their evidence is likely to go against him. It is no doubt open to the prosecutor not to examine witnesses who in his opinion have not witnessed the incident but normally he has to examine all the eye witnesses in support of his case. Where as here it is disclosed that material witnesses have been deliberately withheld the court is justified in drawing an inference against the prosecution and may hold that omission to examine such witnesses constitutes a serious infirmity vide *Darya Singh v State of Punjab* AIR 1963 SC 327.

12 In an appeal by the State Government under S 417 Cr P C against the acquittal it is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the finding of the trial Court was not sound. If it is found that the trial Court adopted a reasonable course and took a plausible view of the matter interference under S 417 Cr P C is not justifiable. The reason is manifest. There are two important factors in every criminal case which have to be kept in view in favour of an accused person. One is that the accused can always claim benefit of reasonable doubt and the other is that when an accused person offers a reasonable explanation of his conduct then even though his defence is not satisfactorily proved it ought normally be accepted unless circumstances warrant that it is false. On a careful examination of the evidence

and the circumstances of this case we are not satisfied that there exist strong and compelling reasons to set aside the finding of acquittal

13. In the result, this appeal, having no force, stands dismissed. The accused are on bail. They need not surrender to their bail bonds

Appeal dismissed.

1970 CRI. L. J. 563 (Vol. 76, C. N. 132) =

AIR 1970 ASSAM & NAGALAND 49

(V 57 C 10)

P. K. GOSWAMI

AND M. C. PATHAK, JJ.

Maniram Gunju, Petitioner v. The State of Assam, Opposite Party.

Criminal Revn No. 159 of 1965, D/- 6-5-1969, against Judgment of Addl. S. J. L. A. D. Nowgong, D/- 28-9-1965.

Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963), Ss. 4, 3A (1963), 3A (1956) and 2 (3) — 'Liquor' — Offence under S. 4 for consuming liquor — Burden of proof — State of drunkenness established by prosecution — Presumption under S. 3A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of S. 3A (1956) and S. 3A (1963) stated — (Evidence Act (1872), S. 106).

Section 3A as inserted in 1963 has introduced a rule of evidence by which a person who is found in a state of drunkenness shall be presumed to have consumed liquor within the prohibited area. This is, of course, a rebuttable presumption. Once the prosecution establishes by evidence to the satisfaction of the Court that the accused was found in a state of drunkenness, the prosecution can rely on the presumption and it is then up to the accused to rebut the presumption. Where the accused has not submitted any explanation, there is nothing wrong in invoking the presumption under S. 3A (1963) and the accused must be held to have consumed liquor within the prohibited area. Case law discussed

(Paras 6, 11)

Under the Act with the definition of 'liquor' as amended and introduction of S. 3A (1956) and in view of presumption under S. 3A (1963), S. 106 of Evidence Act may be justifiably called in aid to tackle such a case. If the accused was in a state of drunkenness showing signs and manifestations supporting that state, the prosecution will be at a great disadvantage to establish as to what parti-

cular things the accused had taken which led him to that state. It will be certainly especially within the knowledge of the accused as to what he had already taken for which he was found in that state by the witnesses. (Para 9)

Liquor under the definition includes all liquid consisting of or containing alcohol and at the same time toilet or medicinal preparations etc. containing alcohol which are unfit for use as intoxicating liquor are excluded from the definition separately under section 3A (1956). 'section 3A (1956) is not an exception, but has explained what liquid containing alcohol will be excluded from the general definition of liquor after the deletion of the Explanation. Section 3A (1956) clearly suggests that but for this exclusion the definition of liquor would include the articles mentioned in this section. Case law discussed. (Paras 4, 6)

Dealing with the prosecution for offences under Section 4 for violating the provisions of section 3 of the Assam Act, so far as import, transport or possession, selling, or buying or manufacture of liquor is concerned, the prosecution has to satisfy the Court that the liquor which is produced in Court is intoxicating liquor and contains alcohol and is not excluded by the provisions contained in Section 3A (1956). The onus is entirely on the prosecution to establish the offence, which includes proof of the incriminating article as liquor within the meaning of the Act and that the same is not unfit for use as intoxicating liquor, as described under Section 3A (1956). Mere introduction of section 3A (1956) separately under the Act after deletion of the explanation in the original definition would not have the effect of shifting the onus in this matter on the shoulders of the accused. However so far as the offence of consumption of liquor is concerned the position has become different after the introduction of S. 3A in 1963. (Para 8)

Case law discussed: Observation in AIR 1967 Assam 56 with regard to S. 3A (1963) that it is otiose and completely unnecessary, held obiter and not followed

(Para 6)

Cases Referred: Chronological Paras

- | | |
|--------------------------------------|------|
| (1968) Criminal Revn. No. 65 of 1965 | |
| D/- 29-2-1968 (Assam) | 11 |
| (1967) AIR 1967 Assam 56 (V 54) = | |
| 1967 Cri LJ 1099, Harendra Nath | |
| Das v. State of Assam | 5, 6 |
| (1967) Criminal Revn. No 170 of 1964 | |
| D/- 2-8-1967 (Assam) | 11 |
| (1966) AIR 1966 SC 722 (V 53) = | |
| 1966 Cri LJ 597, Ratanlal v. State | |
| of Maharashtra | 4 |
| (1964) AIR 1964 Andh Pra 429 | |
| (V 51) = 1964 (2) Cri LJ 271, | |
| Madiga Boosenna. In re | 5 |

- (1962) AIR 1962 SC 579 (V 49)=
1962 Supp (1) SCR 15=1962 (1)
Cri LJ 512 State of Bombay v
Narandas Mangal Agarwal 4
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Ajmer 9
(1955) AIR 1955 SC 123 (V 42)=
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shid Pesikaka v State of Bombay 5 6
(1951) AIR 1951 SC 318 (V 38)=
52 Cri LJ 1361 State of Bombay
v F N Balsara 4 6
(1910) 55 L Ed 191=219 US 219
Bailey v Alabama 10
(1910) 55 L Ed 78=219 US 35
Mobile J & K CR Co v Turnip
Seed 10

S N Bhuyan, for Petitioner D C
Goswami as Public Prosecutor for State

GOSWAMI J — This Criminal revision is directed against the petitioner's conviction under Section 4 of the Assam Liquor Prohibition Act for consuming liquor in the prohibited area and sentence of three months rigorous imprisonment and a fine of Rs 100/ in default one month's rigorous imprisonment

2 Briefly the prosecution case is that on the night of 22nd of March 1964 at about 9 P M the accused petitioner was found in a drunken state at the platform of Jakhlabandha Railway Station. He was caught by the Excise staff and then produced before the Medical Officer at Silghat Dispensary who examined him then and there and found as follows

- (1) Smell of alcohol in breath found
- (2) Conjunctiva congested
- (3) Gait unsteady
- (4) Speech incoherent."

In the opinion of the doctor the accused took alcohol in sufficient quantity as to make him intoxicated

3 The accused pleaded not guilty to the charge and stated that he did not take liquor. The learned Magistrate examined the doctor and two Excise officials. The accused did not adduce any evidence. The learned Magistrate relying on the evidence of the prosecution convicted the accused and the learned Additional Sessions Judge on appeal affirmed the conviction.

4 The State Legislature of Assam passed the Assam Liquor Prohibition Act (Assam Act I of 1953) hereinafter called the Act. In 1953 this Act has since been amended. The preamble of the Act shows that it was passed in order to prohibit consumption and manufacture of liquor in and smuggling thereof into the Sub-division of Barpeta and in other areas of the State as may be necessary from time to time. The Act has since been extended to other areas and it is not disputed that the place where the offence is said to have been committed in this

case is within the prohibited area. This Act has since been amended by four successive Acts namely Assam Act XXXI of 1953 Assam Act XIII of 1956 Assam Act XIX of 1956 and Assam Act XI of 1963 and we will describe them hereinafter as the first second third and fourth amendment respectively. The definition of liquor is given under Section 2 (3) and it has been amended under the second and third amendments. The third amendment besides deleting the Explanation inserted new Sections 3-A 3-B and 3-C. In the fourth amendment inter alia another Section 3-A is added regarding presumption as to the State of drunkenness. Section 3-A in this amendment is not numerically correct as there had already been a Section 3-A introduced in the third amendment. We will therefore refer to this section as Section 3-A (1963) and the earlier Section 3-A as Section 3-A (1956) to avoid confusion. The original definition of liquor under Section 2 (3) runs as follows

"Liquor" means any intoxicating liquor and includes all liquid consisting of or containing alcohol also tari and pachwai in any form and any substance which the State Government may by notification declare to be liquor for the purposes of this Act

Explanation.— This definition shall not apply to any toilet preparation or medicine containing alcohol

This definition as it stands after the amendments reads as follows

"Liquor" means any intoxicating liquor and includes all liquid consisting of or containing alcohol also Tari containing alcohol and Pachwai in any form and any substance which the State Government may by notification declare to be liquor for the purpose of this Act

Explanation. — Tari in an unfermented stage is not included within the term liquor and is exempted from the operation of this Act."

By the third amendment as noted earlier the following new sections were inserted

3A. Provisions of the Act not to apply to certain articles.— Nothing in this Act shall be deemed to apply to—

(1) Any toilet preparation containing alcohol which is unfit for use as intoxicating liquor;

(2) Any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor

(3) Any antiseptic preparation or solution containing alcohol which is unfit for use as intoxicating liquor

(4) Any flavouring extract essence or syrup containing alcohol which is unfit for use as intoxicating liquor

3B Board of Experts.— (1) For the purpose of determining whether any of the preparations mentioned in 3-A is fit or

likely to be used as intoxicating liquor the State Government shall constitute a Board of Experts

(2) ** **

(3) It shall be the duty of the Board to advise the State Government on the question of whether any article or preparation containing alcohol is fit for use as intoxicating liquor and on such other matters incidental thereto as may be referred to it by the State Government

3C Restrictions on use of medicinal and toilet preparations. — On the advice of the Board constituted under Section 3A, the State Government may by notification in the official Gazette declare any such preparation to be liquor within the definition of the Act and thereupon the State Government may, notwithstanding anything contained in any other provision of the Act, impose such restriction and in such manner as may be prescribed.

By the fourth amendment, an important Section 3A has been introduced which we will, as stated earlier, describe as Section 3A (1963).

"3A Presumption as the (sic) state of drunkenness — Whenever any person is found in a state of drunkenness within a prohibited area, the Court shall presume that the person has consumed liquor within the prohibited area"

The result is that medicinal and toilet preparations containing alcohol which are unfit for use as intoxicating liquor, are excluded from the provisions of the Act. But if on the advice of the Board of Experts to the effect that such articles containing alcohol are fit for use as intoxicating liquor, the Government may declare such preparation to be liquor within the meaning of the Act and it may also impose such restrictions as may be necessary.

It is thus clear that liquor under the definition includes all liquid consisting of or containing alcohol and at the same time toilet or medicinal preparations etc containing alcohol which are unfit for use as intoxicating liquor are excluded from the definition separately under Section 3A (1956)

Broadly speaking there are the following prohibitions under the Act which may be grouped under two categories. Firstly, no person shall import, transport, possess, sell or buy or manufacture liquor, use or keep any material for manufacture of liquor. These prohibitions are subject to condition for the issue of license under Section 21. The second category is that no person shall consume liquor except on a prescription from a registered medical practitioner. This prohibition is in terms conditional. Section 20 provides for permit for use or consumption of foreign liquor on certain conditions. So far as the first category is concerned, it is ap-

parent that the liquor must be produced in court in order to satisfy it that what is produced is liquor within the meaning of the Act. To illustrate, prior to the third amendment, suppose some liquid is produced in Court as liquor by the prosecution, it has to establish that the liquid produced is intoxicating liquor or contained alcohol and that it is not toilet or medicinal preparations containing alcohol. After the third amendment also, prosecution has to establish in addition to the above that what is produced in Court is not toilet or medicinal preparation etc containing alcohol which is unfit for use as intoxicating liquor. Under Section 3C on the advice of the Board of Experts to the effect that such articles are fit for use as intoxicating liquor, Government may declare such toilet, medicinal or other preparations mentioned in Section 3A as liquor within the definition of the Act and impose such restrictions as may be prescribed. Our attention has not been drawn to any such declaration by the Government. Assuming there are some articles declared as liquor, the prohibitions of the Act will apply. But if there is no such declaration by the Government, it cannot be assumed that all such articles mentioned in Section 3A are unfit for use as intoxicating liquor in absence of proof to that effect. While dealing with the expression "unfit for use as intoxicating liquor" appearing in the Bombay Prohibition Act, in AIR 1962 SC 579, the Supreme Court observed as follows (Naran Das's case)

"Again the preparation even if it is medicinal, toilet, antiseptic or flavouring must be unfit for use as intoxicating liquor i.e., it must be such that it must not be capable of being used for intoxication without danger to health. If the preparation, may be consumed for intoxication, it would still not attract the application of Sec. 24A provided the intoxication would not be accompanied by other harmful effects. A medicinal preparation which may, because of the high percentage of alcohol contained therein, even if taken in its ordinary or normal dose intoxicate a normal person, would be regarded as intoxicating liquor. The medicinal preparation containing a small percentage of alcohol may still be capable of intoxicating if taken in large quantities but if consumption of the preparation in large quantities is likely to involve danger to the health of the consumer, it cannot be regarded as fit for use as intoxicating liquor."

It will be useful to have a look at the Bombay Prohibition Act, 1949, some of the provisions of which were declared invalid by the Supreme Court in Balsara's case, AIR 1951 SC 318. For example, un-

like the definition of this term in the original Assam Act with the Explanation excluding toilet preparation or medicine containing alcohol there was no such exclusion in the Bombay definition Fazl Ali, J who delivered the judgment of the Court, summarised his conclusions as follows:

In the result I declare the following provisions of the Act only to be invalid

(1) Clause (c) of Section 12 so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol

(2) Clause (d) of Section 12 so far as it affects the selling or buying of such medicinal & toilet preparations containing alcohol

(3) Clause (b) of Section 13 so far as it affects consumption or use of such medicinal and toilet preparations containing alcohol

Section 2(24) of the Bombay Act defines Liquor as including

(a) Spirit of wine methylated spirits wine beer and toddy and liquids consisting of or containing liquor and

(b) any other intoxicating substance which the Provincial Government may by notification in the Official Gazette declare to be liquor for the purposes of this Act

The Act thereafter had to be amended by the Bombay Amendment Act 26 of 1952 which added amongst others Section 24A which without the two provisions in the Bombay Act corresponds to Section 3A of the Assam Act introduced by the third amendment. Another section was also introduced by the same amendment in the Bombay Act namely Section 6A of which Section 6A(1)(a) (b) and (c) materially correspond to Section 3B(1) of the Assam Act. Section 6A(2) materially corresponds to Section 3B(2) of the Assam Act. Section 6A(6) has two parts and the first part materially corresponds to Section 3B(3) and the second part in the Bombay Act introduces a presumption which is absent in Section 3C of the Assam Act.

In the above Naran Dass case AIR 1962 SC 579 (Supra) while dealing with the burden of proof the Supreme Court observed as follows:

It was for the State to prove that the substance seized if a medicinal preparation was not unfit for use as intoxicating liquor. The State has even under the Prohibition Act to establish that the respondent has infringed the provisions contained in Sections 12 and 13 (which materially correspond to Section 3 of the Assam Act). Undoubtedly by virtue of Section 24A the prohibitions do not apply to certain categories of toilet medicinal or Lepic and flavouring preparations. Even if they contain alcohol but on that ground the burden lying upon

the State to establish in any given case in which it is alleged that the accused has infringed the provisions contained in Sections 12 and 13 that the infringement was not in respect of an article or preparation which was covered by Section 24A is not shifted on to the shoulders of the accused. Section 24A is in substance not an exception. It takes out certain preparations from the prohibitions contained in Sections 12 and 13. But the operation of Section 24A does not extend to all medicinal toilet antiseptic or flavouring preparations containing alcohol even if the preparation is a toilet medicinal antiseptic or flavouring preparation if it is fit for use as intoxicating liquor the prohibitions contained in Sections 12 and 13 will apply.

To summarise in view of the relevant provisions of the Bombay Prohibition Act, which we have noticed above as they stood prior to the amendment of Section 6A(6) and in relation of sub-section (7) therein by the Bombay Act 22 of 1960 the Supreme Court held that in a prosecution for offences for import and possession of liquor under Section 65(a)(1) and 66(b)(1) of the Bombay Act (which materially correspond to S 4 of the Assam Act) the State had to prove that the substance seized if a medicinal preparation was not unfit for use as intoxicating liquor and that the accused had infringed the provisions contained in Sections 12 and 13.

In the next case reported in AIR 1966 SC 722 the same question came up for decision. After the amendment of Section 6A(6) and insertion of sub-section (7) therein by Act 22 of 1960 the Supreme Court gave effect to the presumption raised under sub-section (7) Sub-section (7) of Section 6A of the Bombay Act reads as follows:

Until the State Government has determined as aforesaid any article mentioned in sub-section (1) to be fit for use as intoxicating liquor every other article shall be deemed to be unfit for such use.

The Supreme Court therefore found that by the amendment of Section 6A and by insertion of sub-section (7) therein there remained only one mode of proof regarding an article which is fit for use as intoxicating liquor and that is by obtaining the advice of the Board of Experts and recording its determination that the article is fit for use as intoxicating liquor and until so determined every article mentioned in sub-section (1) of Section 6A is to be deemed as unfit for use as intoxicating liquor. This presumption under Section 6(7) however has been held to be rebuttable. After this amendment in the Bombay Act in 1960 therefore there was no onus on the accused to establish that he has possessed or

consumed medicinal or toilet preparation, which is unfit for use as intoxicating liquor as he can now rely on the presumption under sub-section (7) in absence of a determination by the Government that the particular articles are fit for use as intoxicating liquor. The law as it stood after the amendment clearly enables the accused to rely on the presumption and unless it is rebutted by the prosecution, it will be deemed in law that a medicinal or toilet preparation possessed by the accused is unfit for use as intoxicating liquor, and in that view of the matter, the Supreme Court set aside the conviction of the accused in the above decision. The Supreme Court has noticed that the Bombay High Court in this case relied on the earlier decision of the Supreme Court in Naran Das's case, AIR 1962 SC 579 (Supra) having lost sight of the amendment of the Act in 1960, and indeed in the aforesaid case the effect of sub-section (7) of Section 6A did not fall to be considered. This is the position under the Bombay Act.

We may now read Section 3 of the Assam Act—

"3. Prohibition. No person shall —

- (1) import, transport or possess liquor,
- (2) sell or buy liquor,
- (3) consume liquor except on a prescription from a registered medical practitioner,
- (4) manufacture liquor; and
- (5) use or keep any material, utensil, implement or apparatus whatsoever for manufacture of liquor."

Section 4 after the fourth amendment, omitting the proviso, which is not material for our purpose, stands as follows—

"4. Punishment for contravention. Whoever contravenes the provisions of Section 3 of this Act, shall be punished with imprisonment for a term which may extend to two years but not less than three months and also with fine which may extend to one thousand rupees but not less than one hundred rupees

** ***"

5. The learned Counsel submits that even if it be assumed that the accused consumed liquor, there is no evidence to establish that he consumed prohibited alcohol. His submission is that although the definition of liquor has undergone a change, the insertion of a new Section 3A (1956) excludes some type of liquor from the definition and in that respect the effect of the original definition continues in force although in another place in the same Act. He further submits that the presumption under Section 3A (1963) cannot relieve the prosecution of the duty to establish the offence charged. In this context he draws our attention to a decision of the Supreme Court in the case of Beharam Khurshid Pesikaka v State of

Bombay, reported in AIR 1955 SC 123, and relies on the following passage:—

"The High Court was in error in placing the onus on the accused to prove that he had consumed alcohol that could be consumed without a permit merely on proof that he was smelling of alcohol. In our judgment, that was not the correct approach to the question. The bare circumstance that a citizen accused of an offence under Section 66(b) is smelling of alcohol is compatible both with his innocence as well as his guilt. It is a neutral circumstance. The smell of alcohol may be due to the fact that the accused had contravened the enforceable part of Section 13 (b) of the Prohibition Act. It may well be due also to the fact that he had taken alcohol which fell under the unenforceable and inoperative part of the section. That being so, it is the duty of the prosecution to prove that the alcohol of which he was smelling was such that it came within the category of prohibited alcohols and the onus was not discharged or shifted by merely proving a smell of alcohol."

We should also read the following passage in the same decision:

'The onus thus cast on the prosecution may be light or heavy according to the circumstances of each case. The intensity of the smell itself may be such that it may negative its being of a permissible variety. Expert evidence may prove that consumption in small dose of medicinal or other preparations permitted cannot produce the smell or a state of body or mind amounting to drunkenness. Be that as it may, the question is one of fact, to be decided according to the circumstance of each case. It is open to the accused to prove in defence that what he consumed was not prohibited alcohol, but failure of the defence to prove it cannot lead to his conviction unless it is established to the satisfaction of the judge by the prosecution that the case comes within the enforceable part of Section 13(b), contravention of which alone, is made an offence under the provisions of Section 66 of the Bombay Prohibition Act."

Counsel also relies upon a decision of a Single Bench of this Court, in the case of Harendra Nath Das v State of Assam, reported in AIR 1967 Assam and Nagaland, 56. As seen from the original records of the case, the date of offence in this case was 21-8-61. Nayudu, C J relying upon the above mentioned Supreme Court decision and also the decision of the Andhra Pradesh High Court in the case of Madiga Boosenna, reported in AIR 1964 Andh Pra 429, held as follows.

"Having regard to the merits of the case, as none of the scientific methods

open to the prosecution to follow had been adopted they lost the opportunity of proving that liquor was present in the stomach contents of the petitioner or it got itself transferred into the urine and blood of the petitioner

'Having regard to the evidence in this case of the doctor who admits that symptoms are consistent with the conclusion that these have been produced by reason of the accused having taken some medicine containing alcohol the doubt which exists has remained unresolved and the accused is entitled to the benefit of doubt

Referring to the presumption under Section 3A (1963) the learned Chief Justice further observed —

When the question is whether a person has taken liquor to say that he should be presumed to have taken liquor because he was in a drunken state seems to be meaningless as it would amount to a sort of argument in a circle. This is particularly so when the meaning of the word 'state of drunkenness is not defined in the Act. If it is proved that a man is in a state of drunkenness it amounts to a proof that he has taken liquor and there is no more necessity of invoking the presumption of the Amending Act. This amendment in my opinion becomes otiose and completely unnecessary. Further if the invoking of this presumption under Section 3A of the Amending Act may be regarded as incapable then it would amount to countering the well known principle of criminal jurisprudence that the burden of proving the guilt of the accused in the case is on the prosecution and continues to be so until the guilt is established.

In *Harendra Dass* case AIR 1967 Assam 56 (supra) the accused being found within a prohibited area exhibiting symptoms of a person who had taken liquor was charged and convicted under Section 4 for contravention of Section 3(3) of the Act. As noted earlier the offence was committed on 21-8-61 that is, prior to the fourth amendment introducing a rule of presumption under Section 3A (1963). It was, therefore, not necessary in this case to consider the effect of Section 3A (1963). On the admission of the doctor in that case that the symptoms exhibited by the accused were consistent with taking of some medicine containing alcohol the accused was entitled to an acquittal since the question of raising the presumption under Section 3A (1963) did not at all arise. The observations of the learned Chief Justice with regard to Section 3A (1963) are therefore mere obiter and as will now hereinafter be seen we are unable with respect, to agree with the same.

6 Since the learned Counsel strenuously relies on *Harendra Dass* case AIR 1967 Assam 56 (supra) even for the purpose of dealing with the present case which arose after the fourth amendment we have to give our views on the two above-quoted points that were dealt with by the learned Chief Justice and also pressed before us. Firstly the learned counsel submits that the legal position has not been altered by Section 3A (1963) and that we should agree with the decision in *Harendra Dass* case AIR 1967 Assam 56 (supra) even in the present case. It is clear that Section 3A (1963) has definitely introduced a rule of evidence by which a person who is found in a state of drunkenness shall be presumed to have consumed liquor within the prohibited area. This is of course a rebuttable presumption. Once the prosecution establishes by evidence to the satisfaction of the court that the accused was found in a state of drunkenness the prosecution can rely on the presumption and it is then up to the accused to rebut the presumption. We are unable to agree with respect with the learned Chief Justice when he observed that Section 3A (1963) is otiose and completely unnecessary. This section was introduced in 1963 in the wake of the third amendment whereby the Explanation in the definition of liquor was deleted and new Sections 3A (1956) 3B and 3C were added. Although the Explanation was deleted the addition of Section 3A (1956) served the same object which had earlier been fulfilled by the Explanation. The Explanation in the definition made the provision prima facie immune from such constitutional objections as were raised against the provisions of the Bombay Prohibition Act 1949. Section 3A (1956) is not an exception but has explained what liquid containing alcohol will be excluded from the general definition of liquor after the deletion of the Explanation. Section 3A (1956) clearly suggests that but for this exclusion, the definition of liquor would include the articles mentioned in this section. With regard to a case prior to the fourth amendment the Act has defined the offence viz as consumption of liquor without a prescription from a registered medical practitioner. Prosecution is required under the law to establish the ingredients of the offence that is to say that the accused has consumed liquor and not one of the articles excluded under Section 3A (1956). Since section 3A (1956) is not an exception, there is no onus on the accused to prove that he comes under the exception. It is for the prosecution to prove that what the accused has consumed is liquor and that it does not come under the category of the articles mentioned in Section 3A (1956). The above would be the position

the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence is upon him and the court shall presume the absence of such circumstances

106 When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

In a case under the present Act with the definition as amended and introduction of Section 3A (1956) and in view of the presumption under Section 3A (1963) Section 106 of the Evidence Act may be justifiably called in aid to tackle a case involved in this revision petition. If the accused as has been held by the courts below was in a state of drunkenness showing signs and manifestations supporting that state the prosecution will be at a great disadvantage to establish as to what particular things the accused had done which led him to that state. It will be certainly especially within the knowledge of the accused as to what he had already taken for which he was found in that state by the witnesses.

Dealing with S 106 of the Evidence Act the Supreme Court in the case of *Shambhu Nath Mehra v The State of Ajmer* reported in AIR 1956 SC 404 observed as follows

Section 106 is an exception to Section 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word especially stresses that it means facts that are preeminently or exceptionally within his knowledge.

This does not however mean that the burden shifts from the prosecution to the accused but the latter has to satisfy the Court in order to rebut the presumption against him which the Court will be authorised to draw under Section 3A (1963).

10. The learned Counsel for the petitioner at one stage submitted that this will be doing violence to the well settled principles of criminal jurisprudence. We are however not impressed with that argument. In *Bailey v Alabama* (1910) 55 L Ed 191 (A) at p 200 Hughes J., who delivered the opinion of the Court, made the following observations:

"The Court has frequently recognised the general power of every Legislature to prescribe the evidence which shall be

received and the effect of that evidence in the Courts of its own Government.

In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue and where the inference is not purely arbitrary and there is a rational relation between the two facts and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue it has been held that such statutes do not violate the requirements of due process of law or a denial of the equal protection of the law.

In another case — *Mobile J & K C R Co v Turnipseed* (1910) 55 Law Ed 78 at p 80 the Supreme Court of the United States affirmed the same principle and held as follows

If a legislative provision not unreasonable in itself prescribing a rule of evidence in either criminal or civil cases does not shut out from the party affected a reasonable opportunity to submit to the jury in his defence all of the facts bearing upon the issue there is no ground for holding that due process of law has been denied to him.

We are clearly of the opinion that there is nothing wrong in invoking the presumption under Section 3A in the particular circumstances of the case and in absence of any explanation from the accused we are satisfied that the evidence establishes a state of drunkenness of the accused and the conviction under Section 4 of the Act is fully justified.

11. Mr Bhuyan also drew our attention to an unreported decision of my learned brother Pathak J in Criminal Revision No 63 of 1963 disposed of on 29.2.1968. It was held in that case that the state of drunkenness was not proved by the prosecution in order to enable them to avail of the presumption under Section 3A. This decision does not assist the learned counsel in throwing out the presumption when the state of drunkenness is established by the prosecution and the accused has not submitted an explanation. His Lordship was not prepared to hold from the outward symptoms found in that case that the state of drunkenness was established.

The learned counsel also referred to another unreported decision of mine in Criminal Revision No 170 of 1961 disposed of on 2.8.1967. That was a case in which the accused was a tea stall owner and was charged for possession of liquor which was found in the dregs of one or two glass tumblers of his tea stall. There was no question of presumption under Section 3A (1963) in that case and this Court was not prepared to hold that the accused on the state of evidence as disclosed could be guilty of possession of

liquor. In the instant case, it cannot be said that from the evidence of the three prosecution witnesses including the doctor, the Courts below erred in law in holding that the accused was found in a state of drunkenness on the Railway Platform at Jakhlabandha Railway Station which is within the prohibited area. According to the doctor, he found in the breath of the accused smell of liquor, his conjunctiva was congested, gait unsteady and speech incoherent. According to him, he took sufficient quantity of alcohol. The doctor stated in cross-examination that the accused was very unsteady and that degree of unsteadiness cannot come when one becomes tried. He also stated that if an alcoholic tonic is taken to the extent of 2/3 bottles, a man can become unsteady. P W 2 also stated that he found the accused in a drunken state. The third witness also stated that he found the accused in a drinking state. The accused was not normal and his mode of speaking was also not normal. It is, therefore, clear from the prosecution evidence and particularly from the evidence of the doctor that the accused was in a state of drunkenness and that being so, he must be held to have consumed liquor within the prohibited area in absence of any explanation from him.

12. In the result, the conviction as well as the sentence are upheld and the petition is dismissed.

13. M. C. PATHAK, J.:— I agree.

Petition dismissed

1970 CRI. L. J. 571 (Vol. 76, C N. 133) =
AIR 1970 CALCUTTA 167 (V 57 C 25)

R N DUTT AND A P DAS, JJ

Superintendent and Remembrancer of Legal Affairs, West Bengal, Appellant v. Prohlad Agarwalla, Respondent

Govt Appeal No 14 of 1962, D/- 20-6-1969

Essential Commodities Act (1955), Ss. 3, 7, 5 — Iron and Steel (Control) Order (1956), Para. 14 (2) — Order under S 3 — Contravention of direction contained in notification issued under para 14(2) of Order — It is not contravention of provisions of Order and so not punishable under S. 7.

A person can be convicted under S 7 of the Essential Commodities Act, 1955, only when it is proved that he has contravened any 'order' made under S 3 of the Act. When there was a contravention of a direction given under the notification made by the Controller in exercise of the powers given to him under paragraph 14(2) of the Iron and Steel (Control) Order, 1956 which was made

under S 3 of the Act and the direction was not a direction contained in the order but that was a direction contained in the notification, the contravention of the direction could not be said to be the contravention of a provision of the Order.

(Para 5)

The notification made by the Controller was not an Order under S 3. Firstly, there was no notified Order made by the Central Government under S 5 of the Act directing the Controller to make an Order under S 3. If the Central Government is to delegate its power to make an order under S 3 to some Officer, it has to make a notified Order under S 5. Secondly, the notification itself showed that it was not an Order under S 3 but it was just a direction to the stockholders in exercise of the powers to the Controller under paragraph 14 (2) of the Order. The Controller did not say that he was making the order by virtue of powers under S 3 on the basis of a delegation made by the Central Government under S 5.

(Para 6)

An Order under S 3 can be made by the Central Government. The Central Government made such an Order, i.e., Order of 1956 Paragraph 14 of the Order no doubt authorised the Controller to make certain directions but those directions do not relate back to the Order or form part of the Order under S 3 because that would involve double delegation of legislative power not authorised by Parliament.

(Para 7)

Furthermore, contravention of the provisions of paragraph 12(1) of the Order is punishable under S 7. But paragraph 14 (2) does not require the stockholder to do a particular thing. Therefore, contravention of a direction contained in a notification issued under paragraph 14(2) of the Order is not a contravention of the provisions of the Order and so is not punishable under S 7.

(Para 8)

Pitri Bhushan Burman, for Appellant; Ajit Kumar Dutt and J P Sribastava, for Respondent

R. N. DUTT, J.:— The respondent was tried by a Magistrate under Section 7 of the Essential Commodities Act convicted and sentenced to a fine of Rs 51, in default to rigorous imprisonment for three weeks. The respondent thereafter made an appeal and the Sessions Judge set aside the conviction and sentence and acquitted the respondent. Thereafter the State Government has filed this appeal against this order of acquittal.

2. The prosecution case was as follows

3. The respondent was employed under Messrs Nandaram Deotram, a firm at Kurseong. The firm was an authorised dealer in iron and steel under

the Iron and Steel (Control) Order 1936 on November 17 1960 the respondent sold three bundles of galvanised corrugated sheets to one Beharilal Baharia against permit no 69/60 dated November 10 1960 granted by the Sub Divisional Controller of Food and Supplies Beharilal paid Rs 294.52 P as price and a cash memo was written and granted to him mentioning the rate at Rs 830 per ton. The weight was not however mentioned in the cash memo. On November 19 1960 Beharilal had certain suspicion about the weight and got the three bundles weighed and found the total weight as 5 Cwt 3 Qrs 6 lbs whose price at Rs 820 per ton would be Rs 255.74 P. The allegation against the respondent was therefore that he sold the G C sheets at a rate higher than the controlled rate.

4 On this allegation the respondent was charged under Section 7 of the Essential Commodities Act for having contravened paragraphs 15 and 27 (4) of the Iron and Steel (Control) Order 1936. The learned Magistrate found that the respondent did not charge a rate in excess of the controlled rate but he held that the respondent did not mention the weight of the G C sheets in the cash memo which he was required to do under notification no S P O 1111/ESS Comm Iron & Steel and on this finding the learned Magistrate convicted the respondent under Section 7 of the Essential Commodities Act. The learned Sessions Judge set aside this conviction primarily on the ground that there was want of material in what the respondent did namely in not mentioning the weight of the G C sheets in the cash memo.

5 Having heard Mr Burman and Mr Dutt I do not think that the order of acquittal should be interfered with in this appeal. It is not necessary for us to consider the ground for which the learned Sessions Judge set aside the conviction of the respondent. We think that even otherwise the respondent cannot be convicted under Section 7 of the Essential Commodities Act on the findings of the learned Magistrate. Section 7 of the Essential Commodities Act makes contravention of an order made under Section 3 of the Act punishable. So a person can be convicted under Section 7 only when it is proved that he has contravened any order made under Section 3 of the Act. Here the Iron and Steel (Control) Order 1936 is an order made by the Central Government under Section 3 of the Essential Commodities Act. There is no contravention of any provision of this Order as such. Paragraph 14(2) of this Order says as follows:

The official Gazette direct that every producer stockholder or other person holding stocks of iron or steel when selling any iron or steel shall give to the purchaser a memorandum containing the particulars specified in such notification.

By virtue of this power the Controller issued notification No S R O 1111/ESS COMM/Iron and Steel and that notification required a stockholder here the respondent to issue a memorandum relating to every sale of iron and steel showing certain particulars weight of the goods sold is one of such particulars. So what the learned Magistrate has found was that there was a contravention of a direction given under this notification made by the Controller in exercise of the powers given to him under paragraph 14(2) of the Iron and Steel (Control) Order. The question therefore arises if contravention of this direction is a contravention of any provision of the Iron and Steel (Control) Order which was made under Section 3 of the Act. This direction is not a direction contained in the Iron and Steel (Control) Order. But this is a direction contained in a notification issued by the Controller in exercise of a power given to him under the Iron and Steel (Control) Order. On the face of it therefore a contravention of this direction cannot be said to be a contravention of a provision of the Iron and Steel (Control) Order 1936.

6 But Mr Burman submits that the Central Government may delegate its authority to make an Order under Section 3 of the Essential Commodities Act to an Officer or Authority subordinate to the Central Government under Section 5 of the Act. So the Central Government may direct an officer or Authority subordinate to it to make Orders under Section 3 of the Act and the provision of paragraph 14(2) of the Iron and Steel (Control) Order is such a direction and notification No S R O 1111/ESS COMM Iron & Steel made by the Controller is an order under Section 3 of the Act. This contention is not tenable. Firstly there is no notified Order made by the Central Government under Section 5 of the Act directing the Controller to make an Order under Section 3. If the Central Government is to delegate its power to make an Order under Section 3 to some Officer it has to make a notified Order under Section 5 but here in this case there is no such notified Order. Secondly the notification itself shows that this was not an Order under Section 3 of the Act but this was just a direction to the stockholders in exercise of the powers to the Controller under paragraph 14(2) of the Iron and Steel (Control) Order. The Controller does not say that he was making this order.

The Controller may by notification in

by virtue of powers under Section 3 of the Act on the basis of a delegation made by the Central Government under Section 5 of the Act

7. Mr. Burman then argues that since this was a direction made by the Controller in exercise of a power conferred on him by the Iron and Steel (Control) Order, 1956 the direction should be regarded as part of the Order made by the Central Government. This argument again cannot be accepted. An order under Section 3 can be made by the Central Government. The Central Government made such an Order, i. e., the Iron and Steel (Control) Order, 1956 Paragraph 14(2) of this Order no doubt authorised the Controller to make certain directions but those directions do not relate back to the Order or form part of the Order under Section 3 because that would involve double delegation of legislative power not authorised by Parliament.

8. Furthermore, we do not think that contravention of such direction was intended to be made punishable under Section 7 of the Essential Commodities Act. When we compare, say, paragraph 12 (1) with paragraph 14 (2) this will be clear. Paragraph 12 (1) says that every stockholder shall keep such books, accounts and records relating to the business carried on by him as the Controller may require. Obviously, the requirement to keep books of accounts and records is a part of the Iron and Steel (Control) Order. But what books are to be kept is left to the discretion of the Controller. Here, if a stockholder does not keep the required books and accounts and records, that act being a contravention of the provisions of the Iron and Steel (Control) Order is punishable under Section 7. But paragraph 14(2) does not require the stockholder to do a particular thing. It only empowers the Controller to give directions to the stockholders to give a memorandum or sale containing some specified particulars. Whatever that may be, we have no doubt that contravention of a direction contained in a notification issued under paragraph 14(2) of the Iron and Steel (Control) Order is not a contravention of the provisions of the Iron and Steel (Control) Order, 1956 and so is not punishable under Section 7 of the Essential Commodities Act. The respondent cannot, therefore, be convicted.

9. In the result, the appeal is dismissed. The respondent is discharged from his bail bond.

10. A. P. DAS, J. :— I agree
Appeal dismissed

1970 CRI. L. J. 573 (Vol. 76, C. N. 134)=

AIR 1970 CALCUTTA 169 (V 57 C 26)

R N DUTT AND B BANERJI, JJ

Mahadeb Karmakar, Petitioner v Adhir Kumar Karmakar and another, Opposite Parties

Criminal Revn Case No 345 of 1968, D/- 21-3-1969.

Criminal P. C. (1898), Ss. 133 and 192 — S. 133 does not exclude provisions of transfer of cases contained in S. 192 after the party has shown cause against the conditional order. AIR 1949 Cal 637 held Overruled by AIR 1956 Cal 24; AIR 1956 Cal 220, Not foll.; AIR 1960 All 244 & AIR 1958 Raj 248 Dissented from.

Under S 133 of the Code the Magistrate who draws up the proceeding can no doubt ask the opposite parties to show cause against the conditional order before some other Magistrate. The terms of S. 133 of the Code cannot and should not be construed as to exclude the general provisions of transfer contained in S 192 of the Code. Transfer of the proceedings after the party has shown cause against the conditional order, before the Magistrate drawing up the proceedings is not invalid. AIR 1956 Cal 24, Rel on; AIR 1949 Cal 637 held Overruled by AIR 1956 Cal 24 AIR 1956 Cal 220, Not foll.; AIR 1960 All 244 & AIR 1958 Raj 248, Dissented from (Para 2)

Cases Referred: Chronological Paras

(1960) AIR 1960 All 244 (V 47)=

1960 Cri LJ 450, Kishorilal v State 2

(1958) AIR 1958 Raj 248 (V 45)=

1958 Cri LJ 1243, Ram Charan v Residents of Shahabad 2

(1956) AIR 1956 Cal 24 (V 43)=

1956 Cri LJ 212 Bardeshwari Prasad Bhattacharjee v Rabi Nandan Saha 2

(1956) AIR 1956 Cal 220 (V 43),

Jhatu Charan Das v Bhanu Chandra Das 2

(1949) AIR 1949 Cal 637 (V 36)=

51 Cri LJ 205, Pran Krishna v Shyam Sundar 2

(1929) AIR 1929 Cal 813 (V 16) =

31 Cri LJ 673, Inasaddar Ali v Isimulla 2

Kalpada Trivedi, for Petitioner; Ramendra Nath Chakraborty, for the State. Biswa Ranjan Ghoshal, for Opp. Parties

R. N. DUTT, J. :— On an application by the petitioner before the Sub-Divisional Magistrate, Barrackpore, a proceeding under Section 133 of the Code of Criminal Procedure was started against the opposite parties and a conditional order was issued and they were asked to show cause. They appeared and showed cause before the Sub-Divisional Magis-

trate Thereafter the Sub-Divisional Magistrate transferred the case to Shri M N Pramanick Magistrate 1st Class for disposal Shri Pramanick examined witnesses heard arguments but ultimately held that the transfer of the proceeding to him was incompetent and as such he dropped the proceeding The petitioner has obtained this Rule against this order of the said Magistrate Shri M N Pramanick

2 When the opposite parties were directed to show cause there was no specific direction as to whether cause should be shown before the Sub-Divisional Magistrate or any other Magistrate We find that though the order does not specifically say that cause is to be shown to the Sub-Divisional Magistrate the cause was in fact shown before him because there was no direction that cause was to be shown before some other Magistrate We then find that after cause was shown the Sub-Divisional Magistrate transferred the proceeding to Shri M N Pramanick The question for consideration is if such transfer is competent in law? On this point the latest Division Bench decision of this Court is contained in *Bardeshwari Prosad Bhatta charjee v Rao Nandan Saha* AIR 1956 Cal 24 The previous decisions on this point were considered by the Division Bench in this case A N Sen J held in *Pran Krishna v Shyam Sundar* AIR 1949 Cal 637 that no such subsequent transfer under Section 192 of the Code was competent Sen J purported to rely on the decision in *Inasaddar Ali v Imulla* AIR 1929 Cal 813 The Division Bench deciding *Bardeshwari's* case AIR 1956 Cal 24 overruled A N Sen J and held that such subsequent transfer can be made under Section 192 of the Code *Debabrata Mookerjee J* no doubt followed the previous decision in *Jhatu Charan Das v Bhanu Chandra Das* AIR 1956 Cal 229 Though this case was decided in February 1956 it appears that the Division Bench decision in *Bardeshwari's* case AIR 1956 Cal 24 decided in June 1955 was not considered as obviously it was not brought to his Lordship's notice The Single Bench decision of the Allahabad High Court in *Kishorilal v State* AIR 1960 All 244 was relied upon by the learned Magistrate We may also refer to the Bench decision of the Rajasthan High Court in *Ram Charan v Presidents of Shahabad* AIR 1953 Raj 248 These decisions have no doubt held that Section 133 of the Code is self-contained and proceedings thereunder cannot be subsequently transferred under Section 192 of the Code But as we have said the latest Division Bench decision of this Court has held in *Bardeshwari's* case AIR 1956 Cal 24 that such transfer is competent. The learned

Magistrate should have followed this decision instead of the Single Bench decisions We have considered the matter in all its aspects True under Section 133 of the Code the Magistrate who draws up the proceeding can no doubt ask the opposite parties to show cause before some other Magistrate But the terms of Section 133 of the Code cannot and should not be construed as to exclude the general provisions of transfer contained in Section 192 of the Code We do not think that this is a matter which should be referred to a larger Bench for further consideration rather we think that we should follow the Bench decision in *Bardeshwari's* case AIR 1956 Cal 24 In that view of the matter the instant order should be set aside

3 In the result the Rule is made absolute The order of the learned Magistrate is set aside and the learned Magistrate is directed to proceed with further hearing of the matter in accordance with law

4 Let the records be sent down at once

5 B BANERJI J — I agree

Rule made absolute

1970 CPI L J 574 (Vol 76, C N 135) =
AIR 1970 GOA DAMAN & DIU 54
(V 57 C 10)

V S JETLEY J C

State Appellant v Jagdish B Rau and others Respondents

Criminal Appeals Nos 23 and 24 of 1969 D/- 28-7-1969

Police Act (1861) S 34 — Scope and applicability — Notification of State Government extending provisions of S 34 to whole of territory is not in conformity with requirements of S 34 — Expression whole of territory would not take within its sweep a town for purpose of S 34 — Town meaning of — In absence of notification specially extending scheme of S 34 to a town prosecution for offences under S 34 committed in that town is not maintainable

What Section 34 of the Police Act expressly requires is that it should be specially extended by the State Government to any town and when such extension takes place then the enumerated offences committed within the limits of any town can be investigated and tried Hence a notification of the State Government extending the provisions of S 34 to the whole of the territory is not in conformity with the requirements of S 34

(Paras 5 6)

The expression whole of the territory in the notification would not take within

HM/HM/DS573/69/LGC/B

its sweep a town for the purpose of S. 34. The whole of the territory may be one unit for other purposes but for the purpose of S. 34, it cannot be equated to "any town". The two expressions are different in meaning and content. The word "town" is not the same thing as "territory" for the purposes of this section. It is not defined in the Act. It is not a term of art, and, therefore, it is to be understood in its ordinary sense. The dictionary meaning of "town" is an assemblage of buildings, public or private larger than a village, and having more complete and independent Local Government. AIR 1952 Cal. 753, Rel on

(Paras 5, 6)

Hence in absence of a notification specially extending the scheme of S. 34 to a town, the prosecution for the offences under S. 34 committed in that town is not maintainable. (Paras 5, 6)

Cases Referred: Chronological Paras

(1952) AIR 1952 Cal. 753 (V 39),

Belat Sheikh v. State of West Bengal

5

In Cri. Appeal No. 23/69

S. Tamba, Govt Pleader, for the State;
Respondents Nos. 1, 3 and 6 in person

In Cri. Appeal No. 24/69

S. Tamba, Govt Pleader, for the State;
G. D. Kamat, for Respondent.

JUDGMENT:— The short question for consideration in criminal appeals Nos. 23 and 24 of 1969 is whether the notification dated 3rd August, 1964, published in the local Government Gazette dated 13th August, 1964, is in conformity with the requirements of Section 34 of the Police Act 1861 (hereinafter referred to as 'the Act').

2. The material facts may be stated before the question formulated is answered. In criminal appeal No. 23 of 1969, the broad facts are that Jagdish Rau and 6 others were seen in Panjim at 3 a.m. on 31st March, 1967, throwing burning crackers near the Gomantak Press Office and near some residential premises thereby causing annoyance to the occupants. They were moving about in a bus. They were stopped near the office of the Bank of Baroda, when, according to the prosecution, they started behaving in a disorderly and riotous manner under the influence of liquor. This incident took place following the declaration of the election results of the Assembly constituency of Panjim. The police, after necessary investigation, challaned them under Section 34 of the Act. In support of the prosecution were examined Sub-Inspector Prabhu Desai, Assistant Sub-Inspector Hugo Nazare and some other witnesses. The learned Magistrate tried this case summarily. He came to the conclusion that as Section 34 had not been specially extended to Panjim as required, there-

fore the prosecution was not maintainable. In this view of the matter he directed their acquittal. In criminal appeal No. 24 of 1969, the respondent was also tried under Section 34 of the Act. The prosecution case against him is that on 3rd December, 1968 at about 22.00 hrs at Azad Maidan near Theatre Hall, Panjim, he was found misbehaving at the main gate of this theatre. He was sent to the hospital where it was certified that he was under the influence of liquor. He was also seen abusing Assistant Sub-Inspector Noberto Gonsalves. He was arrested. He was thereafter challaned under Section 34 of the Act. This case was also tried summarily. The learned Magistrate after examining the prosecution evidence directed his acquittal on the same ground as in the case against Jagdish Rau and 6 others. The State felt aggrieved by these two decisions dated 25th March 1969 and 26th March, 1969, and filed the present appeals against their acquittal under sub-section (1) of Section 417 of the Code of Criminal Procedure.

3. The scheme of the Act may be broadly explained. As will appear from the short title and the preamble, the Act was enacted for the regulation and reorganization of the police, in order to make it a more efficient instrument for the prevention and detection of crime. Section 1 is an interpretation clause on the usual lines. Sections 2 to 29 relate to regulation and reorganization of the police and other allied matters. Sections 30 to 33 deal with regulation of public assemblies and processions etc. Section 34, to the extent it is material for the present purpose, reads as under—

"Any person who, on any road or in any open place or street or thoroughfare within the limits of any town to which this section shall be specially extended by the State Government, commits any of the following offences, to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers shall, on conviction before a Magistrate, be liable to a fine not exceeding fifty rupees, or to imprisonment with or without hard labour not exceeding eight days, and it shall be lawful for any police-officer to take into custody, without a warrant, any person who within his view commits any of such offences, namely:—

.....
Sixth — Any person who is found drunk or riotous or who is incapable of taking care of himself."

Sections 35 to 45 relate to matters such as recovery of penalties, fines, etc. Sub-section (1) of Section 46 provides that the Act shall not, by its own operation, take effect in any State or place, but the State Government by an order to be published in the official gazette, may extend the whole or any part of the Act to any State

or place and the whole or such portion of the Act as shall be specified in such order shall thereupon take effect in such State or place. Sub-section (2) provides for rule-making power vested in the State Government for regulating the procedure etc. to be followed by Magistrates and police officers in the discharge of their duties imposed upon them by or under the Act. Section 47 provides for exercise of authority of District Superintendent of Police over village police.

4. The Act as a whole was extended to the territory under sub-section (1) of Section 3 of the Goa Daman and Diu (Laws) Regulation, 1962 promulgated by the President on 22nd November 1962. The Act was brought into force in pursuance of sub-section (2) of Section 3 of this Regulation on 15th December 1963, by notification dated 31st December 1963 published in the local Government Gazette dated 9th January 1964. By notification dated 3rd August 1964 published in the local Government Gazette dated 13th August 1964 in exercise of the powers conferred by Section 34 of the Act the Lt Governor extended the provisions of this Section to the whole of the territory with effect from 13th August 1964. This notification was relied upon in support of the prosecution against the respondents under Section 34.

5. Section 34 enumerates different kinds of offences which are committed by any person on any road or in any open place or street or thoroughfare within the limits of any town to which it is specially extended by the State Government. It is true that this section has been extended to the whole of the territory but what it expressly envisages is its extension to any town and not to any territory. It is not in dispute that the alleged offences for which the respondents were tried took place within the limits of Panjim. In the memo of appeal it was submitted that the whole territory has been regarded as one unit and therefore the offences committed under Section 34 in Panjim would also be covered by the notification dated 3rd August, 1964. In other words the extension of the Act to the entire territory would also include extension to the town of Panjim as contemplated by this section. This submission does not seem to be sound. The word town is not the same thing as territory for the purposes of this section. It is not defined in the Act. It is not a term of art and, therefore it is to be understood in its ordinary sense. The primary duty of a Court is to find its natural meaning in its context. The dictionary meaning of town is an assemblage of buildings public or private larger than a village, and having more complete and independent local Government' (Shorter Oxford Dictionary, Vol. II

p 2221). In 'Belait Sheikh v State of West Bengal AIR 1952 Cal 753 the meaning of the word town' was considered by the learned Judges of the Calcutta High Court for the purposes of Section 6 of the Bengal Municipal Act 1932. Under Section 6 of this Act the State Government has the power to declare by notification its intention to constitute into a municipality a town with or without a local area or a village subject to the proviso which is not relevant for the present purpose. Section 8 enables the Government to constitute a municipality by notification. The first requirement was that there must be a town to be constituted into a municipality. The learned Judges of the Calcutta High Court observed —

'The word has however a fairly definite connotation to the ordinary man — the main attributes of a town being the existence of houses in clear proximity concentration of a large number of people in a comparatively small area engagement of the bulk of the population in non-agricultural pursuits. We are bound to hold in the absence of any statutory definition of the word that the legislature used it in the sense in which ordinary people understand it'.

The aforesaid observations are apposite. The notification dated 3rd August 1964 specially extending Section 34 of the Act to the whole of the territory is not likely to be viewed by ordinary people as an act of extension of this section to Panjim, which is a town in the territory. A general cross-section of the community — the butcher the baker and the candlestick maker — will not regard the town of Panjim as a territory for the purposes of this notification. What Section 34 expressly requires is that it should be specially extended by the State Government to 'any town' and when such extension takes place then the enumerated offences committed within the limits of any town can be investigated and tried. These offences are minor offences for which a fine not exceeding Rs 50/- or imprisonment not exceeding 8 days is provided. It enables any police officer to take into custody without warrant any person who within his view commits any of these offences. The regulatory powers in Sections 30 to 33 are not confined to towns but they are applied generally to towns and other places. The offences under Section 34 are different in nature and character from the offences under these sections. They seem to be peculiar to towns. Section 34 has to be specially extended to any town before any person committing these offences could be tried and convicted. The words district place and territories employed in Sections 26, 46 and 47 of the Act have a

different meaning in their context. These words are not helpful for the purposes of ascertaining the true meaning and ambit of the word 'town'.

6. Mr. G. D. Kamat, learned counsel for the respondent, in criminal appeal No 24 of 1969, contends that in absence of a notification extending the scheme of Section 34 to the town of Panjim, the prosecutions are not maintainable. This contention is sound. It seems the expression "whole of the territory" in the notification dated 3rd August, 1964, would not take within its sweep the town of Panjim for the purpose of Section 34. The whole of the territory may be one unit for other purposes but for the purpose of Section 34, it cannot be equated to "any town". The two expressions are different in meaning and content. In view of the scheme of the Act in general and Section 34 in particular, the learned Government Pleader concedes that, in absence of a notification specially extending the scheme of Section 34 to the town of Panjim, the prosecution for the offences enumerated therein is not maintainable. The learned Magistrate acted correctly when he directed acquittal of the respondents in both cases under Section 247 of the Code of Criminal Procedure on the ground of failure to comply with the provisions of Section 34. The appeals filed on behalf of the State must fail because of this legal flaw. In this view of the matter it is not necessary to express any opinion on the merits of the prosecution evidence. The appeals are accordingly dismissed. Order accordingly.

Appeals dismissed.

1970 CRI. L. J. 577 (Vol. 76, C. N. 136) =

AIR 1970 GOA, DAMAN & DIU 56

(V 57 C 11)

V. S JETLEY, J C

Registrar, Judicial Commissioner's Court, Applicant v. Fr. Sebastiao Francisco Xavier dos Remedios Monteiro and State, Respondents.

Criminal Revn. Appln. 30 of 1969, D/- 16-6-1969

(A) Foreigners Act (1946), Ss. 14 and 3(2)(c) — Sentence — Accused though born and brought up in Goa choosing to retain his Portuguese nationality after Goa became part of India — Accused deliberately disobeying order under S. 3(2)(c) for second time — Accused contending that in spite of de facto occupation of Government of India, Goa continued de jure as Portuguese territory and by exercising option to continue as Portuguese national he did not become foreigner — Held sentence of simple imprisonment for

three months and fine of Rs. 100/- or, in default further imprisonment for 20 days was unduly lenient and manifestly inadequate when accused had been wilfully disregarding law and challenging territorial integrity of India; sufficiently deterrent sentence was called for in the ends of justice — Sentence enhanced in exercise of powers under S. 439(2) of Criminal P. C. (1898) to 12 months simple imprisonment and fine of Rs. 1,000 and in default, further imprisonment for six months. (Paras 6, 7)

(B) Criminal P. C. (1898), Ss. 439(1) and 32 — Principles of punishment — Duty of Court — Enhancement of sentence — Penal Code (1860), S. 53.

There should be an end of all temporal things and that end cannot be achieved with soft-peddling with the question of the sentence. A judge, when administering justice, is as much influenced by the tides and currents of human emotions and passions as other human beings, but yet he is enjoined by the law to restrain and control them, else he will not be qualified to try a criminal case; but, at the same time, he is not expected to act ostrich-like and close his eyes to deliberate disregard or defiance of the law of the land. Judicial detachment is a virtue, but not judicial passivity. (Para 6)

Cases Referred: Chronological Paras

(1968) Cri Appeal No 173 of 1968,

D/- 4-12-1968=1969-1 S.C. W. R

87, Shivajirao v. State of Maharashtra 5

(1968) AIR 1968 Goa 17 (V 55)=

1968 Cri L J. 316, Sebastiao

Francisco v State 4

(1967) Cri. Appeal No 62 of 1965,

D/- 20-11-1967=1968 MP L J.

371 (SC), Bhalchandra Waman

Pathe v. State of Maharashtra 5

(1967) AIR 1967 Goa 95 (V 54)=

1967 Cri L J. 1005, Raghunath

Naik v. Mrs Terezinha Pacheco

Faria 7

(1959) AIR 1959 SC 436 (V 46)=

1959 Cri. L. J. 527, Alamgir v.

State of Bihar 5

S Tamba, Govt Pleader, for the State;

Respondent in person.

ORDER:— This is one of those exceptional cases where exercise of revisional jurisdiction suo motu under Section 439 (1) of the Code of Criminal Procedure, is considered necessary in the ends of justice

2. The respondent — Fr Sebastiao Francisco Xavier dos Remedios Monteiro — was served with an order under Section 3(2)(c) of the Foreigner's Act, 1946, requiring him not to remain in India after the expiry of the date of its service. This order, dated 11th April, 1969, was issued by the Lt Governor of this territory. He did not leave India. He was ac-

cordingly prosecuted in the Court of the First Class Magistrate Mapusa on 28th April 1969. The charge was framed against him by the learned Magistrate under Section 14 of the Foreigners Act. He pleaded not guilty. In support of the prosecution were examined prosecution witnesses Domingos Fernandes (PW 1), Shivaji K. Zamaoli (PW 2), Cruz D Souza (PW 3) and Vishwanath G. Dessai (PW 4). Out of these witnesses three are inspectors of police while Cruz D Souza is a Head Constable. The respondent led no defence evidence. In his statement under Section 342 of the Code of Criminal Procedure he admitted that he had been served with an order requiring him to leave India. The reason why he did not leave India was that he was born in Goa where he and his ancestors had lived for centuries that as Goa was a part of Portugal as its overseas province he was a Portuguese national that the Government of India had occupied this territory forcibly and that in spite of de facto occupation by the Government of India it continued de jure as Portuguese territory and that he did not become a foreigner when he declared in 1962 that he wanted to retain the Portuguese nationality. The learned Magistrate after considering the prosecution evidence and this statement of the respondent convicted him under Section 14 of the Foreigners Act for breach of the order under Section 3(2) (c) issued thereunder. The sentence imposed by the learned Magistrate on 13th May 1969 was simple imprisonment for three months and a fine of Rs 100/- or in default of its payment to undergo further imprisonment for 20 days. The respondent had previously been convicted in 1965 for contravention of a similar order dated 19th June 1965 under Section 3(2) (c) by another Magistrate and was sentenced to undergo simple imprisonment for 30 days and a fine of Rs 50/- and in default to undergo simple imprisonment for 5 days. The appellant appealed against that decision to the learned Sessions Judge but that appeal was rejected. He then moved this Court in revision but without success. He felt aggrieved and later sought special leave to appeal against the decision of this Court. This leave was granted by their Lordships of the Supreme Court and after hearing the parties their Lordships dismissed the said appeal by order dated 26th March 1969. The sentence imposed on 13th May 1969 was considered grossly inadequate and therefore a notice was issued on 27th May 1969 under Section 439(2) of the Code of Criminal Procedure requiring him to show cause why this sentence should not be enhanced and also why the imprisonment should not be rigorous. This action was taken suo motu for the purpose of satisfying my self about the

correctness or propriety of the sentence imposed after calling for the record of the criminal proceeding. This in short is the background of this case.

3 The respondent in response to the notice issued to him, reaffirmed that he is innocent in his own words —

I wish to stress that I have love for justice and I am an observer of order and discipline. My attitude was dictated by an effort of love for truth and honesty. It comforts me exceedingly to firmly believe that justice is being done simultaneously outside the human forum as unfailingly as God exists. I pray to our Lord Jesus Christ that He in the meantime may help me as in the past to overcome the human frailties which usually appear in the disputes of this nature such as the weakness of hatred and weakness of cowardice. I once again affirm that I am innocent. I believe that my punishment will not be enhanced but on the contrary it will be set aside.

4 The respondent last time was represented in this Court by Mr Edward Gardner QC from England assisted by Mr Antonio Anastasio Bruto da Costa local counsel. This time he is not represented by any counsel. He states that no appeal has been preferred by him in the Court of Session Panaji, and that he has not even applied for a certified copy of the judgment of the learned Magistrate. The learned counsel appearing on behalf of the respondent in the lower court raised the following three objections to the maintainability of the prosecution launched against the respondent: (1) The accused although a Portuguese citizen is not a foreigner for the purposes of the Foreigners Act since he was born and always lived in Goa. (2) The order of the Lt Governor is illegal for the prosecution did not produce in the Court the notification under which the powers to deport foreigners are vested in him and (3) that the prosecution did not prove as it should have done that the signature on the order requiring him to leave India is of the Lt Governor. The learned Magistrate considered these technical objections carefully and in the light of the previous decisions of the superior courts on similar objections he came to the conclusion that they were devoid of substance. I shall very briefly deal with the objections. As regards the first objection the respondent is undoubtedly a foreigner within the meaning of Section 2(a) (iii) of the Foreigners Act. It is stated by him in this Court that because he was born and brought up in Goa before liberation therefore he cannot be treated as a foreigner. By way of an analogy he cites the example of a French man who according to him, if he had been staying here for some time could have been treated as a foreigner but his opinion can

is distinguishable. This analogy is not relevant to the point. It was on the basis of the status of the respondent as a foreigner that this Court as well as the Supreme Court maintained the conviction and the sentence imposed on him for contravention of a similar order in 1965. The second objection also is without substance. Mr S. Tamba, learned Government Pleader, appearing on behalf of the State, produces the notification dated 12th March, 1965, in this Court delegating powers in favour of the Lt. Governor in support of his submission that the Lt. Governor acted under the powers conferred by this notification. In para 2 of my previous decision reported in AIR 1968 Goa 17 this aspect of the matter had been considered and a similar objection raised by the respondent was overruled. At page 17 of the paper book the respondent admitted the legality of the order requiring him to leave India. The delegation in favour of the Lt Governor was in pursuance of Clause (1) of Article 239 of the Constitution. The notification issued is a "law" within the meaning of Clause (1) of Article 13 of the Constitution. The provisions of definition Section 3(29) of the General Clauses Act 1897, relied upon by the learned Magistrate, do not seem to be applicable, for the simple reason that this Act applies to all Central Acts enacted after it came into force. The Indian Evidence Act of 1872, a Central law, was in existence before this Act and therefore it will not apply. As regards the third objection it is also devoid of substance. The learned Magistrate has carefully considered this objection. It will be seen from the judgment of the learned Magistrate that the respondent is repeating the same objections which had been urged on his behalf earlier in a criminal prosecution arising out of the contravention of a similar order in 1965. I am satisfied that the conviction in this case was properly recorded by the learned Magistrate and the respondent has not been able to satisfy me to the contrary. The respondent has had an adequate opportunity of being heard both as to the correctness of his conviction and also the propriety of the sentence.

5. In 'Bhalchandra Waman Pethe v. State of Maharashtra', Criminal Appeal by special leave No (62 of 1965) decided on 20-11-1967 (SC), the Supreme Court observed.—

"What sentence should be imposed in a given case is essentially within the discretion of the trial Court. The High Court would not be justified in interfering with that discretion unless it is satisfied that the sentence imposed by the trial Court is unduly lenient or in other words grossly inadequate."

In making these observations reliance

was placed by the Supreme Court on the following passage from 'Alamgir v. State of Bihar', AIR 1959 SC 436:—

"It is unnecessary to emphasize that the question of sentence is normally in the discretion of the trial Judge. It is for the trial Judge to take into account all relevant circumstances and decide what sentence would meet the ends of justice in a given case. The High Court undoubtedly has jurisdiction to enhance such sentence under Section 439 of the Code of Criminal Procedure, but this jurisdiction can be properly exercised only if the High Court is satisfied that the sentence imposed by the trial Judge is unduly lenient or, that, in passing the order of sentence, the trial Judge had manifestly failed to consider the relevant facts"

In 'Shivajirao v. State of Maharashtra', Criminal Appeal by special leave No. 173 of 1968 (SC) the Supreme Court said.—

"In a matter of enhancement there should not be interference when the sentence of the trial Court imposes substantial punishment. Interference is only called for when it is manifestly inadequate."

6. As stated by me in the opening paragraph, this is an exceptional case where interference in revision is considered necessary by this Court. There is a deliberate disobedience of the law and this is to be seriously reviewed. This is the second instance of such a disobedience. There should be an end of all temporal things and that end cannot be achieved with soft-peddling with the question of the sentence. A judge, when administering justice, is as much influenced by the tides and currents of human emotions and passions as other human beings, but yet he is enjoined by the law to restrain and control them, else he will not be qualified to try a criminal case; but, at the same time, he is not expected to act ostrich-like and close his eyes to deliberate disregard or defiance of the law of the land. Judicial detachment is a virtue, but not judicial passivity. The respondent is not a citizen of India. He is a Portuguese national and thus a "foreigner" within the meaning of Section 2(a) (iii) of the Foreigners Act. As a foreigner, he has no right to remain in this territory. It is true that he was born and brought up in Goa, but after this territory became part of India, he got an option to become a citizen of India but he chose to retain his Portuguese nationality. The law requiring a foreigner to leave India is not an unjust law so that it could be disobeyed by men of conscience on ethical grounds. One of the earliest examples of disobedience of an unjust law is contained in Sophocles' tragedy 'Antigone'. In this Greek play,

Creon, a King proclaims that no one may bury the corpse of Polyuces a warrior who died attacking the city-state of Thebes But, according to Greek religion, an absolute duty lay on the family of a dead man to see that his body received burial rites as without them he might be prejudiced in the next world. Antigone a sister of the dead man deliberately disobeys the King's law so that she may obey the divine law. It is not the case of the respondent that he is dis regarding the order of the Lt Governor requiring him to leave India so that he may obey the divine law. Far from it the other priests in this territory similarly situated opted for Citizenship of India and they have not been disregarding or disobeying the laws of the land. The traditions of Christianity, both Catholic and Reformed on which Christian culture is based place due stress on obedience to the laws of the land. They respect the established order. If the respondent had really love for justice and further wished to observe Order and discipline he should have complied with the order requiring him to leave India but instead of doing so he has wilfully disregarded it. I have a feeling that he is deliberately disobeying the law of the land at the instance of a certain section of the people who seem to be misleading him. They seem to be pulling strings behind the screen. There is nothing ethical about his stand in wilfully disregarding the order passed by the Lt Governor requiring him to leave India. His parrot-like performance that Portugal is a de jure sovereign of this territory gives us some insight into his mind. This does not advance his cause nor of others. As a foreigner living here he has no right to question the territorial integrity of this country. He has prayed for blessings of Our Lord Jesus Christ to overcome human frailties but I wish he had done so for a better cause. Political robe does not befit a priest.

7. The sentence imposed by the learned Magistrate is unduly lenient and manifestly inadequate. This is also the contention of the learned Government Pleader. A sufficiently deterrent sentence therefore is called for in the ends of justice. Crime is contagious. As stated in *Raghunath Naik v. Mrs. Terezinha Pacheco Faria* AIR 1967 Goa 93 the object of punishment is prevention of crime and every punishment is intended to have a double effect, namely to prevent the person who has committed a crime from repeating the act and also to prevent others from committing similar crimes. The law is no respecter of persons be they rich or poor, priests or peasants. In the view taken by me of this case the conviction of the respondent is maintained but the sentence under Section 14 of the

Foreigners Act is enhanced to 12 months simple imprisonment and a fine of Rs 1000/- or in default of payment additional simple imprisonment for 6 months. The maximum sentence under Section 14 is 5 years and also fine.

8. It is a matter of common knowledge that if such wilful disregard of the law had taken place during the Portuguese regime the respondent would have received a very heavy sentence but every system of law has its own good or bad points. The respondent's case is not concluded by this judgment. If he is aggrieved by the conviction and the sentence now imposed he has the Supreme Court to which he can resort and for this purpose he is not without constitutional remedies. Speaking for myself it would be a matter of comfort to me that if I have erred in enhancing the sentence, my error would be rectified by the Supreme Court. Let me meanwhile discharge my duty as I see it. Order accordingly.

Order accordingly

1970 Cr L J 580 (Vol 76 C N 137) =

AIR 1970 ORISSA 54 (V 57 C 25)

G K MISRA AND S ACHARYA JJ

Darbari Kamar Appellant v State, Respondent

Criminal Appeal No 227 of 1966 D/23-11-1968 from order of S J Koraput, D/ 2 12 1966

(A) Evidence Act (1872) S 8 III (i) — Accused absconding from village after commission of offence—Fact of absconding is an incriminating circumstance and is relevant (Para 5)

(B) Criminal P C (1898) Ss 161 and 367 — Retracted confession of accused — Extent of corroboration required — Case of an accomplice is different — Variation between confessional statement and evidence in case — Variation held not material — (Evidence Act (1872) Ss 24 133 114 illus (b))

Law is well settled that if the confession is retracted, a conviction cannot be based thereon unless it is corroborated. There is a distinction between the nature of corroboration required in the case of an accused and that of an accomplice. In the case of an accomplice the corroboration must be in material particulars. In the case of corroboration of a retracted confession of an accused if the general trend of the prosecution evidence corroborates the essential part of the confessional statement, the confession can be accepted as true. It is not essential that each and every fact and circumstance in

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the confessional statement must be proved by independent evidence. In such a case the confession has no value, and in every case the court has to insist upon independent evidence on each and every point (Para 6)

In a case, the accused confessed before a Magistrate that the deceased and he were drunk; that they quarrelled on account of drinking, that the accused shot an arrow which struck the deceased on his chest as a result of which he died. The accused also stated where the incident took place and how he absconded for fear. The confession was however later on retracted. Evidence of one eye-witness to the incident was corroborated by another witness whose deposition was accepted as being true. Their evidence and that of the Doctor who examined the body of the deceased corroborated almost every part of the confessional statement, except that the quarrel spoken of by the accused in his confessional statement was not mentioned by the witnesses. But one of the witnesses merely stated that the accused challenged the deceased by saying that he would kill one of the four brothers including the deceased and the deceased replied that he was alone there and whom the accused would shoot.

Held, (1) that the confessional statement of the accused having been corroborated by the evidence in the case, it must be held to be true and a conviction could be based thereon. However, the conviction was based on the evidence in the case.

(Para 6)

and (2) that much importance should not be attached to the minor discrepancy, viz, the variance between the prosecution evidence and the confessional statement regarding the quarrel between the deceased and the accused and that the confessional statement could not be held untrue on that account AIR 1965 Orissa 175, Foll

(Para 6)

Cases Referred: Chronological Paras (1965) AIR 1965 Orissa 175 (V 52)= 1965 (2) Cri LJ 520, State v. Ramchandra 6

S C. Adhikari, for Appellant; Standing Counsel, for Respondent.

G. K. MISRA, J.: The appellant has been convicted under Section 302, I P C. and sentenced to imprisonment for life.

2. There was some ill-feeling between the accused and the members of the family of the deceased. In the afternoon of 1-12-63 the deceased was going to bring fuel from the forest. All of a sudden the accused came out of his house armed with a bow and arrows and told the deceased that he would kill him. He shot an arrow which pierced the left side of the chest of the deceased who died

Instantaneously. The accused absconded from the village and was arrested only on 26-9-65. The evidence of the prosecution witnesses was recorded under Section 512 Cr. P. C. in the absence of the accused. The defence is one of complete denial. The learned Sessions Judge held that the death was homicidal and that the accused killed the deceased.

3. The finding that the death was homicidal is fully supported by the evidence of the Doctor (P. W. 8). There was a punctured wound. The lower portion of the two ventricles of the heart were completely punctured. The injury was ante mortem. The Doctor opined that the deceased must have died within half an hour from the time of the infliction of the injury. There can hardly be any dispute that the deceased died as a result of the arrow shot.

4. The conviction is based on the evidence of the eye-witness P. W. 14 corroborated by that of P. W. 4, who appeared on the scene immediately after the occurrence. P. W. 14 is a sister-in-law of the deceased. She narrated as to how the accused came out of his house and suddenly gave an arrow shot as a result of which the deceased fell down. Thereafter the accused went away with his bow and arrow inside the jungle.

P. W. 4 has not seen the actual arrow shot, but hearing the shout of P. W. 3 she came out, found the deceased lying dead with the arrow sticking to his chest, and the accused going away to the jungle. These two witnesses are two rustic village folks and though there was some quarrel between the accused and the family members of the deceased, we find no sufficient justification as to why these two ladies would falsely implicate the accused in such a ghastly crime.

5. Soon after the occurrence the accused was untraced. He did not remain in the village. He was arrested about 2 years after on 26-9-65. P. Ws 2, 4 and 6 testify to the fact of his absence from the village. P. Ws 12, 13 and 15 are the Investigating Officers. They depose that they could not trace out the accused during the period of these two years. This conduct on the part of the accused in absconding from the village is admissible under Section 8 of the Evidence Act. Illustration (i) appended to the section runs thus:

"A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant." The fact of absconding therefore is an incriminating circumstance. In his statement under Section 342 Cr. P. C. the

accused was put this question. He did not furnish any reasonable explanation, but merely denied the factum of his absence from the village.

6 The accused also made a confession before the Magistrate First Class (P W 7). The learned Sessions Judge held that the confession is voluntary and true. That the confession is voluntary is not disputed before us. It is however contended that the confession is not true. To appreciate this contention the confessional statement which is a very short one may be quoted:

Myself and Budu were both drunk. We started quarrelling on account of drinking. I shot an arrow. That struck on the chest of Budu. He fell down there and died. This incident happened near the outer courtyard of the house of the deceased. After this incident I left the village out of fear. I concealed myself in village Nuagad. When I appeared before the Thana, the Police arrested me.

This confession has been retracted. Law is well settled that if the confession is retracted a conviction cannot be based thereon unless it is corroborated. There is a distinction between the nature of corroboration required in the case of an accused and that of an accomplice. In the case of an accomplice the corroboration must be in material particulars. In the case of corroboration of a retracted confession of an accused if the general trend of the prosecution evidence corroborates the essential part of the confessional statement the confession can be accepted as true.

The aforesaid distinction however is academic in the peculiar facts and circumstances of this case where almost every part of the confessional statement is corroborated in material particulars by the prosecution evidence.

It has been established from the evidence of the Doctor and the eye witness that the deceased died as a result of an arrow shot on his chest. This is exactly the confessional statement. The evidence of the eye-witness establishes that the deceased had an instantaneous death on the very spot near the house of the deceased. That is also the confessional statement. There is evidence that after the incident the accused left the village and absconded. That is proved by the evidence of P Ws 2, 4, 6, 12, 13 and 15. He was arrested two years after.

The confessional statement begins by saying that both the accused and the deceased were drunk and they started quarrelling between them. There is no prosecution evidence that both of them were not drunk. On this point therefore there is no contradiction. There need not be any positive evidence on the point also

to accept the confessional statement as it is not essential that each and every fact and circumstance in the confessional statement must be proved by independent evidence. In such a case the confession has no value and in every case the court has to insist upon independent evidence on each and every point.

With regard to the fact that there was a quarrel between the accused and the deceased P W 14 states that there was no quarrel between the two. She however deposed that the accused challenged the deceased by saying that he would kill one of the four brothers including the deceased and the deceased gave a reply that he was alone there and whom the accused would shoot. If this is construed to be a quarrel then there is no contradiction. Assuming that this does not evidence any quarrel the question is whether on account of this contradiction the confessional statement would be declared to be untrue.

The identical question came up for consideration before a Bench of this Court in AIR 1965 Orissa 175 State v Ramchandra. Their Lordships observed thus:

As to the statement when Ramchandra hid the gun in the bush near the school and subsequently removed it to the place where it was found there is some discrepancy between the prosecution evidence and the confessional statement. This is not however very significant. The recording of the confessional statement is not conducted like deposition of witness in court. The accused goes or making statement in his own way. It is not subjected to cross-examination or clarification by re-examination and the accused cannot be directed to follow the chronology exactly in the manner it happened. If the contradiction goes to the root of the matter on a material link of the case it may be vital. A part of the confessional statement might however be rejected and other part accepted if the part to be rejected is proved to be false by other prosecution evidence. No hard and fast rule can be laid down. The ultimate conclusion will depend upon the facts and circumstances of each case. The discrepancy leading to the timings is not however very material. The question for consideration in this case is that even assuming that the prosecution evidence is at variance to the confessional statement as to whether there was a quarrel between the accused and the deceased it does not constitute such a vital link in the prosecution story as to hold that the confessional statement is untrue. In all essential particulars the confessional statement is fully corroborated and not merely in material particulars. In the facts and circumstances of this case we do not attach much importance to this discrepancy and we

hold that the confessional statement is true

As has already been stated, the conviction can be sustained on the evidence of the eye-witness P. W 14 corroborated by that of P W 4 and the fact of absconding of the accused for about 2 years from the village. It is not necessary to take in aid the confessional statement to sustain the conviction. The conviction can also be based on the confessional statement as it stands corroborated in the manner already discussed.

7. The appeal has no merit and is accordingly dismissed

8. **ACHARYA, J.:** I agree
Appeal dismissed.

1970 CRI. L. J. 583 (Vol. 76, C N. 138) =
AIR 1970 PATNA 104 (V 57 C 16)
B P. SINHA, J.

Rewati Raman Sharma, Petitioner v Jamshedpur Notified Area Committee, Opposite Party

Criminal Revn No 2054 of 1968, D/- 11-2-1969, against order of 3rd Addl. S. J Singhbhum Camp, Jamshedpur, D/- 8-7-1968

(A) Criminal P. C. (1898), S. 423 — Judgment affirming conviction—No finding regarding necessary ingredient constituting offence — Order is vitiated.

In a criminal matter the appellate court irrespective of the fact whether any finding of the trial court is challenged or not, has to come to its own finding about the facts which are alleged to have constituted the offence. If there is lack of finding of any necessary ingredient constituting an offence, the order of the appellate court affirming conviction becomes vitiated (Para 5)

(B) Prevention of Food Adulteration Act (1954), Ss. 16 (1) (b) and 10 — Expression "to prevent" — Mere refusal to sell article does not amount to prevention.

Section 10 of the Act empowers a Food Inspector to take the sample. It does not create any obligation on the part of the salesman or any other person mentioned therein to actively co-operate with the Food Inspector in taking the sample by physically handing over the article to him. Thus simply not co-operating by not handing over any article to the Food Inspector will not amount to preventing him from taking the sample. Mere refusal to sell the article unaccompanied by any gesture indicating that the Inspector would not be allowed to take the sample does not amount to prevention as contemplated by section 16 (1) (b) AIR 1961 All

103, Disting; AIR 1957 Punj 99 and AIR 1967 Guj 61 Foll (Paras 6, 7)

Cases Referred: Chronological Paras

(1967) AIR 1967 Guj 61 (V 54)=

1967 Cri LJ 376 (1), State of Gujarat v Lalubhai Chaturbhai 7

(1961) AIR 1961 All 103 (V 48)=

1961 (1) Cri LJ 204, Municipal Board Sambhal v Jhamman Lal 7

(1957) AIR 1957 Punj 99 (V 44)=

1957 Cri LJ 656, Bishan Dass Telu Ram v State 7

(1954) AIR 1954 Mad 199 (V 41)=

1954 Cri LJ 197, Public Prosecutor v. Murugesan 7

L M Sharma and Babhunath Roy, for Petitioner, L K Choudhary and S. K. Choudhary, for Opposite Party

ORDER: A complaint was filed against Tejmal Sharma, proprietor of the grocery shop at Baridih, P S Golmur, Jamshedpur and Rewati Raman Sharma, alleging that on 23-12-1966 when the Food Inspector Upendra Narain Sinha (P. W 2) went to the shop and wanted to take sample of mustard oil and Haldi for chemical analysis, the accused persons refused to sell the same to him and thereby prevented him from taking sample. On this complaint the prosecution was started against both the aforesaid accused persons under section 16 (1) (b) of the Prevention of Food Adulteration Act (hereinafter referred to as the Act).

2. The defence of Tejmal Sharma was that he was not present at the shop at the time of the arrival of the Food Inspector and that he did not prevent the Food Inspector from purchasing sample. The defence of Rewati Raman Sharma was that he had no concern with the shop. He was kept in charge of the shop just as a care-taker in the absence of his brother Tejmal Sharma, who was the proprietor thereof. His further defence was that his act of refusal to sell the articles to the Food Inspector, under the circumstances, did not amount to preventing him from taking the sample and as such no offence was committed by him

3. The trial court held that accused Rewati Raman Sharma was working as salesman in the shop in question on 23-12-1966 when the Food Inspector wanted to take the sample of the mustard oil and Haldi for chemical analysis and that he refused to sell the same. It further held that this refusal amounted to preventing the Food Inspector from taking the sample. Hence it found him guilty of offence under section 16 (1) (b) of the Act and convicted and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs 1,000/-, in default to undergo rigorous imprisonment for a further period of six months. So far Tejmal Sharma was concerned, the learned Magistrate found that he

was found on the counter and was receiving the payment for the articles sold. Further he held that even assuming that he was not present in the shop at the time of occurrence he would be liable of any act done by his servant or salesman. With such findings he held him also guilty under section 16 (1) (b) of the Act and imposed the same sentence on him as well. On appeal the appellate court did not accept the finding about presence of Tejmal Sharma at the time the Food Inspector visited the shop and it rejected the contention that he had any vicarious liability for what was done by Rewati Raman Sharma. Consequently it acquitted him. The appellate court however affirmed the conviction and sentence of Rewati Raman Sharma. Rewati Raman Sharma has therefore filed this revision application.

4. Learned Counsel for the petitioner has submitted that the appellate court did not record any finding as to whether the petitioner Rewati Raman Sharma was working as salesman in the shop at the relevant time and as such by refusing to sell the article to the Food Inspector he did not commit any offence. His next submission is that even assuming that Rewati Raman Sharma was the salesman at the relevant time his mere refusal to sell the article did not amount to preventing the Food Inspector from taking the sample.

5. So far the first point is concerned on perusal of the order of the appellate Court I find that the contention is correct. Nowhere in the judgment the appellate court has held that Rewati Raman Sharma was the salesman at the relevant time in the shop in question. The appellate court has simply discussed the defence of Rewati Raman Sharma to the effect that he had been to the shop as his service was requisitioned for performing Pooja and that he was left there to wait in the shop as a caretaker of the articles. Rejection of that defence does not amount to a positive finding that Rewati Raman Sharma was working as salesman at the relevant time. This finding is wanting in this case. Learned Counsel for the opposite party has however submitted that there was positive finding by the trial court that Rewati Raman Sharma was working as salesman in the shop in question on 23-12-1966 and as this part of the finding was not specifically challenged and argued by the appellants in the lower appellate court and the judgment is of affirmance it must be taken that the appellate Court affirmed this finding as well. I do not see any force in this contention. In a criminal matter the ap-

pellate Court irrespective of the fact whether any finding of the trial Court is challenged or not has to come to its own finding about the facts which are alleged to have constituted the offence. If there is lack of finding of any necessary ingredient constituting an offence the order of the appellate court affirming conviction becomes vitiated.

6. The second point urged by the learned Counsel for the petitioner needs careful consideration. The allegation against the petitioner in the complaint petition is that on 23-12-1966 the petitioner refused to sell to the Food Inspector the sample of mustard oil and Haldi which were kept in the shop for sale and thereby prevented him from taking the sample for chemical analysis. In the evidence also the Food Inspector stated that he demanded the sample from Rewati Raman Sharma for which he was prepared to pay the price but Rewati Raman Sharma refused to give him the sample. He recorded this refusal in writing. There is no provision in the Act that mere refusal to sell by itself is an offence. It will be offence only when it amounts to prevention as contemplated by section 16 (1) (b) of the Act. The relevant part of section 16 is as follows:

(1) If any person

(b) prevents a food inspector from taking a sample as authorised by this Act, The Food Inspector is authorised to take a sample under section 10 of the Act. That section reads as follows:

(1) A food inspector shall have power—

(a) to take samples of any article of food from

(i) any person selling such articles

(ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee

(iii) a consignee after delivery of any such article to him

Therefore this section empowers a Food Inspector to take sample of any article of food from any person selling such article. Even if it be assumed that petitioner Rewati Raman Sharma was selling the articles on the relevant date and at the relevant time it has to be seen if his refusal to sell amounted to prevention as contemplated by Section 16 of the Act. Section 10 of the Act empowers a Food Inspector to take the sample. It does not create any obligation on the part of the salesman or any other person mentioned therein to actively co-operate with the Food Inspector in taking the sample by physically handing over the article to him. It was for the Food Inspector to take the sample and if the salesman prevented him from doing so he could be

liable for an offence under section 16 (1) (b) of the Act.

7. The dictionary meaning of "to prevent" according to Oxford English Dictionary is to stop, keep, or hinder from doing something, to render an act or event impracticable or impossible by anticipatory action, to frustrate, defeat, bring to naught, render void or nugatory (an expectation, plan, etc) This means that there must be some action on the part of the person preventing any act, which would render the performance of that act impracticable or impossible. Such action of that person may be in the shape of physical obstruction or show of force or threat or show of any gesture which hinders performance of the act. Simply not co-operating by not handing over any article to the Food Inspector will not amount to preventing him from taking the sample. Mere refusal to sell the article unaccompanied by any gesture indicating that the Inspector would not be allowed to take the sample does not amount to prevention as contemplated by section 16 (1) (b). This view gets support from some cases cited on behalf of the petitioner. The first case referred to is a decision in *Bishan Dass Telu Ram v State*, AIR 1957 Punj 99. In that case also the accused had refused to give sample even on payment and it was held

"that is not the same thing as prevention which need not have an element of physical obstruction but it does involve some act which hinders an inspector from taking a sample".

Another case referred to is a decision in *State of Gujarat v Laljibhai Chaturbhai*, AIR 1967 Guj 61. It was held therein

"Whether the Food Inspector was prevented or not would depend on the facts of the case in order to constitute the offence. There must be a physical obstruction or threat or an assault. Mere refusal to give a sample would not amount to such prevention. Nor would merely leaving the shop, we do not know for what purpose, amount to prevention".

As against this, the learned Counsel for the opposite party has relied upon a decision of the Allahabad High Court in *Municipal Board Sambhal v Jhamman Lal*, AIR 1961 All 103 in support of his contention that mere refusal to give the sample amounted to prevention as contemplated by section 16 (1) (b) of the Act. In this case when the Food Inspector reached the shop and demanded sample, Jhamman Lal instead of giving it to him left the shop and promised to come shortly. The Food Inspector waited for some time but he did not turn up. Then he asked one Tota Ram, who was sitting there in the shop, to supply

the sample. This man also did not give him the sample saying that it would be given by Jhamman Lal and he was going to call him. He also left the shop. The Food Inspector prosecuted both of them for offence under section 16 (1) (b) of the Act. It was contended on behalf of the accused that before there could be prevention, there should be some kind of overt act. In that connection it was held

"If a person disappears from the shop, in our opinion, he has done an overt act by means of which he made it impossible for the Food Inspector to obtain a sample from him. Apart from this fact we do not think that in cases of prevention an overt act is necessary".

In making the above observation, the learned Judge relied upon a decision of the Madras High Court in the case of *Public Prosecutor v Murugesan*, AIR 1954 Mad 199. In that Madras case, however, the conduct of the accused was interpreted as sufficient overt act on his part to render the taking of sample impracticable. A sample of milk was demanded from the accused. He did not give it to the authority concerned. He went to the hotel and handed over the milk to the servant of the hotel. The milk was put into the milk pan in which milk was boiling. Therefore the whole conduct was such as made it difficult for the authority to take the sample for analysis. It is in that connection that it was held.

"On the facts alleged there could be no doubt that this accused, in the manner set out above and which need not be repeated, has effectively prevented the local executive officer from taking the sample and for this no further overt act is necessary than what has happened". This observation does not say that no sort of overt act was necessary to constitute prevention as contemplated by section 16 (1) (b) of the Act. In the Allahabad case referred to above so far Jhamman Lal was concerned, his disappearance from the shop was treated as an overt act by means of which he made it impossible for the Food Inspector to obtain a sample from him. It is for that reason that the aforesaid Punjab case which was cited before their Lordships of the Allahabad High Court was distinguished by making the following observations

"With respect we might say that the learned single Judge did not consider the point that by disappearance, the accused had made it impossible for the Food Inspector to obtain sample "from the persons selling such article" which he was entitled to obtain under section 10 (1) and thereby he had prevented the Food Inspector in taking the

sample as authorised by the Act. The learned Judges did not observe that the view taken by the Punjab High Court was wrong. They simply distinguished it by saying that disappearance of the accused amounted to prevention. So far Tota Ram who had refused to give the sample was concerned it was observed that it was not clear from the evidence that he was selling the oil and that he refused to give sample and had prevented the Food Inspector from taking the sample from any person who was selling such article. The point where there was refusal to sell would amount to prevention was not considered in that Allahabad decision. This case is therefore no authority for the proposition that mere refusal to sell the article as sample to the Food Inspector amounts to preventing him from taking the sample as contemplated by section 16 (1) (b) of the Act.

8. In the instant case the allegation in the complaint is that the accused refused to sell the sample to the Inspector. There is no evidence that the Inspector insisted on taking sample and that the accused spoke that he would not allow him to do so. Rewati Raman Sharma did not offer any physical obstruction. There is no evidence that he gave any threat or showed any undesirable gesture. He quietly wrote out his refusal to sell the articles when asked to do so. He did not do anything from which it could be inferred that he would not allow the Inspector to take the sample if he wanted to do so. In my opinion the facts alleged and proved did not amount to preventing the Food Inspector from taking the sample and as such no offence under section 16 (1) (b) is made out.

9. The result is that the revision application is allowed. The order of conviction and sentence passed against the petitioner is set aside. He is discharged from the bail bond. Fine if realised shall be refunded.

Revision allowed

which induced him to take action under section 107 of the Code is bad. AIR 1953 Cal 491. Rel on (Para 3)

(B) Criminal P C (1898), Ss 439 112 and 107 — Revision of orders in proceedings under Ch 8 — Initial order drawing up proceeding under S 107 and calling on other side to show cause — Specification required under law not mentioned in order — Revision against order is not premature and it can be entertained — Cri Rev No 351 of 1954 D/- 18 11 1954 (Pat) Not followed. AIR 1929 Pat 67 followed. (Para 5)

(C) Criminal P C (1898) Ss 439 112 and 107 — Revision of orders in proceedings under Ch 8 — Order asking party to show cause why he should not execute bond for keeping peace for one year — Order not directing that the period of one year should commence from any particular date — Fact that the period of one year from date of passing the order had already elapsed by the time revision is heard does not mean that the order has to be set aside. AIR 1949 All 21, Dissented from. (Para 6)

Cases Referred Chronological Paras

(1954) Criminal Revn No 351 of 1954 D/- 18 11 1954 (Pat) Zahuruddin v State	4 5
(1953) AIR 1953 Cal 491 (V 40) = 1953 Cri LJ 1165 Birdhaj Roy v State	3
(1949) AIR 1949 All 21 (V 36) = 50 Cri LJ 78 Baburam v Rex	6
(1929) AIR 1929 Pat 67 (V 16) = 30 Cri LJ 492 Amanat Ali v Emperor	5

Surendra Prasad (No II) and Zakir Hussain Mirza for Petitioners. Naseem Ahmad for Opposite Party.

ORDER This application is directed against an order passed by the Sub divisional Magistrate of Patna City on the 22nd July 1966 drawing up a proceeding under section 107 of the Code of Criminal Procedure (hereinafter referred to as the Code) against the petitioners calling upon them to show cause by the 6th August 1966 as to why they should not be ordered to execute bonds of rupees one thousand with two sureties of the like amount each for keeping peace for a period of one year. It appears that this order was passed on the basis of a police report of the Malsalami Police station that there was an apprehension of the breach of the peace due to old enmity for a piece of land which is a graveyard.

2. Learned Counsel for the petitioners has submitted that the order of the Court below is vague and the notices served upon the petitioners did not disclose as to what was the substance of the informations which they were to

1970 CRI L J 536 (Vol 76 C N 133) =

AIR 1970 PATNA 107 (V 57 C 17)

B P SINHA J

Balkishun Sao and others Petitioners v Munno Khan Opposite Party

Criminal Pevn No 2020 of 1968 D/- 24-1-1969 from order of Sub Divisional Magistrate Patna City D/- 22-7-1966

(A) Criminal P C (1898) Ss 112 and 107 — Substance of the information — Order of the Magistrate not indicating the nature of the information received

IN JUNE 1969 C/MS/D

answer. In this connection he has referred to section 112 of the Code, which provides that when a Magistrate acting under Section 107 of the Code deems it necessary to require any person to show cause, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, etc. I think the contention of the learned counsel is well founded.

3. Under Section 107 of the Code, whenever a Magistrate is informed that any person is likely to commit a breach of the peace he may require such person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for a period not exceeding one year. This has to be done in the manner provided in the subsequent sections and the manner is provided in S. 112 of the Code. That section requires a Magistrate to make an order in writing setting forth the substance of the information received.

Here, in the instant case, it appears that the learned Magistrate has not given the substance of the information received in the order. He has simply passed orders in the following terms:

"Perused the police report of Malsalami P. S. and duly forwarded by D. I. Police, Patna City, for action under section 107 Cr. P. C.

Whereas, I am satisfied from the police report of Malsalami P. S. that there is a serious apprehension of breach of peace at the hands of members of O. P. due to old enmity for piece of land which is graveyard which may disturb the public peace and tranquillity in a place which lies within the local limits of my jurisdiction.

Draw up proceeding under section 107 Cr. P. C. against the members of O. P.

It is not stated in this order as to what was the substance of the report of the police and in what manner the petitioners were likely to commit breach of the peace. It is also not stated as to with regard to which graveyard there was apprehension of breach of the peace. All these things have been left vague. The notices to show cause served on the petitioners were in these very terms. Therefore, it was not clear from the contents of the notices as well as to what allegations the petitioners were to answer.

Such order which does not contain the substance of the information received has been held to be bad in a decision of the Calcutta High Court in the case of *Birdhaj Roy v State*, AIR 1953 Cal 491, which has been referred to by the learned Counsel for the petitioners. It has

been held therein that the order of the Magistrate not indicating the nature of the information received which induced him to take action under section 107 of the Code is bad. No decision counter to it could be pointed out by the learned Counsel for the opposite party.

4. It has, however, been submitted by the learned Counsel for the opposite party that the revision application is premature inasmuch as the petitioners have only been called upon to show cause and that stage is to come when, after the perusal of the show cause the Magistrate would take a decision whether to proceed with the proceeding or not. In this connection, learned Counsel for the opposite party has relied upon a decision of this Court in *Criminal Rev No 351 of 1954 (Pat) Zahuruddin v State*, decided on the 18th November, 1954. In that case also a proceeding was started under Section 107 of the Code and the petitioners were called upon to show cause as to why they should not be ordered to execute a bond. It was observed that it would be premature for this Court to say whether the allegations did or did not warrant a proceeding under Section 107 of the Code, the learned Magistrate having complete jurisdiction to issue notices under that section.

5. In answer to this, learned Counsel for the petitioners has referred to an earlier decision of this Court in the case of *Amanat Ali v Emperor* AIR 1929 Pat 67. In that case also against the very initial order drawing up a proceeding under section 107 of the Code and calling upon the other side to show cause, a revision was filed and that was allowed on the ground that specifications as required under the law were not indicated in the order, that is to say, the petition in revision was entertained against the initial order calling upon the other side to show cause. This decision is counter to the aforesaid decision in the case of *Zahuruddin*, *Criminal Revn No 351 of 1954 D/- 18-11-1954 (Pat)*, referred to by learned Counsel for the opposite party, in which the revision was characterised as premature at that stage. The decision in the case of *Amanat Ali* AIR 1929 Pat 67 was not referred to in that decision, which has been relied upon by the learned Counsel for the opposite party. The decision in the case of *Amanat Ali* being an earlier decision and having not been overruled by a Bench decision of this Court has to be followed. Therefore, I hold that the present revision application is not premature.

6. Another contention of the learned Counsel for the petitioners has been that the petitioners were called upon to show

cause why they should not execute a bond for keeping peace for a period of one year and this period must be taken to have begun from the date of the order that is to say, from the 22nd July, 1966 and since that period has already elapsed the order is fit to be set aside now. In this connection he has relied upon a decision of the Allahabad High Court in the case of Baburam v Rex AIR 1949 All 21. In that case the initial order requiring the parties concerned to furnish security for a period of three months commenced from the 18th August 1947 when it was observed that that period having already expired if the learned Magistrate was to hear the case upon merits under section 117 of the Code he would not be in a position to pass a final order in confirmation of the previous order and he would have to drop the proceeding. With such observations the proceeding was quashed.

It would however appear that in that particular case the period of three months was directed to commence from a particular date. That is not the case in the case under consideration. Further if such be the intention of law then in every case by coming in revision and dealing the matter the person proceeded against would evade the execution of the bond. Learned Counsel has not been able to cite any decision of this Court on this point. With respect I am not inclined to agree with the decision referred to above.

7 In view of what has been said above the application is allowed and the order of the learned Magistrate dated the 22nd July 1966 is set aside on the ground that it is vague. I would however like to make it clear that it is always open to the learned Magistrate to take appropriate action in a legal way if any such occasion arises.

Petition allowed

1970 CRI L J 588 (Vol 76 C N 140) =
AIR 1970 SUPREME COURT 491
(V 57 C 109)

(From Madras 1969 Mal LW (Cri) 98)
J M SHELAT v BHARGAVA C A
VAIDIANINGAM & S HEGDE
v GROVER JJ

M/s Rayala Corporation (P) Ltd and
another Appellants v The Director of
Enforcement New Delhi Respondent
Advocate General Tamil Nadu, Intervener

LM/A/N/D390/69/GCM/M

Criminal Appeals Nos 18 and 19 of
1969 D/- 25 1969 and 237 1969

(A) Foreign Exchange Regulation Act
(1947), Sections 23 (1) (b), 23 (1) (a) and
23 D — Vires — Provision of Section 23
(1) (b) does not violate Article 14 of the
Constitution

It cannot be said that the provisions of Section 23 (1) (b) of the Foreign Exchange Regulation Act violate Article 14 of the Constitution by providing for a punishment heavier and severer than the penalty provided for the same acts under Section 23 (1) (a) of the Act. This is because the effect of Section 23 D of the Act is that the choice in respect of the proceeding to be taken under Section 23 (1) (a) or Section 23 (1) (b) has not been left to the unguided and arbitrary discretion of the Director of Enforcement but is governed by principles indicated by that section. Parliament by Foreign Exchange Regulation (Amendment) Act 39 of 1957 amended Section 23 (1) and at the same time also introduced Sec 23 D in the Act. These two Sections 23 (1) and 23 D (1) must be read together so that the procedure laid down in Section 23-D (1) is to be followed in all cases in which proceedings are intended to be taken under Section 23 (1). The effect of this interpretation is that whenever there is any contravention of any section or rule mentioned in Section 23 (1), the Director of Enforcement must first proceed under the principal clause of Section 23 D (1) and initiate proceedings for adjudication of penalty. He cannot at that stage at his discretion choose to file a complaint in a Court for prosecution of the person concerned for the offence under Sec 23 (1) (b). The Director of Enforcement can only file a complaint by acting in accordance with the proviso to Section 23 D (1) which clearly lays down that the complaint is only to be filed in those cases where at any stage of the inquiry the Director of Enforcement comes to the opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate. Until this requirement is satisfied he cannot make a complaint to the Court for prosecution of the person concerned under Section 23 (1) (b). The choice of the proceeding to be taken against the person who is liable for action for contravention under Section 23 (1) is thus not left entirely to the discretion of the Director of Enforcement but the criterion for making the choice is laid down in the proviso to Section 23-D (1).

Thus, whenever, there is a contravention by any person which is made punishable under either clause (a) or clause (b) of Section 23 (1), the Director of Enforcement must first initiate proceedings under the principal clause of Section 23-D (1) and he is empowered to file a complaint in Court only when he finds that he is required to do so in accordance with the proviso. It is by resorting to the proviso only that he can place that person in greater jeopardy of being liable to a more severe punishment under Section 23 (1) (b) of the Act AIR 1962 SC 1764, Rel on. (Paras 5, 6, 7 & 8)

(B) Foreign Exchange Regulation Act (1947), Sections 4 (1), 5 (1), 9, 23-D (1) and proviso, and 23 (3) — Contravention of Sections 4 (1), 5 (1) and 9 — Enquiry under Section 23-D (1) instituted by issue of show cause notice — Complaint made to the Court without having any material which could lead to the opinion that Director of Enforcement will not be in a position to impose adequate penalty — Complaint, held was filed without complying with the proviso and was invalid. 1969 Mad LW (Cr) 98, Reversed.

(Para 12)

(C) Defence of India Rules (1962), Rules 132-A (2) and 132-A (4) — Violation of Rule 132-A (2) — Prosecution launched on 17-3-1968 after Rule 132-A (2) was omitted by Defence of India Amendment Rules 1965 — Prosecution is illegal. 1969 Mad LW (Cr) 98, Reversed.

The language contained in clause 2 of the Defence of India (Amendment) Rules, 1965 whereby Rule 132-A (2) was omitted can only afford protection to action already taken while Rule 132-A (2) was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after Rule 132-A (2) had ceased to exist. On this interpretation, the complaint made for the offence under R 132-A (4) of the D I Rules after 1st April 1965, when Rule 132-A (2) was omitted, has to be held invalid. 1969 Mad LW (Cr) 98, Reversed, AIR 1951 SC 301, Rel on, AIR 1951 All 703, Approved, 1947 AC 362, AIR 1959 Madh Pra 93 & AIR 1947 FC 38, Dist (Paras 12 and 16)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 1764 (V 49)=
(1963) 2 SCR 297, Shanti Prasad
Jam v Director of Enforcement 8
(1959) AIR 1959 Madh Pra 93

(V 46) = 1959 Cri LJ 325, State of Madhya Pradesh v. Hiralal Sutowala 15
(1952) AIR 1952 SC 75 (V 39)= 1952-3 SCR 284= 1952 Cri LJ 510, State of W B. v. Anwar Ali 8
(1951) AIR 1951 SC 301 (V 38)= 1951 SCR 621= 52 Cri LJ 1103, S. Krishnan v State of Madras 13
(1951) AIR 1951 All 703 (V 38)= 52 Cri LJ 1094, Jugmendar Das v. State 13, 16
(1947) AIR 1947 FC 38 (V 34)= 1947 FCR 141= 48 Cri LJ 886, J K Gas Plant Manufacturing Co (Rampur) Ltd. v. King-Emperor 16
(1947) 1947 AC 362= 1947-1 All ER 205, Wicks v Director of Public Prosecutions 14, 16

Mr A K Sen, Senior Advocate, (M/s. N C. Raghavachari, W. S. Sitaram and R Gopalakrishnan, Advocates with him), for Appellants, Mr S. T. Desai, Senior Advocate (M/s B D Sharma and S P. Nayar, Advocates, with him), for Respondent, Mr P R. Gokulakrishnan, Advocate-General of Tamil Nadu (Mr. A V. Rangam Advocate with him), for Intervener

ORDER OF THE COURT

BHARGAVA, J. (On behalf of Shelat, Vaidialingam, Hegde and Grover, JJ.):— (2-5-1969) — We have come to the finding that this was a fit case where the High Court of Madras should have allowed the applications under Section 561-A of the Code of Criminal Procedure and should have quashed the proceedings taken on the basis of the complaint dated 17th March, 1968. Consequently, the appeals are allowed. The order of the High Court is set aside and the proceedings are quashed. The detailed reasons will follow.

[The Judgment of the Court (giving the detailed reasons for the above order) was delivered by]

BHARGAVA, J.: (23-7-1969)— These appeals, by certificate, challenging a common Order of the High Court of Madras dismissing applications under Section 561-A of the Code of Criminal Procedure presented by the appellants in the two appeals for quashing proceedings being taken against them in the Court of the Chief Presidency Magistrate, Madras, on the basis of a complaint filed on 17th March, 1968 by the respondent the Director of Enforcement, New Delhi. The Rayala Corpora-

tion Private Ltd appellant in Criminal Appeal No 18 of 1969, was accused No 1 in the complaint, while one M R Pratap Managing Director of accused No 1 appellant in Criminal Appeal No 19/1969 was accused No 2. The circumstances under which the complaint was filed may be briefly stated.

2 The premises of accused No 1 were raided by the Enforcement Directorate on the 20th and 21st December 1966 and certain records were seized from the control of the Manager. Some enquiries were made subsequently and thereafter on the 23.8.1967 a notice was issued by the respondent to the two accused to show cause why adjudication proceedings should not be instituted against them for violation of Secs 4 and 9 of the Foreign Exchange Regulation Act VII of 1947 (hereinafter referred to as "the Act") on the allegation that a total sum of 24171370 Swedish Kronars had been deposited in a Bank account in Sweden in the name of accused No 2 at the instance of accused No 1 which had required the foreign exchange and had failed to surrender it to an authorised dealer as required under the provisions of the Act. They were called upon to show cause in writing within 14 days of the receipt of the notice. Thereafter, some correspondence went on between the respondent and the two accused and later on 11th November 1967 another notice was issued by the respondent addressed to accused No 2 alone stating that accused No 2 had acquired a sum of Sw Krs 8891309 during the period 1963 to 1965 in Stockholm and did not offer or cause it to be offered to the Reserve Bank of India on behalf of the Central Government so that he had contravened the provisions of Section 4 (1) and Section 9 of the Act and affording to him an opportunity under Section 23 (3) of the Act of showing within 15 days from the receipt of the notice that he had permission or special exemption from the Reserve Bank of India in his favour for acquiring this amount of foreign exchange and for not surrendering the amount in accordance with law. A similar show cause notice was issued to accused No 1 in respect of the same amount on 20th January 1968 mentioning the deposit in favour of accused No 2 and failure of accused No 1 to surrender the amount and giving an opportunity to accused No 1 to produce the permission or special exemption from

the Reserve Bank of India. On the 16th March, 1968, another notice was issued addressed to both the accused to show cause in writing within 14 days of the receipt of the notice why adjudication proceedings as contemplated in Section 23-D of the Act should not be held against them in respect of a sum of Sw Krs 1,55,801.41 which were held in a bank account in Stockholm in the name of accused No 2 and in respect of which both the accused had contravened the provisions of Sections 4 (3) 4 (1), 5 (1) (e) and 9 of the Act. The notice mentioned that it was being issued in supersession of the first show cause notice dated 25th August 1967 and added that it had since been decided to launch a prosecution in respect of Sw Krs 8891309. The latter amount was the amount in respect of which the two notices of 4th November 1967 and 20th January 1968 were issued to the two accused while this notice of 16th March 1968 for adjudication proceedings related to the balance of the amount arrived at by deducting this sum from the original total sum of Sw Krs 24171370. The next day on 17th March 1968 a complaint was filed against both the accused in the Court of the Chief Presidency Magistrate Madras for contravention of the provisions of Sections 4 (1), 5 (1) (e) and 9 of the Act punishable under Section 23 (1) (b) of the Act. In addition, the complaint also charged both the accused with violation of Rule 132 A (2) of the Defence of India Rules (hereinafter referred to as "the D I Rs") which was punishable under Rule 132 A (4) of the said Rules. Thereupon both the accused moved High Court for quashing the proceedings sought to be taken against them on the basis of this complaint. Those applications having been dismissed the appellants have come up in these appeals challenging the order of the High Court dismissing their applications and praying for quashing of the proceedings being taken on the basis of that complaint.

3 In these appeals Mr A K Sen, appearing on behalf of the appellants has raised three points. In respect of the prosecution for violation of Sections 4 (1), 5 (1) (e) and 9 of the Act punishable under Section 23 (1) (b) of the Act the principal ground raised is that Sec 23 (1) (b) of the Act is ultra vires Article 14 of the Constitution inasmuch as it provides for a punishment heavier and severer than the punishment or penalty provided for the same acts under Section 23

(1) (a) of the Act. In the alternative, the second point taken is that, even if Section 23 (1) (b) is not void, the complaint in respect of the offences punishable under that section has not been filed properly in accordance with the proviso to Section 23-D (1) of the Act, so that proceedings cannot be competently taken on the basis of that complaint. The third point raised relates to the charge of violation of Rule 132-A (2) of the D I Rs. punishable under Rule 132-A (4) of those Rules, and is to the effect that Rule 132-A of the D I Rs. was omitted by a notification of the Ministry of Home Affairs dated 30th March, 1965 and, consequently, a prosecution in respect of an offence punishable under that Rule could not be instituted on 17th March, 1968 when that Rule had ceased to exist. On these three grounds, the order quashing the proceedings being taken on the complaint in respect of all the offences mentioned in it has been sought in these appeals.

4. To appreciate the first point raised before us and to deal with it properly, we may reproduce below the provisions of Section 23 and Section 23-D (1) of the Act—

23 Penalty and procedure.— (1) If any person contravenes the provisions of Section 4, Section 5, Section 9, Section 10, sub-section (2) of Section 12, Section 18, Section 18-A or Section 18-B or of any rule, direction or order made thereunder, he shall—

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court be punishable with imprisonment for a term which may extend to two years, or with fine, or with both

(1A) If any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1B) Any Court trying a contravention under sub-section (1) or sub-section (1A) and the authority adjudging any contravention under clause (a) of sub-section (1) may, if it thinks fit, and in addition to any sentence or penalty which it may im-

pose for such contravention, direct that any currency, security, gold or silver, or goods or any other money or property, in respect of which the contravention has taken place, shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation— For the purposes of the sub-section, property in respect of which contravention has taken place shall include deposits in a bank, where the said property is converted into such deposits

(2) Notwithstanding anything contained in Section 32 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), it shall be lawful for any magistrate of the first class, specially empowered in this behalf by the State Government, and for any presidency magistrate to pass a sentence of fine exceeding two thousand rupees on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance—

(a) of any offence punishable under sub-section (1) except upon complaint in writing made by the Director of Enforcement, or

(aa) of any offence punishable under sub-section (2) of Section 191,—

(i) where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Central Government,

(ii) where the offence is alleged to have been committed by an officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement, or.

(b) of any offence punishable under sub-section (1A) of this section or Section 23-F, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by a general or special order.

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been

given an opportunity of showing that he had such permission

(4) Nothing in the first proviso to Section 188 of the Code of Criminal Procedure, 1898 (Act 5 of 1895) shall apply to any offence punishable under this section

: : : :

23D Power to adjudicate—(1) For the purpose of adjudging under clause (a) of sub section (1) of Section 23 whether any person has committed a contravention, the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if on such inquiry he is satisfied that the person has committed the contravention he may impose such penalty as he thinks fit in accordance with the provisions of the said Section 23

Provided that if, at any stage of the inquiry the Director of Enforcement is of opinion that having regard to the circumstances of the case the penalty which he is empowered to impose would not be adequate he shall instead of imposing any penalty himself make a complaint in writing to the Court

A plain reading of Section 23 (1) of the Act shows that under this sub section provision is made for action being taken against any person who contravenes the provisions of Sections 4 5 9 10 12 (2) 18 18A or 18B or of any rule, direction or order made thereunder and clauses (a) and (b) indicate the two different proceedings that can be taken for such contravention Under clause (a) the person is liable to a penalty only and that penalty cannot exceed three times the value of the foreign exchange in respect of which the contravention has taken place or Rs 5000 whichever is more This penalty can be imposed by an adjudication made by the Director of Enforcement in the manner provided in Sec 23D of the Act The alternative punishment that is provided in clause (b) is to be imposed upon conviction by a Court when the Court can sentence the person to imprisonment for a term which may extend to two years or with fine or with both Clearly the punishment provided under Section 23 (1) (b) is severer and heavier than the penalty to which the person is made liable if proceedings are taken under Sec 23 (1) (a) instead of prosecuting him in a Court under Section 23 (1) (b) The argument of Mr Sen is that this section lays down no principles at all for

determining when the person concerned should be proceeded against under Section 23 (1) (a) and when under Section 23 (1) (b), and it would appear that it is left to the arbitrary discretion of the Director of Enforcement to decide which proceedings should be taken The liability of a person for more or less severe punishment for the same act at the sole discretion and arbitrary choice of the Director of Enforcement it is urged, denies equality before law guaranteed under Article 11 of the Constitution

5 The submission made would have carried great force with us but for our view that the effect of Section 23D of the Act is that the choice in respect of the proceeding to be taken under Section 23 (1) (a) or Section 23 (1) (b) has not been left to the unguided and arbitrary discretion of the Director of Enforcement but is governed by principles indicated by that section In this connection it is pertinent to note that Section 23 (1) of the Act as originally enacted in 1917 did not provide for alternative punishment for the same contravention and contained only one single provision under which any person contravening any of the provisions of the Act or of any rule direction or order made thereunder was punishable with imprisonment for a term which could extend to two years or with fine or with both, with the additional clause that any Court trying any such contravention might, if it thought fit and in addition to any sentence which it might impose for such contravention direct that any currency security gold or silver or goods or other property in respect of which the contravention has taken place shall be confiscated No question of the applicability of Article 11 of the Constitution could therefore arise while the provision stood as originally enacted

6 Parliament by Foreign Exchange Regulation (Amendment) Act XXIX of 1957, amended Section 23 (1) and at the same time also introduced Section 23D in the Act It was by this amendment that two alternative proceedings for the same contravention were provided in Section 23 (1) In thus introducing two different proceedings Parliament put in the forefront proceedings for penalty to be taken by the Director of Enforcement by taking up adjudication while the punishment to be awarded by the Court upon conviction was mentioned as the second type of proceeding that could be resorted to Section 23D (1) is also dis-

sible into two parts. The first part lays down what the Director of Enforcement has to do in order to adjudge penalty under Section 23 (1) (a), and the second part, contained in the proviso, gives the power to the Director of Enforcement to file a complaint instead of imposing a penalty himself. In our opinion, these two Sections 23 (1) and 23D (1) must be read together, so that the procedure laid down in Sec. 23D (1) is to be followed in all cases in which proceedings are intended to be taken under Sec. 23 (1). The effect of this interpretation is that, whenever there is any contravention of any section or rule mentioned in Section 23 (1), the Director of Enforcement must first proceed under the principal clause of Section 23D (1) and initiate proceedings for adjudication of penalty. He cannot at that stage, at his discretion, choose to file a complaint in a Court for prosecution of the person concerned for the offence under Section 23 (1) (b). The Director of Enforcement can only file a complaint by acting in accordance with the proviso to Section 23D (1), which clearly lays down that the complaint is only to be filed in those cases where, at any stage of the inquiry, the Director of Enforcement comes to the opinion that, having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate. Until this requirement is satisfied, he cannot make a complaint to the Court for prosecution of the person concerned under Section 23 (1) (b). The choice of the proceeding to be taken against the person, who is liable for action for contravention under Section 23 (1), is, thus, not left entirely to the discretion of the Director of Enforcement, but the criterion for making the choice is laid down in the proviso to Section 23D (1). It cannot possibly be contended, and no attempt was made by Mr. Sen to contend, that, if we accept this interpretation that the right of the Director of Enforcement to make a complaint to the Court for the offence under Section 23 (1) (b) can be exercised only in those cases where, in accordance with the proviso, he comes to the opinion that the penalty which he is empowered to impose would not be adequate, the validity of Section 23 (1) (b) of the Act can still be challenged.

7. In this connection, it was urged before us that the language of the principal clause of Section 23D (1) taken together with the language of the proviso does not

justify an interpretation that a complaint for an offence under Section 23 (1) (b) cannot be made by the Director of Enforcement except in accordance with the proviso, particularly because the principal clause of Section 23D (1) merely lays down the procedure that has to be adopted by the Director of Enforcement when proceeding under Section 23 (1) (a), and contains no words indicating that such a proceeding must invariably be resorted to by him whenever he gets information of a contravention mentioned in Section 23 (1). The language does not contain any words creating a bar to his proceeding to file a complaint straightway instead of taking proceedings for adjudication under Section 23D (1). It is true that neither in Section 23 (1) itself nor in Section 23D (1) has the Legislature used specific words excluding the filing of a complaint before proceedings for adjudication are taken under Section 23D (1). If any such words had been used, no such controversy could have been raised as has been put forward before us in these appeals. We have, however, to gather the intention of the Legislature from the enactment as a whole. In this connection, significance attaches to the fact that Section 23D (1) was introduced simultaneously with the provision made for alternative proceedings under Section 23 (1) in its clauses (a) and (b). It appears to be obvious that the Legislature adopted this course so as to ensure that all proceedings under Section 23 (1) are taken in the manner laid down in Section 23D (1). Parliament must be credited with the knowledge that, if provision is made for two alternative punishments for the same act one differing from the other without any limitations, such a provision would be void under Article 14 of the Constitution, and that is the reason why Parliament simultaneously introduced the procedure to be adopted under Section 23D (1) in the course of which the Director of Enforcement is to decide whether a complaint is to be made in Court and under what circumstances he can do so. We have also to keep in view the general principle of interpretation that, if a particular interpretation will enure to the validity of a law, that interpretation must be preferred. In these circumstances, we have no hesitation in holding that, whenever there is a contravention by any person which is made punishable under either clause (a) or clause (b) of Section 23 (1), the Director of Enforcement must first initiate proceed-

ings under the principal clause of Section 23D (1) and he is empowered to file a complaint in Court only when he finds that he is required to do so in accordance with the proviso. It is by resorting to the proviso only that he can place that person in greater jeopardy of being liable to a more severe punishment under Section 23 (1) (b) of the Act.

8 The view we have taken is in line with the decision of this Court in *Shanti Prasad Jain v The Director of Enforcement* (1963) 2 SCR 297 = (AIR 1962 SC 1764) where this Court considered the validity of Section 23 (1) (a) and Section 23D which were challenged on the ground of two alternative procedures being applicable for awarding punishment for the same act. The Court noticed the position in the following words —

"It will be seen that when there is a contravention of Section 4 (1) action with respect to it is to be taken in the first instance by the Director of Enforcement. He may either adjudge the matter himself in accordance with Section 23 (1) (a) or he may send it on to a Court if he considers that a more severe penalty than he can impose is called for. Now the contention of the appellant is that when the case is transferred to a Court it will be tried in accordance with the procedure prescribed by the Criminal Procedure Code but that when the Director himself tries it he will follow the procedure prescribed therefor under the Rules framed under the Act and that when the law provides for the same offence being tried under two procedures which are substantially different and it is left to the discretion of an executive officer whether the trial should take place under the one or the other of them there is clear discrimination and Article 14 is contravened. Therefore Section 23 (1) (a) must it is argued be struck down as unconstitutional and the imposition of fine on the appellant under that section set aside as illegal."

The Court then distinguished the provisions of the Act with the law considered in the case of *State of West Bengal v Anwar Ali* (1952) 3 SCR 284 = (AIR 1952 SC 75) and held —

"Section 23D confers authority on the very officer who has power to try and dispose of a case to send it on for trial to a Court and that too only when he considers that a more severe punishment than what he is authorised to impose should be awarded."

On this view about the effect of Section 23D, the Court gave the decision that the power conferred on the Director of Enforcement under Section 23D to transfer cases to a Court is not unguided and arbitrary, and does not offend Article 14 of the Constitution and Section 23 (1) (a) cannot be assailed as unconstitutional. In that case the argument was that Section 23 (1) (a) should be struck down because the procedure prescribed by it permitted proceedings to be taken by the Director of Enforcement himself which procedure did not confer the same rights on the defence as the procedure prescribed for trial if the Director of Enforcement filed a complaint for the offence under Section 23 (1) (b). In the case before us it is Section 23 (1) (b) which is challenged and on a slightly different ground that it provides for a higher punishment than that provided by Section 23 (1) (a). The answer to both the questions is found in the view taken by us in the present case as well as by this Court in the case of *Shanti Prasad Jain* (1963) 2 SCR 297 = (AIR 1962 SC 1764) (supra) that the Director of Enforcement though he has power to try the case under Section 23 (1) (a) can only send the case to the Court if he considers that a more severe punishment than what he is authorised to impose should be awarded. The Court in that case also thus accepted the principle that Section 23D limits entirely the procedure the Director of Enforcement has to observe when deciding whether the punishment should be under Section 23 (1) (a) or under Section 23 (1) (b).

9 However we consider that in this case there is considerable force in the second point urged by Mr Sen on behalf of the appellants that the respondent in filing the complaint on 17th March 1968 did not act in accordance with the requirements of the proviso to Section 23E (1). We have held above that the proviso to Section 23D (1) lays down the only manner in which the Director of Enforcement can make a complaint and this provision has been laid down as a safeguard to ensure that a person, who is being proceeded against for a contravention under Section 23 (1) is not put in danger of higher and severer punishment at the choice and sweet will of the Director of Enforcement. When such a safeguard is provided by legislature it is necessary that the authority which takes the step of instituting against that person proceed in such a manner in which severer punishment can be

awarded, complies strictly with all the conditions laid down by law to be satisfied by him before instituting that proceeding. In the present case, therefore, we have to see whether the requirements of the proviso to Section 23D (1) were satisfied at the stage when the respondent filed the impugned complaint on 17th March, 1968

10. The proviso to Section 23D (1) lays down that the complaint may be made at any stage of the enquiry but only if, having regard to the circumstances of the case, the Director of Enforcement finds that the penalty which he is empowered to impose would not be adequate. It was urged by Mr. Sen that, in this case, the complaint was not filed as a result of the enquiry under the principal clause of Section 23D (1) at all and, in any case, there was no material before the respondent on which he could have formed the opinion that the penalty which he was empowered to impose would not be adequate in respect of the sum of Sw. Krs 88,913 09 which, it was alleged, had been acquired by the two accused during the period 1963 to 1965 and kept in deposit against law. Arguments at some length were advanced before us on the question as to what should be the stage of the enquiry at which the Director of Enforcement should form his opinion and will be entitled to file the complaint in Court. It appears to us that it is not necessary in this case to go into that question. It is true that the enquiry in this case under Section 23D (1) had been instituted by the issue of the show cause notice dated 25th August, 1967, that being the notice mentioned in Rule 3 (1) of the Adjudication Proceedings and Appeal Rules, 1957. On the record, however, it does not appear that, even after the issue of that notice, any such material came before the respondent which could be relevant for forming an opinion that the penalty which he was empowered to impose for the contravention in respect of the sum of Sw. Krs. 88,913 09 would not be adequate. The respondent, in the case of accused No. 2, appears to have formed a prima facie opinion that a complaint should be made against him in Court when he issued the notice on 4th November, 1967 under the proviso to Section 23 (3) of the Act, and a similar opinion in respect of accused No. 1 when he issued the notice on 20th January, 1968 under the same proviso. There is, however, no information on the record to indicate that, by the time these notices were issued,

any material had appeared before the respondent in the course of the enquiry initiated by him through the notice dated 25th August, 1967, which could lead to the opinion being formed by the respondent that he will not be in a position to impose adequate penalty by continuing the adjudication proceedings. Even subsequently, when one of the accused replied to the notice, there does not appear to have been brought before the respondent any such relevant material.

11. Mr. S. T. Desai on behalf of the respondent drew our attention to para. 3 (E) of the petition presented by accused No. 1 for certificate under Article 132 (1) and Article 134 (1) (c) of the Constitution in this case which contains the following pleading :—

“In this case, having issued show cause notice dated 25th August, 1967 in respect of the subject matter of the pending prosecution and having taken various acts, taking statements, taking recorded statements, investigations, the respondent did not hold an enquiry for the purpose of his forming an opinion that the accused is guilty of violations and that the penalty is not adequate and as such, the prosecution filed in C. C. 8756 of 68 is liable to be quashed on this ground.”

Relying on this pleading, Mr. Desai urged that it amounts to an admission by accused No. 1 that, during enquiry, various statements were taken and recorded and investigations made, so that we should not hold that there was no material on the basis of which the respondent could have formed the opinion that it was a fit case for making a complaint. The pleading does not show that any statements were taken or recorded during the course of the enquiry held under S. 23D (1) of the Act in the manner laid down by the Adjudication Proceedings and Appeal Rules 1957. Under these Rules, after a notice is issued, the Director of Enforcement is required to consider the cause shown by such person in response to the notice and, if he is of the opinion that adjudication proceedings should be held, he has to fix a date for the appearance of that person either personally or through his lawyer or other authorised representative. Subsequently, he has to explain to the person proceeded against or his lawyer or authorised representative the offence alleged to have been committed by such person indicating the provisions of the Act or of the Rules, directions or

orders made thereunder in respect of which contravention is alleged to have taken place and then he has to give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry. It is on the conclusion of such an inquiry that the Director can impose a penalty under Section 23 (1) (a). In the present case there is no material at all to show that any proceedings were taken in the manner indicated by the Rules referred to above. There does not appear to have been any cause shown by either of the two accused or consideration of such cause by the respondent to decide whether adjudication proceedings should be held. It is true that there is some material to indicate that after the issue of notice dated 25th August 1967 some investigations were carried on by the respondent but those investigations would not be part of the inquiry which had to be held in accordance with Adjudication Proceedings and Appeal Rules 1957. It appears that, at one stage before the complaint was filed a writ petition was moved under Article 226 of the Constitution in the High Court of Madras praying for the quashing of the notice dated 25th August 1967. The order made by the High Court on one of the interim applications in connection with that notice shows that while that writ petition was pending some investigations were permitted by the Court but further penal proceedings in pursuance of that notice were restrained. This clearly indicates that whatever statements were recorded by the respondent as mentioned in the petition of accused No. 1 referred to above must have been in the course of investigation and not in the course of the inquiry under Section 23D (1) of the Act. The record before us therefore, does not show that any material at all was available to the respondent in the course of the enquiry under Section 23D (1) on the basis of which he could have formed an opinion that it was a fit case for making a complaint on the ground that he would not be able to impose adequate penalty. The complaint has therefore to be held to have been filed without satisfying the requirements and conditions of the proviso to Section 23D (1) of the Act and is in violation of the safeguard provided by the Legislature for such contingencies. The complaint insofar as it related to the contravention by the accused of provisions of Sections 4 (1) 5 (1) (c) and 9 of the Act punishable under Section 23 (1)

(b) is concerned, is invalid and proceedings being taken in pursuance of it must be quashed.

12 There remains for consideration the question whether proceedings could be validly continued on the complaint in respect of the charge under Rule 132 A (4) of the D I Rs against the two accused. The two relevant clauses of Rule 132 A are as follows:

132A (2) No person other than an authorised dealer shall buy or otherwise acquire or borrow from or sell or otherwise transfer or lend to or exchange with any person not being an authorised dealer, any foreign exchange.

(4) If any person contravenes any of the provisions of this rule he shall be punishable with imprisonment for a term which may extend to two years, or with fine or with both and any Court trying such contravention may direct that the foreign exchange in respect of which the Court is satisfied that this rule has been contravened shall be forfeited to the Central Government."

The charge in the complaint against the two accused was that they had acquired foreign exchange to the extent of Sw Rs 88,913.09 in violation of the prohibition contained in Rule 132A (2) during the period when this Rule was in force so that they became liable to punishment under Rule 132A (4). Rule 132 A as a whole ceased to be in existence as a result of the notification issued by the Ministry of Home Affairs on 30th March 1965 by which the Defence of India (Amendment) Rules 1965 were promulgated. Clause 2 of these Amendment Rules reads as under—

"In the Defence of India Rules 1962 Rule 132A (relating to prohibition of dealings in foreign exchange) shall be omitted except as respects things done or omitted to be done under that rule."

The argument of Mr Sen was that even if there was a contravention of Rule 132A (2) by the accused when that Rule was in force the act of contravention cannot be held to be a "thing done or omitted to be done under that rule" so that after that rule has been omitted no prosecution in respect of that contravention can be instituted. He conceded the possibility that if a prosecution had already been started while Rule 132A was in force that prosecution might have been completely continued. Once the Rule was omitted altogether no new proceeding by

way of prosecution could be initiated even though it might be in respect of an offence committed earlier during the period that the rule was in force. We are inclined to agree with the submission of Mr Sen that the language contained in clause 2 of the Defence of India (Amendment) Rules, 1965 can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. On this interpretation, the complaint made for the offence under Rule 132A (4) of the D. I. Rs., after 1st April, 1965 when the rule was omitted, has to be held invalid.

13. This view of ours is in line with the general principle enunciated by this Court in the case of *S. Krishnan v. State of Madras*, 1951 SCR 621=(AIR 1951 SC 301) relating to temporary enactments, in the following words—

“The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires.”

Mention may also be made to a decision of a learned Single Judge of the Allahabad High Court in *Seth Jugmendar Das v. State*, AIR 1951 All 703 where a similar view was taken when considering the effect of the repeal of the Defence of India Act, 1939, and the Ordinance No XII of 1946 which had amended Section 1 (4) of that Act

14. On the other hand, Mr. Desai on behalf of the respondent relied on a decision of the Privy Council in *Wicks v. Director of Public Prosecutions*, 1947 AC 362. In that case, the appellant, whose case came up before the Privy Council, was convicted for contravention of Regulation 2A of the Defence (General) Regulations framed under the Emergency Powers (Defence) Act, 1939 as applied to British subjects abroad by section 3 (1) (b) of the said Act. It was held that, at the date when the acts, which were the subject-matter of the charge, were committed, the regulation in question was in force, so that, if the appellant had been prosecuted immediately afterwards, the validity of his conviction could not be open to any challenge at all. But the Act of 1939 was a temporary Act, and after

various extensions it expired on February 24, 1946. The trial of the accused took place only in May 1946, and he was convicted and sentenced to four years' penal servitude on May 28. In these circumstances, the question raised in the appeal was: 'Is a man entitled to be acquitted when he is proved to have broken a Defence Regulation at a time when that regulation was in operation, because his trial and conviction take place after the regulation has expired?' The Privy Council took notice of sub-section (3) of Section 11 of the Emergency Powers (Defence) Act, 1939 which laid down that "the expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done". It was argued before the Privy Council that the phrase "things previously done" does not cover offences previously committed. This argument was rejected by Viscount Simon on behalf of the Privy Council and it was held that the appellant in that case could be convicted in respect of the offence which he had committed when the regulation was in force. That case, however, is distinguishable from the case before us inasmuch as, in that case, the saving provision laid down that the operation of that Act itself was not to be affected by the expiry as respects things previously done or omitted to be done. The Act could, therefore, be held to be in operation in respect of acts already committed, so that the conviction could be validly made even after the expiry of the Act in respect of an offence committed before the expiry. In the case before us the operation of Rule 132A of the D. I. Rs has not been continued after its omission. The language used in the notification only affords protection to things already done under the rule, so that it cannot permit further application of that rule by instituting a new prosecution in respect of something already done. The offence alleged against the accused in the present case is in respect of acts done by them which cannot be held to be acts under that rule. The difference in the language thus makes it clear that the principle enunciated by the Privy Council in the case cited above cannot apply to the notification with which we are concerned.

15. Reference was next to a decision of the Madhya Pradesh High Court in *State of Madhya Pradesh v. Hiralal Sutwala*, AIR 1959 Madh Pra 93, but, there again, the accused was sought to be prosecuted for an offence punishable under

an Act on the repeal of which Section 6 of the General Clauses Act had been made applicable. In the case before us, Section 6 of the General Clauses Act can not obviously apply on the omission of Rule 132A of the D I Rs for the two obvious reasons that Section 6 only applies to repeals and not to omissions and applies when the repeal is of a Central Act or Regulation and not of a Rule. If Section 6 of the General Clauses Act had been applied no doubt this complaint against the two accused for the offence punishable under R 132A of the D I Rs could have been instituted even after the repeal of that rule.

16 The last case relied upon is J K Gas Plant Manufacturing Co (Rampur) Ltd v King Emperor 1947 FCR 141= (AIR 1947 FC 38). In that case the Federal Court had to deal with the effect of sub section (4) of Section 1 of the Defence of India Act 1939 and the Ordinance No XII of 1946 which were also considered by the Allahabad High Court in the case of Seth Jugmender Das (supra). After quoting the amended sub section (4) of Section 1 of the Defence of India Act the Court held —

"The express insertion of these saving clauses was no doubt due to a belated realisation that the provisions of Section 6 of the General Clauses Act (X of 1897) apply only to repealed statutes and not to expiring statutes and that the general rule in regard to the expiration of the temporary statute is that "unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it and it ceases to have any further effect. Therefore offences committed against temporary Acts must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate."

The Court cited with approval the decision in the case of 1947 AC 362 (supra) and held that in view of Section 1 (4) of the Defence of India Act 1939 as amended by Ordinance No XII of 1946 the prosecution for a conviction for an offence committed when the Defence of India Act was in force was valid even after the Defence of India Act had ceased to be in force. That case is however distinguishable from the case before us in two respects. In that case the prosecution had been started before the Defence of India Act ceased to be in force and secondly the language introduced in the amended

sub sec (4) of Section 1 of the Act had the effect of making applicable the principles laid down in Section 6 of the General Clauses Act so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force. As we have indicated earlier the notification of the Ministry of Home Affairs omitting Rule 132 A of the D I Rs did not make any such provision similar to that contained in Section 6 of the General Clauses Act. Consequently, it is clear that after the omission of Rule 132A of the D I Rs, no prosecution could be instituted even in respect of an act which was an offence when that Rule was in force.

17 In this connection Mr Desai pointed out to us that simultaneously with the omission of R 132 A of the D I Rs Section 4 (1) of the Act was amended so as to bring the prohibition contained in Rule 132A (2) under Section 1 (1) of the Act. He urged that from this simultaneous action taken it should be presumed that there was no intention of the Legislature that acts which were offences punishable under R 132A of the D I Rs should go unpunished after the omission of that rule. It however, appears that when Section 4 (1) of the Act was amended the Legislature did not make any provision that an offence previously committed under Rule 132A of the D I Rs, would continue to remain punishable as an offence of contravention of Section 4 (1) of the Act nor was any provision made permitting operation of Rule 132A itself so as to permit institution of prosecutions in respect of such offences. The consequence is that the present complaint is incompetent even in respect of the offence under Rule 132A (a). This is the reason why we hold that this was an appropriate case where the High Court should have allowed the applications under Section 561 A of the Code of Criminal Procedure and should have quashed the proceedings on this complaint.

18 Consequently as already directed by our short Order dated 2nd May 1969 the appeals are allowed the order of the High Court rejecting the applications under Section 561 A of the Code of Criminal Procedure is set aside and the proceedings for the prosecution of the appellants are quashed.

Appeals allowed

1970 CRI. L. J. 599 (Vol. 76, C. N. 141) =
AIR 1970 SUPREME COURT 520
(V 57 C 113)

(From Kerala. ILR (1967) 2 Kerala 676)
S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

K. Ranganatha Reddiar, Appellant v.
The State of Kerala, Respondent.

Criminal Appeal No. 141 of 1967, D/-
14-8-1969.

Prevention of Food Adulteration Act (1954), Sections 14, 19 (2) — Prevention of Food Adulteration Rules (1955), R. 12A proviso — Object underlying Act achieved by giving reasonable interpretation — Court must do so — Warranty as required by proviso to Rule 12A — Use of popular language therein — Object of Act is not defeated — ILR (1967) 2 Ker 676, Reversed — (Civil P. C. (1908), Pre. — Interpretation of Statutes).

When the proviso to R. 12A of Prevention of Food Adulteration Rules expressly says that no warranty in form VIA shall be necessary in certain eventualities it would be rewriting the rule to infer that nevertheless the same things must exist in the label or the cash memo. If the words in the warranty can reasonably be interpreted to have the same effect as certifying the nature, substance and quality of an article of food, the warranty will fall within the proviso. The Act is of wide application and millions of small traders have to comply with the provisions of the Act and the Rules. If the object underlying the Act can be achieved, without disorganising the trade, by giving a reasonable interpretation to Rule 12A it is Court's duty to do so. The object of the Act is not defeated even if traders use ordinary language of the trade or popular language in warranties. AIR 1966 SC 1569, Distinguished, ILR (1967) 2 Ker 676, Reversed (Paras 6, 7)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 1569 (V 53) =

1966-2 SCR 815 = 1966 Cri LJ
1208, Baborally v Corporation of
Calcutta

9
Mr A S R Chai, Senior Advocate
(M/s. A. S. Nambiar and K. R. Nambiar,
Advocates with him), for Appellant; Mr
V. K. Krishna Menon, Senior Advocate
(Mr M R K Pillai, Advocate, with him),
for Respondent

The following Judgment of the Court
was delivered by

SIKRI, J.:— In this appeal by certifi-
cate the only point that arises is whether

LM/AN/D934/69/SSG/P

the cash memo. Ex. D1, issued by the seller to the appellant contains a warranty within Rule 12A of the rules framed under the Prevention of Food Adulteration Act, 1954 (Act 37 of 1954), hereinafter referred to as the Act. The Magistrate, who tried the complaint, held that Ex. D1 was a proper warranty and it fell within the proviso to Rule 12A. The High Court on appeal held to the contrary.

2. The relevant facts are these. The appellant is a Rice & General Merchant and holds a wholesaler's licence. It was alleged in the complaint that the appellant had stored and exposed for sale and sold compounded Asafoetida which was found to have been adulterated by wheat starch and tapioca starch and that non-permitted orange coal-tar dye was present. The report of the Public Analyst to Government, Trivandrum, was relied on in this connection.

3. The appellant appeared as a witness and he stated that he purchased Asafoetida from L. T. Alakesan and Brothers, received it in enclosed packets in bags and sold it in bags. He received invoice which reads as follows:

"L. T. Alakesan & Brothers, Asafoetida Merchants, Vellamadam	
Sri K. Ranganatha Reddiar	
Kottarakara Rate. 6 00	
Particulars C S T. Rs. 2	
One case of Asafoetida	
Misky bag 30	Rs 180 00
The quality is up to the	
mark C.S.T.	Rs. 3 60
	<hr/> Rs. 183 60

Rupees one hundred and eighty-three and N. P. sixty only.

One case (1d) (Id) 1/4/64 (Sd) 147542
18/5/64."

He further stated that "it is written on the packet as "Extra Superior" in English and as "Compounded misky full of quality and flavour" in Tamil."

4. The relevant statutory provisions are:

The Prevention of Food Adulteration Act, 1954.

"S. 14. Manufacturers, distributors and dealers to give warranty—

No manufacturer, distributor or dealer of any article of food shall sell such article to any vendor unless he also gives a warranty in writing in the prescribed form about the nature and quality of such article to the vendor."

"S 19 (2) A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded article of food if he proved —

(a) that he purchased the article of food—

(i) in a case where a licensee is prescribed for the sale thereof from a duly licensed manufacturer distributor or dealer

(ii) in any other case from any manufacturer distributor or dealer with a written warranty in the prescribed form and

(b) that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it"

The Prevention of Food Adulteration Rules, 1955

"Rule 12-A Warranty — Every trader selling an article of food to a vendor shall if the vendor so requires deliver to the vendor a warranty in Form VI A

Provided that no warranty in such form shall be necessary if the label on the article of food or the cash memo delivered by the trader to the vendor in respect of that article contains a warranty certifying that the food contained in the package or container or mentioned in the cash memo is the same in nature substance and quality as demanded by the vendor

Explanation — The term trader shall mean an importer manufacturer, whole sale dealer or an authorised agent of such importer manufacturer or wholesale dealer"

5 We are not concerned with the question whether Rule 12A is contrary to the provisions of the Act. We take it that it is valid and if the appellants' case falls within the proviso he is entitled to acquittal.

6 It was contended before us on behalf of the respondent that the warranty must state expressly that the food mentioned in the cash memo was the same in nature substance and quality as demanded by the vendor and if these words did not exist in the cash memo the proviso would not apply. We are unable to accede to this contention. It may be that if the warranty is not contained in a label or cash memo the warranty must be in Form VI A which uses these words:

"We hereby certify that the food/foods mentioned in this invoice is/are warranted to be the same in nature substance and quality as that demanded by the vendor." But we do not decide thus as it is not necessary to do so. In our view when the

proviso expressly says that no warranty in such form shall be necessary in certain eventualities it would be rewriting the rule to hold that nevertheless the same things must exist in the label or the cash memo. It seems to us that if the words in the warranty can reasonably be interpreted to have the same effect as certifying "the nature, substance and quality" of an article of food the warranty will fall within the proviso. The Act is of wide application and millions of small traders have to comply with the provisions of the Act and the Rules. The learned counsel for the State says that if they are not able to comply with the provisions they should stop carrying on their trade. But if the object underlying the Act can be achieved without disorganising the trade by giving a reasonable interpretation to Rule 12A, it is our duty to do so.

7 A number of English cases were referred to us but we do not find it necessary to refer to them as they interpret the Sale of Food & Drugs Act 1875 and the later Food & Drugs Act 1935. The language of the relevant sections dealing with defences is different and warranties employing different words have been interpreted. But they do at least show that trade can be carried on and the object of the Act is not defeated even if traders use ordinary language of the trade or popular language in warranties.

8 Coming now to the language used in the cash memo it seems to us that the words "quality is up to the mark" mean that the quality of the article is up to the standard required by the Act and the vendee. Quality in this context would include nature and substance because the name of the article is given in the cash memo. It must be remembered that it is not a document drafted by a solicitor; it is a document using the language of a tradesman. Any tradesman when he is assured that the quality of the article is up to the mark will readily conclude that he is being assured that the article is not adulterated. The offence if any has been committed by the seller and not the appellant.

9 There was some argument before us as to the difference in the meaning of the words "nature substance and quality". It was pointed out that Section 14 only uses two words "nature and quality" and not substance. But it is not necessary to express our views on this point. Refer

ence was made to the case of Baburally v Corporation of Calcutta, 1966-2 SCR 315= (AIR 1966 SC 1569). This Court held that the words on the label and the so-called cash memo in that case did not contain the requisite warranty. But we are unable to see how that case assists either the appellant or the State.

10. In the result the appeal is allowed, judgment of the High Court set aside and that of the Magistrate restored. The appellant's bail bond shall be treated as cancelled.

Appeal allowed.

1970 CRI. L. J. 601 (Vol. 76, C. N. 142) =

AIR 1970 SUPREME COURT 535

(V 57 C 117)

(From Allahabad)

S. M. SIKRI AND P JAGANMOHAN REDDY, JJ

Sheo Nath, Appellant v The State of Uttar Pradesh, Respondent

Criminal Appeal No 49 of 1969, D/- 15-10-1969

Penal Code (1860), Sections 411, 396 — Recovery of cloth, stolen in dacoity, from accused, a cloth merchant, three days after occurrence — Other stolen articles not recovered from him — His name not mentioned as one of the participants in dacoity, either by any eye-witnesses or in dying declaration of person killed in dacoity — No evidence to show that in village in which accused lived, it was known that dacoity took place and goods stolen — Held, only presumption that could be drawn was that accused knew that goods were stolen but he did not know that they were stolen in dacoity — He could be convicted only under S. 411 and not under Section 396 — Decision of All. H. C., Reversed — Evidence Act (1872), Section 114, Illustration (a). ILR (1954) 4 Raj 476, Approved; AIR 1956 SC 54, Rel. on; AIR 1956 SC 400, Disting.

(Paras 5, 6)

Cases Referred: Chronological Paras

(1956) AIR 1956 SC 54 (V 43)=

1956 Cri LJ 150, Sanwat Khan v State of Rajasthan

4

(1956) AIR 1956 SC 400 (V 43)=

1956 SCR 191= 1956 Cri LJ 790, Wasim Khan v. State of U. P.

4

(1954) ILR (1954) 4 Raj 476= 1954

Raj LW 404, Bhurgiri v. State

7

The following Judgment of the Court was delivered by

SIKRI, J.:— The only question which arises in this appeal by special leave is whether the appellant, Sheo Nath, should be convicted under Section 396, Indian Penal Code, or Section 411, Indian Penal Code, or Section 412, Indian Penal Code. The facts as found by the High Court are these A dacoity was committed at the shop of Ram Murat in Dhaneja village by 15 to 20 persons on August 19, 1966, at about 1130 p m One dacoit Ram Shankar, was armed with a gun while others carried spears, Gandas and lathis. During the course of the dacoity Ram Murat was injured. One Pancham who lived in a house not far from Ram Murat's shop, and two others came running on hearing the noise. Pancham was shot down with the gun by dacoit Ram Shankar The dacoits then escaped with clothes, ornaments, cash, etc., looted from Ram Murat's shop After the dacoits left Ram Murat dictated a report about the occurrence in which he named Ram Shankar Singh, Jaintri Prasad Singh, Nanhe Singh and Sulai accused as having been among the culprits and this report was sent to the Jalalpur police station, five miles away, where it was received and recorded at 6 a m next morning.

2. On August 22, 1966, i.e., three days after the dacoity, the house of Sheo Nath, appellant, was searched and three lengths of cloth were recovered which were subsequently identified by Ram Murat and a tailor named Bismillah as having been stolen from Ram Murat's shop in the dacoity.

3. The High Court, agreeing with the learned Sessions Judge, relied on the evidence of three eye-witnesses regarding the manner in which the occurrence took place and regarding the participation of the four named accused persons Sheo Nath had not been named by the eye-witnesses or in the dying declaration of Pancham and no witness claimed to have identified him taking part in the dacoity But, relying on the discovery of three lengths of cloth and their identification, the High Court convicted Sheo Nath under Section 396, I P C. The High Court observed

"From the material on record we are fully convinced that the Exhs 2 and 3 were stolen from the shop of Ram Murat in the course of the dacoity committed in the night between 19 to 20 August 1966, and since they were recovered from

the possession of Sheo Nath appellant only 2 or 3 days later, it is legitimate to infer that he was one of the dacoits vide illustration (a) to Section 114 of the Evidence Act. Sheo Nath therefore, has been rightly convicted under Section 396 I P C."

4 The learned Counsel for the appellant contends that in the circumstances of the case the High Court should not have convicted the appellant under Section 396, Indian Penal Code but only under Section 411 Indian Penal Code. Section 114 of the Evidence Act and illustration (a) read as follows:

"114 The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to facts of the particular case.

Illustrations

The Court may presume—

(1) that a man who is in possession of stolen goods after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession."

This Section was considered by this Court in *Sinwat Khan v State of Rajasthan* AIR 1956 SC 54. This Court after considering some High Court cases, observed:

"In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where however the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof."

In *Wasim Khan v State of Uttar Pradesh* 1956 SCR 191 = (AIR 1956 SC 400) this Court held that "recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder". On the facts of that case this Court held that the appellant was rightly convicted of the offence of murder and robbery. But apart from the possession of stolen property there were other circumstances indicating that the appellant was guilty of murder and robbery. The circumstances

were that the appellant in that case had travelled with the deceased on his bullock cart alone and the deceased never reached his home and was found murdered. The appellant was found in possession of the goods of the deceased three days after and the appellant made no effort to trace the whereabouts of the deceased or lodge information of his disappearance from the bullock cart.

5 In the present case three presumptions are possible from the recovery of the stolen goods from the appellant three days after the occurrence of the dacoity.

(1) that the appellant took part in the dacoity.

(2) that he received stolen goods knowing that the goods were stolen in the commission of a dacoity and

(3) that the appellant received these goods knowing them to have been stolen. The choice to be made however, must depend on the facts proved in this case. It is quite clear that all the property, which was stolen by the dacoits was not recovered from the appellant. We may repeat that clothes ornaments cash etc., were stolen. The only articles that were found with the appellant were a length of muslin (exh 2) and a length of char khana doriya (Exh 3). The appellant is stated to be a cloth merchant and he may well have acquired these goods as a receiver. It has not been shown that in the village in which the appellant lived it was known that a dacoity had taken place and goods had been stolen in the dacoity.

6 On the facts of this case it seems to us that the only legitimate presumption to be drawn is that the appellant knew that the goods were stolen but he did not know that they were stolen in a dacoity. The appellant therefore can only be convicted under Section 411, Indian Penal Code.

7 In this connection we may refer to a decision of the Rajasthan High Court in *Bhurgiri v State of R* (1954) 4 Raj 176 at pp 482-183 (Wanchoo C J and Dye J). Wanchoo C J, after holding that the recovery of ornaments from Bhurgiri had been established observed:

"The next question is whether on this evidence Bhurgiri can be convicted for dacoity. The recovery took place five days after the dacoity. It is not impossible that during that period the property might have passed from the dacoits to a receiver. Under these circumstances we are of opinion that it would not be safe

to convict Bhurgiri of dacoity on the evidence of this recovery alone. It would be more proper to convict him as a guilty receiver.

Then the question arises whether he should be convicted under Section 411 or 412, Indian Penal Code. So far as Section 411 is concerned, he is clearly guilty under that section. The presumption under Section 114 applies, and we can safely presume that he is a guilty receiver of stolen property particularly when we find that the property was kept in the Bara, and not at his own house. He must have had reason to believe that it was stolen when he received the property, and that is why he left it in the Bara. But we feel that it would not be proper to convict him under Section 412 because that section requires that the receiver should know or have reason to believe that the property had been transferred by the commission of dacoity. The prosecution, in our opinion, has to show something more than the mere possession of stolen goods for a conviction under Section 412. If the prosecution is only able to show mere possession, the proper section to use is 411."

8. In the result the appeal is allowed and the appellant convicted under Section 411, Indian Penal Code, instead of Section 396, Indian Penal Code, and sentenced to undergo rigorous imprisonment for three years.

Appeal allowed

1970 CRI. L J 603 (Vol 76, C N 143)

(ALLAHABAD HIGH COURT)

GANGESHWAR PRASAD, J

Shri Irfan Ali, Applicant v. State, Opposite Party.

Criminal Revn No 1166 of 1964 connected with CrI. Revn No 1181 of 1964. D/- 29-10-1968 against judgment of Civil and S J, Bareilly — Bijnor, D/- 16-7-1964

(A) Evidence Act (1872), Ss. 3, 24 — Confessional statement of accused, believed and forming main evidence against accused — Rest of evidence not sufficient in itself to convict accused, treated as corroborating confession — This is the correct estimate of probative force of other evidence. (Para 5)

(B) Evidence Act (1872), S. 26 — Accused in police custody for 10 days, before being sent to jail custody — Confession in jail — Prolonged detention in police

custody unless satisfactorily explained, is a circumstance strongly mitigating against voluntariness of confession — Prolonged detention held satisfactorily explained and the confession held was voluntary. AIR 1956 SC 56 & AIR 1959 SC 1, Rel. on.

(Para 6)

(C) Evidence Act (1872), S. 25 — Criminal P. C. (1898), S. 164 — Impropriety of recording confession in jail pointed out — The Courts can however hold that the confession is voluntary if, after properly appreciating the importance and significance of the circumstances, they find that there are other facts and circumstances which completely assure its voluntariness. (Para 7)

(D) Evidence Act (1872), S. 30 — Confession of co-accused, can only be used to strengthen evidence against accused — It does not supplement evidence against accused, which is otherwise insufficient — Other evidence should not only be worthy of reliance but must also be, by itself and unaided by confession sufficient for finding of guilt of accused. AIR 1964 SC 1184 & AIR 1952 SC 159 & AIR 1931 Mad 177, Rel. on. (Para 10)

(E) Evidence Act (1872), S. 27 — Statement leading to discovery — Scope of information cannot be extended by reading possible implications in it.

Section 27 of the Evidence Act is in the nature of an exception to the prohibition imposed by the two preceding sections of the Evidence Act, and a statement which is sought to be made admissible under that provision must be construed strictly and with exactitude. Even a slight variation in the language of the statement may substantially change its meaning and import and have a far reaching effect on the inference to be drawn from it. While, therefore, a verbatim reproduction of the words used by the accused may not be expected in the recovery memo prepared by the police officer or in the deposition of the witnesses of recovery, precision is a matter of utmost importance in the interpretation of the statement of the accused as incorporated in the recovery memo and as proved in Court. Only such information should be deemed to have been given by the accused as the words used by him expressly conveyed and the scope of the information cannot be extended by reading possible implications in it or by judging its meaning with reference to all the facts that were discovered. The facts discovered may quite frequently exceed and go beyond the information given by the accused and the information cannot therefore, be regarded as having contained all the discovered facts. (Para 12)

Where the accused had stated that "the Dhatura plants from which he had extracted Dhatura fruits and which he had

subsequently broken were within the limits of the bungalow towards the jail and he would go and show the same the statement did not contain any information to the effect that stems or fruits of Dhatura plants were thrown by him at the place where he had broken the plants or at the place to be pointed out by him. The stems and the fruit recovered from near the place might not have been of the plants whose roots the accused pointed out. In these circumstances the statement made by the accused cannot be read as having reference to the stems recovered by the C I D Inspector. The statement must therefore be regarded as having been limited to the information regarding the existence towards the jail side of the bungalow of Dhatura plants from which he had extracted fruits and which he had subsequently broken and regarding his preparedness to go and show them. (Paras 11 12)

So far as that portion of the information is concerned which related to the preparedness of the accused to go and show Dhatura plants it is admissible and the question to be considered is only with regard to the admissibility of that portion of the information which related to the extraction of fruits and the breaking of plants. The extraction of fruits and the breaking of plants by the accused were facts relating to the past user or the past history of the plants whose roots he was prepared to point out. The statement of the accused containing the information that he had extracted Dhatura fruits and had subsequently broken the plants is not admissible in evidence. The information given as to how the roots of Dhatura plants pointed out by accused happened to be in the condition in which they were found i.e. without stems cannot therefore be regarded as an information related distinctly to the facts discovered and it has to be rejected as inadmissible. Indeed the object to which the aforesaid information related and the context in which it was discovered make the inadmissibility of the information still more obvious. The only portion of the information given by the accused in connection with the recovery of Dhatura roots that is admissible is that which related to the place where Dhatura plants were to be found and his preparedness to go and show them and the only inference to which this information can lead is that the accused knew of their existence at the place where they were found. AIR 1962 SC 1783 Distinguished AIR 1966 SC 119 Rel on AIR 1962 SC 1116 & AIR 1963 SC 1113 Ref.

(Paras 13 15)

(F) Evidence Act (1872) S 27 — Statement by accused that he had kept the stone on which he ground Dhatura in a corner inside the pit in the motor garage. Statement to the effect that the accused

had ground Dhatura on the stone related to the past user of the stone and did not lead to any discovery and accordingly was inadmissible — The remaining part of the statement was admissible. (Para 16)

(G) Evidence Act (1872) S 27 — Prosecution must establish connection between fact discovered and the crime — Held that there was total absence of evidence direct or circumstantial to connect the recovered objects with the crime. AIR 1962 SC 1788 Rel on. (Para 17)

(H) Evidence Act (1872), S 3 — Circumstantial evidence — Appreciation

The mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a little if need be to force them to form parts of one connected whole and the more ingenious the mind of the individual the more likely is it considering such matters to overreach and mislead itself to supply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete. What has to be seen is not the effect of each isolated item of circumstantial evidence separately but their cumulative effect. AIR 1952 SC 354 & (1938) 2 Lewis 227 Ref. (Para 22)

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G. P. Bhargava and J N Chaturvedi,
 for Applicant

ORDER:— Irfan Ali, applicant in revision No 1166 of 1964 and Smt Lareti, applicant in revision No 1181 of 1964 who were tried together by the Assistant Sessions Judge, Bareilly, were convicted under Section 120-B, I P C read with Section 328, I P C and Smt Lareti was further convicted under Sec 328, I P C simpliciter Irfan Ali was sentenced to two years rigorous imprisonment on the charge against him and Smt. Lareti was sentenced to two years' simple imprisonment on each of the two charges for which she was convicted. The sentences imposed upon Smt. Lareti were, however, directed to run concurrently. The applicants appealed against the convictions and sentences, but their appeals were dismissed by the Civil and Sessions Judge Bareilly-Bijnor. Thereupon they came up in revision to this Court

2. Briefly stated the prosecution case was as follows.

In 1959, when the offences were said to have been committed, both the applicants were in the employ of Sri Ashwini Kumar, I. A S who was at that time posted as District Magistrate, Bareilly. Smt Lareti was employed as an Aya and Irfan Ali as a motor driver. The applicants had grown intimate with each other and had eventually developed illicit relations. One Puran was also in the service of Sri Aswini Kumar at that time as a cook. These three persons and one Ali Husain, orderly, lived in the outhouses attached to Sri Ashwini Kumar's residence Banney, a cousin of Irfan Ali, also used to live with Irfan Ali, and since he was out of employment in those days, the applicants were anxious to oust Puran and have Banney appointed as a cook instead. To achieve this object they spread a rumour that Puran had illicit relations with Ali Husain's married daughter, who was staying with Ali Husain. Later, it so happened once that Puran chanced to see the two applicants, Smt Lareti and Irfan Ali, in a compromising position inside the motor garage of Sri Ashwini Kumar. He started telling people about what he had seen, with the result that the matter became the subject of common talk and the applicants got apprehensive that it may reach the ears of Sri Ashwini Kumar and lead to unpleasant con-

sequences. The applicants, therefore, became very keen on getting Puran turned out of the service of Sri Ashwini Kumar. With that end in view Smt Lareti dropped some pieces of salt in the Dal cooked by Puran one day so that Sri Aswini Kumar and his wife may feel annoyed and dissatisfied with Puran. Since this did not have the desired effect the applicants entered into a conspiracy to mix Dhatura in the food prepared by Puran for the members of Sri Aswini Kumar's family so that Puran may be finally turned out. In prosecution of that conspiracy Smt Lareti managed to mix Dhatura in the food which was served by Puran for Sri Aswani Kumar and Smt Aswini Kumar on the night of 3rd May 1959. That day Sri Aswini Kumar had gone to Nainital with the Commissioner and returned to his residence late. The food was laid for him and his wife at about 10 or 10.30 P. M. and one of the items of the food was cooked brinjal vegetable. Sri Aswini Kumar had no appetite and he, therefore, took only some soup and just a little of two other vegetables but did not eat the brinjal vegetable at all. Smt. Ashwini Kumar, however, had her dinner as usual and ate the brinjal vegetable as well. After about an hour Smt Ashwini Kumar began feeling unwell and when her condition showed deterioration Dr. Miss A W. Dukley Medical Superintendent of the Dufferin Hospital, Bareilly and, later, the Civil Surgeon, Dr C S D. Misra, were sent for. As the Doctors suspected it to be a case of Dhatura poisoning the stomach of Smt Ashwini Kumar was washed and the stomach wash was duly preserved and sealed for examination. Smt Ashwini Kumar recovered after treatment for a few days.

The Civil Surgeon made a formal report about the matter to District Magistrate who forwarded it to the Deputy Superintendent of Police, and the latter ordered registration of a case and investigation. The Circle Inspector of Police started the investigation but later it was taken up by the Criminal Investigation Department. The stomach wash was sent for examination to the Chemical Examiner, Agra, who reported that Dhatura was detected therein. Smt. Lareti and Irfan Ali were taken under arrest in the night intervening 21st and 22nd May, 1959. On 28th May, 1959, at the pointing out of Irfan Ali, the investigating Officer recovered roots, stems and one dry fruit of a plant from a place within the limits of Sri Ashwini Kumar's residence and a stone from his motor garage. These articles were also sent for examination to the Chemical Examiner, Agra, who reported that the roots, stems and the fruits were identified to be of Dhatura plant and that Dhatura was detected on the stone. On 1st June 1959 Smt. Lareti made a confes-

sion which was recorded by a Magistrate in jail. After the completion of the investigation the applicants were sent up for trial

3 Irfan Ali pleaded not guilty Smt Lareti in her statement in the committal proceedings admitted guilt accepted the correctness of all the facts alleged against her by the prosecution including the administration of Dhatura and acknowledged having made the confession recorded in jail but at the trial she pleaded not guilty repudiated the allegations made against her and with regard to her confession stated that she had made it as directed (meaning presumably as directed by the police) because her daughter was seriously ill and she was assured that she would be let off if she did so The Courts below found the charge of criminal conspiracy to administer Dhatura poison proved against the applicants and the charge of actual administration of the poison proved against Smt Lareti As was but natural in a case of this kind there was no direct evidence in proof of the offence with which applicants were charged The case of the prosecution rested on evidence of motive some items of circumstantial evidence including the evidence of conduct of the applicants and the recoveries made at the instance of Irfan Ali and the confessional statements made by Smt Lareti The courts below accepted the entire prosecution evidence and also held that the confessional statements of Smt Lareti were voluntary and true

4 The evidence led by the prosecution clearly proved that Dhatura was mixed in the brinjal vegetable which was served for Sri Ashwini Kumar and Smt Ashwini Kumar on the relevant night The children of the family who had taken their food earlier and had also eaten the brinjal vegetable had no complaint whatsoever and Sri Ashwini Kumar who took only the other two vegetables and not the brinjal vegetable did not at all feel unwell Puran too who took his meal later and ate the brinjal vegetable also remained quite well Smt Ashwini Kumar however who ate along with other things the brinjal vegetable started feeling unwell shortly afterwards and Dhatura was detected in her stomach wash The only reasonable inference in the circumstances therefore is that somebody mixed Dhatura in the brinjal vegetable served for Sri Ashwini Kumar and Smt Ashwini Kumar In the courts below it was suggested on behalf of the applicants that the case might have been one of attempted suicide by Smt Ashwini Kumar but the suggestion was repelled and indeed there was no foundation for it and having regard to the circumstances it was too fantastic to deserve serious consideration Very rightly the sugges-

tion was not put forward by the learned counsel for the applicants before me

5 In regard to the fact that it was Smt Lareti who mixed Dhatura in the brinjal vegetable the two confessional statements of Smt Lareti one made in jail during investigation and the other made in committal proceedings constituted the main evidence The judgments of the courts below clearly show that the rest of the evidence was regarded as only corroborative of the confessional statements and not as sufficient in itself to establish the above fact This in my opinion was a correct estimate of the value and the probative force of the evidence other than the confessional statements If the confessional statements were either untrue or had not been voluntarily made the remaining evidence could at best only involve Smt Lareti in suspicion of a grave character but it could not fix the guilt upon her conclusively The courts below considered in detail the circumstances attending the confessional statements and they felt satisfied of their voluntariness and truth Their finding in regard to the confessional statements and to the guilt of Smt Lareti was not at all challenged before me but the learned counsel for Smt Lareti I shall however briefly refer to the main grounds on which the confession recorded in jail was assailed in the courts below

6 The two major objections urged against the confession were that Smt Lareti was detained in police custody for an unduly long period before she was sent to jail and that the confession should have been recorded in court and not in jail As noted above Smt Lareti was arrested in the night intervening 21st and 22nd May but she was sent to jail on 1st June For about ten days therefore she was kept in police custody and unless satisfactorily explained this prolonged detention was indeed a circumstance strongly militating against the voluntariness of the confession

In *Nathu v State of Uttar Pradesh* AIR 1956 SC 56 there was before the Supreme Court a confession of the appellant who had been kept separately in the custody of the CID Inspector for about thirteen days preceding the making of it Dealing with that confession their Lordships observed

It appears to us that the prolonged custody immediately preceding the making of the confession is sufficient unless it is properly explained to stamp Exhibit P-15 as involuntary PW 33 made no attempt to explain this unusual circumstance It is true that with reference to this matter the appellant made various suggestions in the cross-examination of PW 33 such as that he was given bhant and liquor or shown pictures or promised to be made an approver and they have

been rejected—and rightly—as unfounded

"But that does not relieve the prosecution from its duty of positively establishing that the confession was voluntary, and for that purpose, it was necessary to prove the circumstances under which this unusual step was taken. There being no such evidence, we are unable to act upon Exhibit P-15 as a voluntary confession. It was argued that better evidence was not forthcoming, as the investigation by PW 32 was, as already stated, half-hearted and perfunctory, and no adequate steps were taken to secure evidence before P.W. 33 took up the matter on 18-7-1952.

"All this is true, and the result is no doubt very unfortunate, but that does not cure the defect from which Exhibit P-15 suffers. It was also argued that both the courts below had found that Exhibit P-15 was voluntary and that that was a finding with which this Court would not interfere in special appeal. But, then the courts below have, in coming to that conclusion, failed to note that P.W. 33 has offered no explanation for keeping the appellant in separate custody from the 7th to 20th August, and that is a matter which the prosecution had to explain, if the confession made on 21-8-1952 was to be accepted as voluntary."

In the instant case, however, the Investigating Officer P.W. 29 gave an explanation regarding the detention of Smt Lareti and the explanation was found by the courts below to be acceptable. In giving their findings as to the voluntariness of the confession, the courts below took into account the fact that Smt Lareti was detained in police custody for about ten days before being sent to jail and her confession was recorded the next day thereafter, and the conclusion reached by them cannot, therefore, be said to be vitiated on account of an omission to consider this important circumstance relating to the confession.

In *Ram Prakash v State of Punjab*, AIR 1959 SC 1, the Supreme Court had before it a confession which was made after the accused had been kept in police custody for fifteen days preceding the confession and which was recorded by a Magistrate barely an hour after the production of the accused before him. Their Lordships observed that the Magistrate ought not to have recorded the confession on the day he did and he ought to have remanded the accused to jail custody for a few days in order that the police influence may be removed from his mind, but the confession was not discarded on that account. In view of the care which the Magistrate had taken to satisfy himself as to the voluntariness of the confession before recording it, the intrinsic reliability of the account given in the confes-

sion, and the acceptance of the confession by the accused in his statement in the committal proceedings, their Lordships held that the confession was both voluntary and true.

It cannot, therefore, be urged that by reason of the fact that Smt Lareti was detained in police custody for about ten days and her confession was recorded just a day after her confinement in jail the confession could in no circumstance be regarded as having been voluntarily made. Whether the other facts of the case could dispel the doubt created by the above feature of the confession and could ensure its voluntary character in spite of it is however, a different matter.

7. As to the impropriety of recording the confession in jail there could hardly be any doubt. As pointed out by their Lordships of the Supreme Court in *Ram Chandra v State of Uttar Pradesh*, AIR 1957 SC 381, the first rule of the standing orders issued by the Government of Uttar Pradesh and printed as Appendix XIX at page 566 of Manual of Government Orders, Uttar Pradesh (1954 Edition) says that confessions may ordinarily be recorded in open court and during court hours unless for exceptional reasons it is not feasible to do so and it thus "emphasises that the Magistrate in recording confession is exercising part of his judicial function in the manner prescribed by law." It was not, however, laid down in that case that irrespective of any other fact or consideration a disregard of the above-mentioned rule would in itself entail the rejection of a confession. It will be noticed that their Lordships observed that there was no tangible evidence, either of a direct or of a circumstantial nature, in corroboration of the confession (which was a retracted confession) and then proceeded to say:

"It appears to us, however, clear that in this case it would be extremely unsafe to base a conviction for murder on the confession of the appellant Ram Chandra which, as pointed out above, is clearly open to a good deal of criticism, and has been taken in the jail without adequate reason, a fact the significance of which has not been noticed by either of the courts below. We are also of the opinion that the story of murder as given in the confession is somewhat hard to believe." That a confession may remain worthy of acceptance and be acted upon, in spite of having been recorded in jail, would be apparent from a reference to the decision of the Supreme Court in *Hem Raj Devi Lal v State of Ajmer*, AIR 1954 SC 462, where it was observed—

"No doubt the confession was recorded in jail though ordinarily it should have been recorded in the Court House, but that irregularity seems to have been made because nobody seems to have realised

that that was the appropriate place to record it but this circumstance does not affect in this case the voluntary character of the confession

While therefore it is true that the abovementioned circumstances made the confession of Smt Lareti open to serious criticism and brought its voluntariness gravely into question it cannot be denied that the courts below could still hold that the confession was voluntary if after properly appreciating the importance and significance of these circumstances they found that there were other facts and circumstances which completely assured its voluntariness. Such assuring facts and circumstances were I think present

8 (His Lordship reviewed the circumstances under which the confession was made and also considered the confessional statement and agreed with the lower court that it was voluntary confession and proceeded)

Having regard to all the facts and circumstances of the case the finding of the courts below that Smt Lareti mixed Dhatura in the food served for Smt Ashwini Kumar and her husband and was guilty of an offence punishable under Section 328 IPC was thus quite correct. Indeed as I have noted at an earlier stage of the judgment the learned counsel for Smt Lareti did not challenge the finding of the courts below against her. Nevertheless I examined the record to satisfy myself of its correctness and particularly of the voluntariness and truth of the confessional statements on which it was principally based. The confession of Smt Lareti however negligible its value and howsoever limited its use against Irfan Ali could in a certain situation and for a certain purpose be taken into consideration against him and that also made it necessary for me to consider the grounds on which the confession was assailed in the courts below.

9 The law as to the proper use of the confession of a co-accused is well settled and in *Haricharan Kurmi v State of Bihar* AIR 1964 SC 1184 their Lordships of the Supreme Court have laid it down as follows

'It could be noticed that as a result of the provisions contained in S 30 the confession has no doubt to be regarded as amounting to evidence in a general way because whatever is considered by the Court as evidence circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of S 30 the fact remains that it is not evidence as defined by S 3 of the Act. The result therefore is that

in dealing with a case against an accused person the court cannot start with the confession of co-accused person it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That briefly stated is the effect of the provisions contained in S 30. The same view has been expressed by this Court in *Kashmira Singh v State of Madhya Pradesh* 1952 SCR 526 = (AIR 1952 SC 159) where the decision of the Privy Council in *Bhuboni Sahu's case* 76 Ind App 147 = (AIR 1949 PC 257) has been cited with approval. In AIR 1952 SC 159 (referred to in the above decision) their Lordships quoted with approval the following passage from the judgment of Reilly J in *In re Periyaswami Moopan ILR 54 Mad 75 at p 77* = (AIR 1931 Mad 177 at p 178)

the provision goes no further than this where there is evidence against the co-accused sufficient if believed to support his conviction then the kind of confession described in S 30 may be thrown into the scale as an additional reason for believing that evidence

and then proceeded to observe

'Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though if believed it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing that without the aid of the confession he would not be prepared to accept

10 The confession of Smt Lareti therefore could not to quote the words of Reilly J from the case referred to by their Lordships be added to supplement evidence otherwise insufficient and could be used only to further strengthen the conclusion reached by the court on the other evidence. In other words the other evidence should not only have been worthy of reliance but should also have been by itself and unaided by the confession, sufficient for a finding of guilt against Irfan Ali. Clearly that evidence was not of such a character

11. The most important pieces of evidence against Irfan Ali were the recoveries made at his instance. The recovery of roots, stems and a dry fruit of Dhatura may be taken up first Sri R N Azad, IAS, P.W. 24 who was posted as a Magistrate at Bareilly and occupied the residence of the District Magistrate for fifteen or twenty days in January 1959, stated that he had seen five or six Dhatura plants growing at a place within the compound of the District Magistrate's residence. Prior to his being taken in the Indian Administrative Service he was an Expert of Plant Diseases in the Indian Horticultural Research Institute and in that capacity he had done some work on Dhatura species. That presumably accounted for his having taken notice of the plants. Sri R N Azad further stated that towards the end of May 1959 the CID Inspector took him to the place where he had seen the Dhatura plants and he found that the plants were not there. The CID Inspector who conducted the investigation deposed to having taken Sri R N. Azad on 29th May 1959 to the place where Irfan Ali had pointed out two Dhatura roots. The fact that the recovery was made on the pointing out of Irfan Ali from a place where Dhatura plants existed in 1959 has been found established by the courts below and the finding on that matter should be accepted. But the recovery alone could only lead to the inference that Irfan Ali knew where Dhatura plants were to be found and mere knowledge of that fact was not a circumstance of much significance. Irfan Ali was living in the compound of Sri Ashwini Kumar's residence, and the statement of the CID. Inspector indicates that the latrine meant for the servants was at a distance of about thirty paces from the place of recovery. Irfan Ali might, therefore, easily have known of the existence of Dhatura plants at the place from where the recovery was made without having had anything to do with them. The prosecution, however, also led evidence to the effect that before pointing out the place of recovery Irfan Ali, whilst in police custody, stated that "the Dhatura plants from which he had extracted Dhatura fruits and which he had subsequently broken were within the limits of the bungalow towards the jail and he would go and show the same". This fact was deposed to by the CID Inspector and the recovery witnesses P.W. 20 and P.W. 22. The trial Judge held that the only portion of the above statement which was admissible in evidence was that which related to the existence of Dhatura plants towards the jail within the limits of the bungalow and to the preparedness of Irfan Ali to go and show them. The rest of the statement did not, in his opinion, fall within the

purview of Section 27 of the Evidence Act and was, therefore, inadmissible. The learned Civil and Sessions Judge, however, differed on this matter from the trial Judge and, relying on Chinnaswamy Reddy v State of Andhra Pradesh, AIR 1962 SC 1788 and Brijesh Kumar v. State, AIR 1958 All 514, he held that the entire statement was covered by Section 27 of the Evidence Act and was admissible in evidence.

12. In Chinnaswamy's case, AIR 1962 SC 1788 the appellant stood charged with an offence punishable under Section 411 IPC in respect of certain ornaments which were said to have been discovered in consequence of an information given by the appellant whilst in police custody. The statement was to the effect that "he had hidden them (the ornaments) and would point out the place." The Supreme Court held the entire statement quoted above to be admissible, but also pointed out that "these words by themselves though they may show possession of the appellant would not prove the offence, for after the articles have been recovered the prosecution has still to show that the articles recovered are connected with the crime i.e., in this case the prosecution will have to show that they are stolen properties." In the instant case, Irfan Ali was not alleged to have said that he had kept or thrown broken stems or fruits of Dhatura plants at the place which he would point out and the question of the admissibility of any such statement does not, therefore, arise. Some stems and dry fruits of Dhatura were certainly, according to the prosecution evidence, recovered within a distance of one yard from the place where Irfan Ali pointed out Dhatura roots, but it could not on that account be correct to construe his statement as meaning that he had kept or thrown the stems near the spot where he had broken the plants. Section 27 of the Evidence Act is in the nature of an exception to the prohibition imposed by the two preceding sections of the Evidence Act, and a statement which is sought to be made admissible under that provision must be construed strictly and with exactitude. Even a slight variation in the language of the statement may substantially change its meaning and import and have a far reaching effect on the inference to be drawn from it. While, therefore, a verbatim reproduction of the words used by the accused may not be expected in the recovery memo prepared by the police officer or in the deposition of the witnesses of recovery, precision is a matter of utmost importance in the interpretation of the statement of the accused as incorporated in the recovery memo and as proved in court. Only such information should be deemed to have been given by the accused as the words

used by him expressly conveyed and the scope of the information cannot be extended by reading possible implications in it or by judging its meaning with reference to all the facts that were discovered. The facts discovered may quite frequently exceed and go beyond the information given by the accused and an information cannot therefore be regarded as having contained all the discovered facts. The statements of Irfan Ali did not contain any information to the effect that stems or fruits of Dhatura plants were thrown by him at the place where he had broken the plants on at the place to be pointed out by him. The stems and the fruit recovered from near the place might not have been of the plants whose roots Irfan Ali pointed out particularly because the evidence of Sri R N Azad shows that there were five or six Dhatura plants at that place. The recovery was made twentyfive days after the commission of the alleged offence and the stems could have been thrown there by anybody and not necessarily by the person who separated the stems from the roots pointed out by Irfan Ali. Again the throwing might have been done much after the incident and might have been wholly unconnected with the offence. In these circumstances the statement made by Irfan Ali cannot be read as having reference to the stems recovered by the CID Inspector.

It may also be noted that the CID Inspector and the recovery witnesses did not state in their evidence that Irfan Ali had pointed out the stems and the fruit. The statement of Irfan Ali must therefore be regarded as having been limited to the information regarding the existence towards the jail side of the bungalow of Dhatura plants from which he had extracted fruits and which he had subsequently broken and regarding his preparedness to go and show them (admissibility to be considered later).

I may here mention that according to the statements of the CID Inspector and the recovery witnesses Irfan Ali placed his hands on two roots and said that they were of those very plants from which he had extracted Dhatura fruits. The placing of the hands, which amounted only to pointing out could of course be proved but the statement made by Irfan Ali thereafter was apart from the reason to be discussed later inadmissible also on account of having been made subsequent to the discovery. The pointing out done by Irfan Ali did not, however cover the stems and mere nearness of the stems to the roots could neither make the pointing out have that effect nor establish any necessary relation between them, particularly when the other Dhatura plants which were seen there by Sri R N Azad in January 1959 were not found by him

on 29th May 1959 and the stems might, therefore have been of those other plants. It is significant in this connection that according to the recovery memo Ex Ka-21 it was only for additional precaution (Ehtiyat Mazeed) that roots of the three other plants (besides the two roots pointed out by Irfan Ali) and stems etc lying within a yard were taken into possession by the CID Inspector. I have dwelt at some length upon the recovery of the stems although in my opinion, the case of the prosecution does not advance even if the information given by Irfan Ali is regarded as having covered the stems as well.

13 So far as that portion of the information is concerned which related to the preparedness of Irfan Ali to go and show Dhatura plants it is undoubtedly admissible and the question to be considered is only with regard to the admissibility of that portion of the information which related to the extraction of fruits and the breaking of plants. This second portion (which is the first portion in the statement as quoted above) of the information does not to my mind stand on the same footing as the information which was mainly in question in Chinnaswamy's case AIR 1962 SC 1788 i.e. the information that the appellant in that case had hidden the ornaments at the place to be pointed out by him. The extraction of fruits and the breaking of plants by Irfan Ali were facts relating to the past user or the past history of the plants whose roots he was prepared to point out. The present case is therefore distinguishable from Chinnaswamy's case AIR 1962 SC 1788. In AIR 1958 All 511 (supra) the other case relied upon by the learned Civil and Sessions Judge it has been stated at page 515 of the report that 'On 23-6-1956 Brijesh is said to have told the Sub-Inspector that he could point out the place where the murder was committed and he led him to go with the witnesses to a field near Dubai where blood stained earth was recovered. At page 520 however there is a passage indicating that the accused had pointed to a spot in a certain field of Dubai village and said 'This is where we committed the murder' and that statement was held to have been rightly allowed to be proved. I may, however with respect observe that admission in evidence of a statement of the above kind would not be justified in view of the decision of the Supreme Court in *Aghnoo Kuresia v State of Bihar* AIR 1966 SC 119. The appellant in the Supreme Court case had lodged a first information report at a police station containing a detailed confession regarding the commission of the four murders in which he stood charged. Their Lordships observed that save and except as provided by S 27 of the Evidence Act and save

and except the formal part identifying the accused as the maker of the report no part of the confessional statement contained in the first information report could be tendered in evidence, and then held that out of the facts mentioned in the first information report what was admissible was only the information relating to the discovery of the dead bodies and the Tangi. Their Lordships divided the statement made in the first information report into 18 paragraphs each paragraph containing a separate fact. It would be seen that in respect of each of the four murdered persons the appellant had given information not merely as to the places where their dead bodies would be found but also as to his having murdered them there or near about and as to how the dead bodies happened to be at those places and in the condition in which they were to be found. The only portion of the information accepted as admissible by their Lordships, however, was that which related to the place where the dead bodies were lying and to the place where the appellant concealed the Tangi, and the final position in that case was summed up as follows:

"The entire evidence against the appellant then consists of the fact that the appellant gave information as to the place where the dead bodies were lying and as to the place where he concealed the Tangi, the discovery of the dead bodies, and the Tangi in consequence of the information, the discovery of a blood-stained chadar from the appellant's house and the fact that he had gone to Dungi Jharan hills on the morning of August 11, 1963. This evidence is not sufficient to convict the appellant of the offences under S 302 of the Indian Penal Code."

In the light of this decision of the Supreme Court it must be held that the statement of Irfan Ali containing the information that he had extracted Dhatura fruits and had subsequently broken the plants is not admissible in evidence and that the learned Civil and Sessions Judge committed an error of law in regarding that information as admissible and taking it into consideration. Evidently, none of the informations given by the appellant in Aghnoo Nagesia's case, AIR 1966 SC 119, about the circumstances in which the dead bodies happened to be at the places and in the condition in which they were found was held by their Lordships to be related distinctly to the facts thereby discovered as required by Section 27. The information given by Irfan Ali, in the instant case, as to how the roots of Dhatura plants pointed out by him happened to be in the condition in which they were found, i.e., without stems, cannot, therefore, be regarded as an information related distinctly to the facts discovered and it has to be rejected as in-

admissible. Indeed, the object to which the aforesaid information related and the context in which it was discovered make the inadmissibility of the information still more obvious. The two roots pointed out by Irfan Ali had not come to exist there as a result of some act done by him and three other Dhatura roots in a similar condition were also found at that place and taken possession of by the CID Inspector. The learned Civil and Sessions Judge has observed that if Irfan Ali had not said that he had destroyed the plants there would have been no recovery of the roots because "the plants would have been looked for and would not have been found." The evidence shows that even the roots were not looked for but were actually pointed out by Irfan Ali by placing his hands on them; but, quite apart from this, there is no ground for saying that the roots would not have been recovered if Irfan Ali had not said that he had himself destroyed the plants. However, on every view of the situation the decision of the Supreme Court in Aghnoo Nagesia's case, AIR 1966 SC 119, precludes the admissibility of the information relating to the extraction of fruits and the destruction of plants.

14. Two other decisions of the Supreme Court should also be referred to in this connection. In *Udai Bhan v State of Uttar Pradesh*, AIR 1962 SC 1116, the appellant, who stood charged under Sections 457 and 380 IPC, was alleged to have handed over to the police a key, saying that he had opened therewith the lock of the shop in which the offences were alleged to have been committed. Dealing with the admissibility of the above statement their Lordships observed,

"The handing over of the key is not a confessional statement but the confession lies in the fact that with that key the shop of the complainant was opened and, therefore, that portion will be inadmissible in evidence and only that portion will be admissible which distinctly relates to the facts discovered i.e., the finding of the key."

15. The other decision is *Prabhu v. State of Uttar Pradesh*, AIR 1963 SC 1113. The information alleged to have been given by the appellant in that case was that "the axe with which the murder had been committed and his blood stained shirt and dhoti were in the house and the appellant was prepared to produce them", and with regard to that information their Lordships held —

"The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of S. 27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him

a statement which led to any discovery within the meaning of S 27

The only portion therefore of the information given by Irfan Ali in connection with the recovery of Dhatura roots that is admissible is that which related to the place where Dhatura plants were to be found and his preparedness to go and show them and the only inference to which this information can lead is that Irfan Ali knew of their existence at the place where they were found

16 The other recovery made on the pointing out of Irfan Ali was a stone from a pit in the motor garage of Sri Ashwini Kumar. The prosecution led evidence to prove that Irfan Ali whilst in police custody had also stated that he had kept the stone on which he ground Dhatura in a corner inside the pit in the motor garage. The learned Civil and Sessions Judge agreeing with the trial Judge observed that the statement to the effect that Irfan Ali had ground Dhatura on the stone related to the past user of the stone and did not lead to any discovery and he accordingly held it to be inadmissible. The remaining part of the statement was held by him to be admissible and undoubtedly it is admissible.

17 The two recoveries coupled with the admissible portions of the information given by Irfan Ali only show that he knew of the existence of two Dhatura roots within the compound of Sri Ashwini Kumar's residence and he had kept a stone on which Dhatura was detected by the Chemical Examiner inside a pit in the motor garage of Sri Ashwini Kumar. But there is no evidence at all to connect the Dhatura roots and the stone with the crime in question and as laid down by the Supreme Court in Chinnaswamy's case AIR 1962 SC 1728 the prosecution has to establish the connection of the object discovered with the crime. A period of fifteen days as noted above elapsed between the administration of Dhatura and the recoveries and during that period Smt Lareti and Irfan Ali were not under arrest. It is not known when the stone was used for grinding Dhatura and when it was kept by Irfan Ali inside the pit in the motor garage. The prosecution examined Sri Krishna P W 16 the husband of Smt. Lareti, to prove that while she lived with him eight or nine years before the occurrence she used to give Dhatura to his family in Mathura and that one day Dhatura was recovered from the end of her Saree. The latter fact was proved also by the testimony of Faqir Chand P W 17. Smt Lareti also in her confession recorded in jail stated that she used to give Dhatura in small doses to the members of her husband's family with the result that they remained under its stupefying influence and did not trouble her as they were

cont. Obviously therefore Smt Lareti was quite familiar with Dhatura and its use. She had illicit relations with Irfan Ali and she bore a grudge against Purnan on account of his giving publicity to the fact that he had seen Irfan Ali and Smt Lareti in a compromising position in the motor garage. Smt Lareti used to accompany the children of Sri Ashwini Kumar when Irfan Ali took them for a drive and she must have been freely and quite frequently entering the motor garage. Taking these circumstances into consideration much significance cannot be attached to the recovery of the stone and to the information given by Irfan Ali. A number of situations are easily conceivable in which Irfan Ali might have put the stone where it was found without having been guilty of the crime with which he was charged. It is not however necessary to set out the various hypotheses that suggest themselves to the mind as there is total absence of evidence direct or circumstantial to connect the recovered objects with the crime.

18 I may now take up the other three circumstances which were relied upon by the learned Civil and Sessions Judge for his finding against Irfan Ali and see whether they along with the circumstances so far dealt with taken in their totality exclude every reasonable hypothesis of Irfan Ali's innocence and establish the charge against him beyond reasonable doubt. But before proceeding to do so I may observe that circumstances which may only in some measure be corroborative of a conclusion of guilt reached on the basis of other evidence have to be distinguished from circumstances which may by themselves constitute the basis for such a conclusion. I may also emphasise the necessity of exercising the caution that a particular conduct utterance or other circumstance which may give the impression of being related to and suggestive of the guilt of the accused if an impression that he is guilty has already been formed may really be entirely neutral and devoid of any incriminating tendency.

19 The first of the remaining three circumstances is that in the evening 3rd May 1959 at about 7-30 P M while Irfan Ali was going somewhere from his quarter Smt Lareti came out of the residence of Sri Ashwini Kumar and had a talk with Irfan Ali. In the course of that talk Smt Lareti asked Irfan Ali as to when the District Magistrate was expected to return whereupon Irfan Ali said 'Saheb nau baje tak ayenge. Tum apna kam poori karo tumhen is se kya'. The learned Civil and Sessions Judge observed that this reply was calculated to serve as a reminder to Smt Lareti that she had to administer Dhatura poison that evening. Clearly this interpretation pre-

supposed the existence of a scheme to administer Dhatura and a presupposition was not warranted. The words used by Irfan Ali could certainly fit into the said scheme if such a scheme had been conceived and was intended to be carried out, but they could not in themselves be indicative of any such scheme and had no sinister implication. It is evident that the only word in the reply of Irfan Ali to which any significance may be said to attach is "poora" and if this word were not there Irfan Ali's reply to the enquiry of Smt Lareti could not be said to have been at all unusual. (After discussing the point His Lordship proceeded)

Nothing, however, turns on these linguistic niceties. On no reasonable construction can the words said to have been used by Irfan Ali furnish any basis for inferring the existence of a conspiracy to administer Dhatura. This circumstance is wholly innocuous and at any rate it is too trivial and inconsequential for any inference.

20. The next circumstance is that Smt Lareti, who had left District Magistrate's House for her quarter after laying the children to sleep on their beds and shortly before Sri Ashwini Kumar started taking his dinner, was seen talking to Irfan Ali under a tree outside District Magistrate's House. (After discussing this circumstance His Lordship continued)

The learned Civil and Sessions Judge observed that Smt Lareti watched what Sri Ashwini Kumar and Smt Ashwini Kumar were eating and as she found Irfan Ali under the tree when she was going, "it was only natural for her to stop there and tell Irfan which items Sri A. Kumar had taken and which of the dishes had been taken by Smt A. Kumar, because it was necessary to apprise her accomplish of the latest developments". This observation again, presupposed the conspiracy which was required to be proved. What had to be seen was not whether, the conspiracy being there, this conduct could in some manner be related to it, but whether this conduct could contribute to an inference that there was a conspiracy. The approach of the learned Judge was, therefore, fundamentally wrong, and it based too heavily on conjecture.

21. The last of these circumstances noted by the learned Civil and Sessions Judge is that some sixteen or seventeen days after the incident while the CID Inspector was interrogating Smt Lareti in District Magistrate's House at about 10 P.M. Irfan Ali looked greatly disturbed and on being questioned by PW 5 R K Tewari as to why he was disturbed he replied "CID ke inspector bungle men Lareti se poochh tanchh kar rahe hain alahda men. Lareti ek aurat hai—

aise na ho koi raz khol de—koi uske munh men tala to dal nahin sakta—main bhi na phans jaoon". R K Tewari then said that investigation goes on like that and repeated the enquiry as to why he should feel disturbed. The reply of Irfan Ali was "Tewari Ji mere mucaddar he kharab hai".

R K Tewari, who was a motor driver in the Information Department, used to live in the servants' quarters attached to the residence of Sri Ashwini Kumar. (His Lordship discussed this piece of evidence and proceeded)

It will be seen that the words alleged to have been used by Irfan Ali do not mean that Irfan Ali was a party to the "raz", and the "raz" spoken of might, therefore, have been confined to Smt Lareti alone. I have already noted that the statement of Irfan Ali excited no curiosity in the mind of R K Tewari and he did not try to know anything further from Irfan Ali. The conclusion naturally is that the statement of Irfan Ali did not convey to him the impression that Irfan Ali had some hand in the matter. The net result in regard to this item of evidence is firstly, the testimony of R K Tewari does not appear to be true, secondly, the account given by him of the conversation with Irfan Ali cannot be regarded as an accurate and dependable account, and thirdly, even the words said to have been uttered by Irfan Ali in the course of that conversation are of no material significance and can afford no basis for any inference against Irfan Ali.

22. The evidence against Irfan Ali really consists only of the recoveries made at his instance, and even the learned Civil and Sessions Judge was of the view that they were the most important pieces of the evidence. The inference deducible from the recoveries does not, in my opinion, gain any additional strength from the circumstances discussed above and is not at all supplemented thereby. It is true that what has to be seen is not the effect of each isolated item of circumstantial evidence separately but their cumulative effect, but the three abovementioned circumstances, even if the evidence relating to each of them is accepted, are so neutral and in any case, so meagre in significance that their assemblage adds little to the case against Irfan Ali. It is well to bear in mind in this connection the warning addressed by Baron Alderson in *Reg v Hodge*, (1838) 2 Lewis 227 to which reference was made by their Lordships of the Supreme Court in *Palvinder Kaur v State of Punjab*, AIR 1952 SC 354. It was as follows—

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious

the mind of the individual the more likely was it considering such matters to overreach and mislead itself to supply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete

The evidence as to motive for the offence also loses much of its importance by reason of the fact that it was shared by Smt Lareti and she alone might easily have been responsible for the whole thing

23 As said above the case really rests on the recoveries so far as Irfan Ali is concerned. I have already dealt with their effect and the conclusion that may legitimately be drawn from them. The result is that although the case against Irfan Ali is one of strong suspicion the evidence is insufficient for proving the offence with which he was charged. In this state of the evidence the confession of Smt Lareti even though it had been found to be voluntary and true cannot be utilized for making up the deficiency of the other evidence and for completing the case against Irfan Ali. I may again draw attention to the case of AIR 1964 SC 1184 (Supra) and refer to the following observations of their Lordships at the end of their judgment

'It is true that the confession made by Ram Surat is a detailed statement and it attributes to the two appellants a major part in the commission of the offence. It is also true that the said confession has been found to be voluntary and true so far as the part played by Ram Surat himself is concerned and so it is not unlikely that the confessional statement in regard to the part played by the two appellants may also be true and in that sense the reading of the said confession may raise a serious suspicion against the accused. But it is precisely in such cases that the true legal approach must be adopted and suspicion however grave must not be allowed to take the place of proof. As we have already indicated it has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In criminal trials there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is

not proved against him, and so he is entitled to the benefit of doubt'

24 On a consideration of the evidence it is clear that the charge against Irfan Ali is not established and he is entitled to acquittal. Revision No 1166 of 1964 should therefore be allowed the conviction and sentence of Irfan Ali should be set aside and he should be acquitted. Since the charge of conspiracy against Irfan Ali fails and one person alone cannot form a conspiracy Smt Lareti's conviction and sentence under Section 120-B I P C have to be set aside and she has to be acquitted of that charge. To that extent revision No 1181 of 1964 has to be allowed. The charge under Section 228 I P C has however been established against her and her conviction and sentence under that section should therefore be maintained and Revision No 1181 of 1964 in so far as the conviction and sentence of Smt. Lareti under Section 228 I P C are concerned should be dismissed.

25 This judgment gives the reasons for the orders already passed in these revisions

Order accordingly

1970 CRI L J 814 (Vol 76, C N 145)

(ALLAHABAD HIGH COURT)

H C P TRIPATHI J

Sarju Narain Applicant v Lachhmi Narain Opposite Party

Criminal Revn No 747 of 1966 D/- 17-1-1968 against order of Addl Dist Magistrate (J) Kanpur D/- 24-3-1966

Criminal P C (1898) Ss 145 and 146 — Proceedings under S 145 — Should be decided by Magistrate before whom they are initiated — Only in extreme cases, advantage of S 146 to be taken

Proceedings under Section 145 are to be primarily decided by the Magistrate before whom they are initiated and only in extreme cases where complicated questions of law and fact arise making it extremely difficult for him to arrive at a conclusion that he should take advantage of S 146 for referring the question to the Civil Court. The reference of the question in a routine manner for the decision of the Civil Court is not intended by the provisions of Section 146 (Para 3)

S S Tiwari for Applicant Duvendra Swarup for Opposite Party

ORDER — This revision is directed against an order of Sri H C Verma Magistrate First Class Kanpur referring the case under Section 145 Criminal P C for decision to the learned Munsif Haveli.

2 I have heard learned counsel for the parties

LL/BV/G546/68/DGB/B

3. In my opinion the impugned order of the learned Magistrate shows that he had not applied his mind to the evidence before him and had abdicated his functions in favour of the Civil Court. He has not given any reasons as to why he was not in a position to decide the question of possession. If the evidence was balanced he could have easily found out as to whether the balance tilted in favour of one party or the other. Instead of exercising his mind he has adopted an easy course of referring the matter to the Civil Court for deciding for him as to which of the two parties was in possession on the date of the preliminary order or within two months of that date. It must be remembered that proceedings under Section 145, Criminal P. C. are to be primarily decided by the Magistrate before whom they are initiated and only in extreme cases where complicated questions of law and fact arise making it extremely difficult for him to arrive at a conclusion that he should take advantage of Section 146, Criminal P. C. for referring the question to the Civil Court. The reference of the question in a routine manner for the decision of the Civil Court is not intended by the provisions of Section 146, Criminal P. C.

4. Accordingly this revision is allowed. The impugned order of the Magistrate is set aside. The case is sent back to him to hear the parties and then to decide the proceedings on the basis of evidence already adduced before him. The record of the case should be sent back at the earliest to the Court below.

Revision allowed

1970 CRI. L. J. 615 (Vol. 76, C. N. 145)

(ALLAHABAD HIGH COURT)

D D SETH, J

Laxmi Narain and another, Applicant
v State, Opp Party.

Criminal Ref No 312 of 1967, D/- 13-2-1969

Essential Commodities Act (1955), S. 7 — U. P. Food Grains Dealers Licensing Order (1964), Cls. 3 and 5 — Mens rea — On facts held that applicants were under bona fide belief that they could deal in food grains and hence they could not be charged under S. 7 for contravention of 1964 Order.

The applicants on behalf of their firm, on 20th October 1966 had made an application for the grant of a licence under the U. P. Food Grains Dealers Licensing Order, 1964 and the rejection of that application was never conveyed to them. In fact the application was not rejected. No provisional license was issued as required by, Cl 5 (1) of the order, during pending

of the consideration of the application. In fact, they were issued a licence in the year 1967. The applicants continued to deal in foodgrains and had sent their returns and other papers in the months of November and December 1966 to the office of the Marketing Inspector. Charges were framed against the applicants for contravention of Cl 3 of the 1964 Order read with Section 7 of the Essential Commodities Act for having sold pea on 17 December 1966 to another food grain licensee

Held, that the applicants were under a bona fide belief that they could deal in foodgrains as their application for the grant of licence had not been rejected. In that view of the matter no breach of any licensing order can be said to have been committed by the applicants and they could not be charged for any offence punishable under the Act. AIR 1966 SC 43, Applied (Para 6)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 43 (V 53) =
1966 Cri LJ 71, Nathulal v State
of M. P. 4

K. K. Bajpai and Man Mohan Srivastava,
for Applicant; K. C. Dhulia, for Opposite
Party

JUDGMENT:— This reference has been made by the learned Additional District Magistrate (J) Etawah. The facts of the case are that Sri Maharaj Singh, Marketing Inspector at Auraiya, district Etawah, was informed in the afternoon of 19th December 1966 that the two applicants had sold 25 kntls and 45 kgs of pea on 17th December 1966 to M/s Shyam Lal, Sri Govind, which was a food grain licensee at Auraiya. The Marketing Inspector was further informed that the applicants did not possess a license for dealing in food grains. The applicants are the partners of the firm known as Laxmi Narain Ram Narain. Against both the applicants charges were framed by the learned Magistrate 1st Class, Etawah, on 22nd April 1967 on the statement of Maharaj Singh, Marketing Inspector, Auraiya. The learned Magistrate framed the charges against the applicants for having contravened Cl 3 of the U. P. Food Grains Dealers Licensing Order 1964 and thus were punishable under Section 7 of the Essential Commodities Act. These charges, as already stated above, were framed on 22nd April 1967. Against the order framing the charge against the applicants the applicants preferred a revision which was heard by the learned Additional District Magistrate (Judicial), Etawah who has made the present reference.

2. Sri Maharaj Singh, the Marketing Inspector Auraiya, was examined and during his examination he admitted that Laxmi Narain, one of the partners of the firm Laxmi Narain Ram Narain, held a

food grains license for another shop in Mahabirganj. The Marketing Inspector further stated that it was possible that the applicants may have filed an application for the grant of a license in the name of the firm Laxmi Narain Ram Narain on 20th October 1966. He further stated that that application had not been rejected till the date of his statement. He also admitted that a licence for selling the food grains was issued to the firm Laxmi Narain Ram Narain for the year 1967.

3 The question therefore is whether under these circumstances the applicants being partners of the firm Laxmi Narain Ram Narain could deal in food grains without holding a license for that firm as such. Clause 5 of U P Food Grains Dealers Licensing Order 1964 deals with period of licence and fees chargeable. The second proviso to sub-clause (1) of Cl 5 of the Order reads as follows:

Provided further that where an application for a new licence made in accordance with sub-clause (1) of Cl 4 has not been disposed of within 30 days from the date of receipt of the application by the licensing authority the applicant shall be issued a provisional licence valid for three months and the application shall be disposed of during the validity of the provisional licence.

4 Since the Marketing Inspector stated that the applicants possibly filed an application for the grant of a licence on 20th October 1966 a provisional licence ought to have been issued in favour of the firm much before 19th December 1966. The applicants being the partners of the firm could not possibly be said to have a guilty intention in selling any licensed food grains on 17th December 1966 because the Marketing Inspector admitted that the firm Laxmi Narain Ram Narain deals in food grains and that on behalf of the firm ready information of its stocks was given to him. The Marketing Inspector further admitted that in the months of November and December 1966 the papers of the firm, Laxmi Narain Ram Narain came to his office on various dates and he and other officials of his office used to sign those papers. Thus the evidence of the Marketing Inspector himself shows that an application for the grant of a new licence for selling food grains had been made by the applicants and the conduct of the Marketing Inspector and the other officials of his office reasonably led the applicants to believe that they could deal in food grains. As a matter of fact as the clause of the U P Food Grains Licensing Order 1964 quoted above shows it was the duty of the Marketing Inspector to have issued a provisional licence valid for three months within 30 days of the making of the application by the firm Laxmi Narain Ram Narain which was admittedly made on 20th October 1966. It was held in

Nathulal v State of M P, 1966 Cr LJ 71 = (AIR 1966 SC 43) as follows:

"an offence under Section 7 of the Essential Commodities Act 10 of 1955 for breach of Section 3 of the Madhya Pradesh Foodgrains Dealers Licensing Order 1958 necessarily involves a guilty mind as an ingredient of the offence. Considering the scope of the Act it would be legitimate to hold that an offence under Section 7 of the Act is committed by a person if he intentionally contravenes any order made under Section 3 of the Act. The object of the Act will be best served and innocent persons will also be protected from harassment if Section 7 is so construed."

5 The provisions of the Food Grains Dealers Licensing Orders in U P and M P are similar. In Nathulal's case the accused was a dealer in food grains and had made an application for licence under the Madhya Pradesh Food Grains Dealers Licensing Order 1958 and also deposited the requisite license fee. No intimation however was given to him whether his application had been rejected. He purchased foodgrains from time to time and submitted returns to the Licensing authority showing the grains purchased by him. The Marketing Inspector checked the godowns of the accused in Nathulal's case and found that the accused had stored food grains without holding any license in excess of the quantity permitted by Sec 3 of the Order. The accused was prosecuted under Section 7 of the Essential Commodities Act 1955 but was acquitted by the trial Court on the ground that he had no guilty mind but in appeal the High Court of Madhya Pradesh convicted the accused. On appeal by special leave Hon'ble Supreme Court held as follows —

That on the facts of the case the conviction of the accused should be set aside. The accused was under a bona fide impression that the licence in regard to which he had made an application was issued to him though not actually sent to him. It was under this impression that he had stored the grain. The fact that the licensing authority did not communicate to him the rejection of his application confirmed the accused's belief. It was on that belief that he stored the foodgrains and was sending the relevant returns to the concerned authority. It was therefore a storage of foodgrains within the prescribed limits under a bona fide belief that he could legally do so. He could not therefore be said to have intentionally contravened the provisions of Section 7 of the Act or those of the Order made under Section 3 of the Act.

6 The principles laid down by the Supreme Court in Nathulal's case quoted above apply with full force to the facts of the instant case. The applicants on

behalf of their firm, on 20th October 1966 had made an application for the grant of the licence and the rejection of that application was never conveyed to them. In fact they were issued a licence in the year 1967. The applicants continued to deal in foodgrains and sent their returns and other papers in the months of November and December to the office of the Marketing Inspector. Thus the applicants held a bona fide belief that they could deal in foodgrains as their application for the grant of licence had not been rejected. In view of the principles of law laid down by the Supreme Court in Nathulal's case no breach of any licensing Order can be said to have been committed by the applicants and they could not be charged for any offence punishable under the Essential Commodities Act.

7. After having heard Sri K. K. Bapnai and Sri M. M. Srivastava in support of the reference and Sri K. C. Dhulia, the learned brief-holder for the State, and for the reasons contained above I accept this reference and quash the charge against the applicants dated 22nd April 1967.

Order accordingly

1970 CRI. L. J. 617 (Vol. 76, C. N. 146)
(ALLAHABAD HIGH COURT)

**GANGESHWAR PRASAD AND
HARI SWARUP, JJ.**

State of U. P., Appellant v. Trilok Chand, Respondent

Govt. Appeal No. 2494 of 1965, D/- 26-3-1969, against order of S. J. Dehradun D/- 23-8-1965

Criminal P. C. (1898), S. 342 — Object — Use of extra-judicial confession for convicting accused — Question giving opportunity to explain must be asked.

The purpose of Section 342, Criminal P. C. is to enable the accused to explain the circumstances appearing in the evidence against him, and in case any particular circumstance is to be utilised against the accused, it has to be specifically put to him, so that he might explain the circumstance. (Para 5)

Where the only evidence to connect the amount recovered from the possession of the accused with the amount stolen was the alleged extra-judicial confessions made by the accused to the two prosecution witnesses.

Held, that, the use of the alleged extra-judicial confessions against the accused in the absence of any question put to him regarding the same was certainly pre-judicial to the accused and not permissible under law. The alleged confession could

not be utilised as circumstances or evidence to prove the guilt against the accused. (Para 5)

G. A., for Appellant, Banarsi Dass, for Respondent

SWARUP, J.:— The State of Uttar Pradesh has filed this appeal against the order of the Session Judge, Dehradun dated the 23rd March, 1965 by which he allowed the appeal of Trilok Chand against his conviction under Section 454, I. P. C., and the sentence of one year's rigorous imprisonment and fine of Rs. 100 awarded by Sri C. N. Srivastava, Magistrate First Class, Dehradun, and acquitted him. The learned Magistrate had directed that the amount of Rs. 2706 recovered from the house of the accused be paid to the complainant. The Sessions Judge directed on allowing the appeal that it be returned to the accused.

2. The case for the prosecution in brief was that Inder Singh had a milk shop in his house in Doiwala, Police Circle Clement town, district Dehradun. He had collected money a few days earlier and had kept it in his cash box in the shop. It was a sum of Rs. 3200. On 13th January, 1964 at about 8 a. m. he went to the bus stand for going out, but by mistake left the milk measuring pot at the shop, and hence, sent his servant Babulal to bring it from the shop. Babulal on coming back informed him that the door of his shop had been broken open, cash box had also been opened and the money had been stolen. At 8.30 a. m. on the same day Inder Singh lodged a first information report at Doiwala police station about the theft and stated that he suspected his neighbour Triloki for having committed the theft. The reference was to the accused Trilok Chand. On receiving the first information report Harbal Singh S. I. immediately proceeded to make a search of the house of Trilok Chand. He, however, found nothing incriminating in the house.

It was then alleged that on 15th January, 1964 at about 7.30 a. m. Trilok Chand went to Khem Chand (P. W. 2) and made a confession before him that he had stolen the money and the same had been concealed in his house. Khem Chand thereupon took him to Jagdish Prasad (P. W. 3) and before him it was alleged that Trilok Chand again made a confession of his guilt and in order to avoid prosecution promised to point out the money which lay concealed in his house so that it may be paid to complainant Inder Singh. Both Khem Chand and Jagdish Prasad then took him to Harbal Singh S. I. and it is said that before him Trilok Chand stated that money was concealed underground in his house. Then the S. I. and other witnesses went to the house of Trilok Chand, and it is alleged that Trilok Chand dug the earth in a corner

of his house and took out a bag which contained currency notes of Rs 2706. The sum was handed over to the S I and a memo of recovery was prepared. Trilok Chand was prosecuted on the basis of these facts.

3 The learned Magistrate on a consideration of the evidence produced by the prosecution believed the statements of Khem Chand and Jagdish Prasad about the confession made by Trilok Chand and convicted him under Section 454 I P C and sentenced him to undergo rigorous imprisonment for one year and pay a fine of Rs 100. The amount of Rs 2706 was directed to be returned to complainant Inder Singh. On appeal filed by Trilok Chand the learned Sessions Judge held that the confession alleged to have been made by Trilok Chand had not been proved. On a consideration of the evidence he held that the prosecution has failed to prove the case against the accused. He therefore allowed the appeal and set aside the conviction and sentences awarded to him. The amount of Rs 2706 was directed to be returned to the accused. The State of Uttar Pradesh has now filed the present appeal.

4 In the first information report no details are given about the currency notes and therefore it is not possible to hold with certainty that the amount recovered from the possession of Trilok Chand which he claimed to be his own was the same which had been lost by Inder Singh. It was only in Court after having seen the money that Inder Singh described the currency notes which composed the amount. As no details of the property lost were given before the recovery and the amount is not identical to that which was stolen no reliance can be placed on his statement to establish that the currency notes recovered from the possession of Trilok Chand were those which had been stolen from the possession of Inder Singh.

5 The only evidence to connect the amount recovered from the possession of Trilok Chand with the amount lost by Inder Singh consists of the alleged extra-judicial confessions made by Trilok Chand to Khem Chand and Jagdish Prasad. The statements of Khem Chand and Jagdish Prasad besides being unreliable cannot be used against the accused for the reason that they had not been put to the accused when his statement under Section 212 Criminal P C was recorded. The only question put to the accused on which the counsel for the appellant relied for showing that the matter had been put to the accused was 'why have the witnesses given testimony against you?' In our opinion this does not comply with the requirements of Section 342, Criminal P C. The purpose of Section 342 Criminal P C is to enable the accused

to explain the circumstances appearing in the evidence against him and in case any particular circumstance is to be utilised against the accused it has to be specifically put to him so that he might explain the circumstance. In the present case the most important circumstances were the making of the alleged confessions by Trilok Chand to the prosecution witnesses Khem Chand and Jagdish Prasad. Unless these were put to the accused it could not be said that the accused had been given an opportunity to explain them.

The use of the alleged extra-judicial confessions against the accused in the absence of any question put to him regarding the same is certainly prejudicial to the accused and not permissible under law. In our opinion the alleged confessions cannot be utilised as circumstances or evidence to prove the guilt against the accused. They have got to be excluded. We are thus left with no evidence to connect the money recovered from the accused with the crime.

6 Further nothing has been shown to make us hold that the appraisal of evidence of Khem Chand and Jagdish Prasad by the learned Sessions Judge was erroneous. According to the prosecution case the house of Trilok Chand accused had already been searched and nothing incriminating was found by the investigating officer and there could be nothing to impel him to make the alleged confessions. We therefore see no reason to set aside the order of acquittal passed by the learned Sessions Judge.

7 In the result the appeal fails and is dismissed. Trilok Chand respondent is on bail. His bail bonds are discharged. He need not surrender.

Appeal dismissed

1970 CRI L J 618 (Vol 75, C N 147)
(ANDHRA PRADESH HIGH COURT)
FONDAIAH J

In re Somiah and others Petitioners
Criminal Revn Case No 620 and
Criminal Revn Petn No 603 of 1967
D/-16-2-1968 from order of S J Medak
at Sangareddy in Cr C F R No 1268
of 1967

(A) Criminal P C (1898) S 91 —
Production of documents — Stage for

The use of the words 'whenever' in Section 94 postulates that the Magistrate can call for the production of any document at the stage of enquiry even before the framing of the charge provided he considers that the documents whose production was sought for were necessary or desirable for the purpose of enquiry.

GM/HM/D167/68/HGP/B

AIR 1963 Andh Pra 362, Rel on, 1955 Andh WR 409, Ref. (Para 6)

(B) Criminal P. C. (1898), Ss. 94 and 39 — Power under S. 94, when can be exercised — Nature of satisfaction required — Enquiry going on — Stage for entering upon defence not come — Court cannot be compelled to call for production of documents.

Unless and until the Court is satisfied in each case, taking into consideration the facts and circumstances, that it is necessary and desirable to call for the documents, the Court is not bound or obliged to end for such documents. The consideration of satisfaction contemplated under Sec 94 is a proper, reasonable and objective one and the Court has to give justiciable reasons for its conclusion, to enable the appellate or revisional Court to know whether the Court has applied its mind to the point at issue and decided the same in accordance with law (Para 7)

Where the enquiry is going on and the stage when accused would be called upon to enter upon his defence has not come, the accused cannot compel the Magistrate at that stage to call for production of documents. In such a case when the request of the accused has not been rejected once and for all, but has been postponed to a later stage, it cannot be said that the impugned order of the Magistrate is illegal, improper or unjust, justifying the interference of the High Court in revision. Cri R C. No 551 of 1961 (Andh Pra), Ref (Para 11)

Cases Referred: Chronological Paras

(1967) Cri R C No 551 of 1967 (Andh Pra), V. R Sarma v Union of India 10

(1963) AIR 1963 Andh Pra 362 (V 50) = 1963 (2) Cri LJ 253, In re Raghotham 9

(1955) 1955 Andh WR 409 = 1955 Andh LT (Cr) 182, Yusuff Sahib v Hayagriva Rao 8

Murtuza Khan and S B Dixit, for Petitioners, Jayachandra Reddy and Hariseshareddy on behalf of the State

ORDER:— This is a revision against the order of the Munsif Magistrate, Sangareddy, refusing to call for 22 documents at the instance of the accused at the enquiry in P. R C. 6 of 1966

2. The short question that arises in this revision is as to the scope, interpretation and the application of the provisions of Section 94 of the Criminal P C to the present case

3. The accused petitioners have been charge-sheeted by the Police under Sections 381, 467, 409 read with 109, 102-B, 414, 471 read with 109, I. P. C and the enquiry in P R C 6 of 1966 was pending before the Magistrate, who has examined some witnesses. Criminal M P 436/65 by the petitioners under

Section 94, Criminal P. C requesting to call for the production of documents mentioned therein was allowed on 7-12-1966. Thereafter, on 6-2-1967, an application under Section 207-A, Criminal P. C. to summon and examine Sri Seshachalapathi Rao was allowed by the Magistrate P Ws 1 to 4 were examined by 18-4-1967. As Sri Seshachalapathi Rao was absent for some adjournments, he could not be examined and the enquiry was posted to 12-9-1967, when the present application was filed. The committal Court rejected the application as it was belated and not bona fide and there was no necessity or desirability to call for those documents at that stage. The revision to the Sessions Court to make a reference to this Court to set aside the order of the Magistrate was also dismissed

4. Mr. Dixit, for the accused, strenuously and emphatically contended (a) that the Magistrate should have exercised the power under Section 94 of the Code in favour of the accused and called for the documents, and (b) that his failure to exercise the jurisdiction in favour of the accused is illegal, improper and unjust and (c) that the order is liable to be quashed. The Public Prosecutor contended contra

5. The question for determination is, whether on the facts and in the circumstances of the case, the accused-petitioners are entitled under Section 94 of the Code to call for the production of the 22 documents as prayed for by them at this stage

6. For a proper appreciation of the question, it is profitable and necessary to consider the provisions of Section 94 of the Code which read thus —

“(1) Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order to the person in whose possession or power such document or thing is believed to be requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order

x x x x x
By Section 94 of the Code, the Court whenever it considers that the production of any document is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the Code by or before such Court, is entitled to call for the production of such documents from the person in whose possession or power such document is believed to be. The use of the words “whenever” in Section 94 postulates that

the Magistrate can call for the production of any document at the stage of enquiry before the framing of the charge provided he considers that the documents whose production was sought for were necessary or desirable for the purpose of enquiry

7 The existence of power and jurisdiction to call for the documents by the Magistrate under certain circumstances as contemplated in Section 94 of the Code cannot be equated to his being compelled to exercise that power whenever the accused prays for the production of certain documents. Unless and until the Court is satisfied in each case taking into consideration the facts and circumstances that it is necessary and desirable to call for the documents the Court is not bound or obliged to send for such documents. The consideration or satisfaction contemplated under Section 94 is a proper reasonable and objective one and the Court has to give justifiable reasons for its conclusion to enable the appellate or revisional Court to know whether the Court has applied its mind to the point at issue and decided the same in accordance with law

8 In *Yusuff Sahib v Hayagriva Rao* 1955 Andh WR 409 it was held that the right of the accused to call for the production of any documents accrues to him only after he is called upon to enter his defence. The learned Judge rejected the contention of the counsel that Sec 94 of the Code conferred an overriding power on a Court to compel the production of documents

9 In *re Raghotham* AIR 1963 Andh Pra 362 a Division Bench of this Court had to consider the scope and effect of the provisions of Sec 94 of the Criminal Procedure Code. In that case the accused had to face an enquiry before a Magistrate for a charge under Sec 408 IPC for embezzlement of certain amounts entrusted to him in his custody as an officer-in-charge of a maternity home. In the course of the enquiry, the accused requested to call for the production of certain documents in the custody of the District Magistrate which according to him, would show that the prosecution case launched on a previous occasion in respect of the very same amounts had been withdrawn against him. Though the Magistrate considered it necessary and desirable to call for the production of the documents the application under Section 94 was dismissed as he felt that in view of the decision of the High Court in 1955 Andh WR 409 (cited supra) he has no power to do so. In those circumstances, a Division Bench of this Court has held that the Court has power even before framing of the charge to call for production of the documents if it is satisfied that the production of the documents was necessary or desirable and in the

interests of justice and observed at p 364 thus —

In that case though the prosecution evidence was concluded no charge was framed but the Magistrate had ordered the calling of three documents at the instance of the accused. In so far as the right of the accused to ask for the calling of such documents is concerned, he had no such right at that stage and the Judgment of Subbarao C J cannot on that ground be assailed.

As the Magistrate found that it was necessary and desirable to call for the production of the documents it was held that the order of the Magistrate can not be sustained. In the present case the Magistrate has felt that it was not necessary or desirable at that stage to call for the production of those documents. The Sessions Judge also found that it was not necessary or desirable at that stage to call for the production of the documents in question and the accused will have an opportunity to call for the same at the stage of the trial.

10 In a recent judgment in *V R Sarma v Union of India* CrI R C No 551 of 1967 (Andh Pra) Mohamed Mirza J under similar circumstances has held that the request of the petitioners to summon the documents has not been altogether turned down but rightly postponed by the Magistrate to a later date.

11 The Criminal Court has ample power and jurisdiction to call for the production of documents if it considers that there is necessity or desirability of the production of the same at the stage of enquiry and before the framing of the charge but the accused cannot compel the Court to do so unless it is satisfied that the provisions of Section 94 of the Code are attracted. In the present case admittedly the stage when the accused would be called upon to enter upon his defence has not yet come. The enquiry is still going on. After the enquiry if the Magistrate finds on the evidence on record that there is *prima facie* material for committing the accused he will commit the accused to take their trial before the trial Court otherwise they will have to be discharged. In case the accused had to take their trial before the trial Court the accused would certainly have their right to call for the production of any documents or adduce evidence by calling any witnesses and the accused can certainly avail that right at that stage. The accused cannot compel the Magistrate at this stage to call for the production of the documents as prayed for in the instant case. The request of the accused has not been rejected once and for all but has been postponed to a later stage. In the circumstances it cannot be said that the impugned order of the Magistrate is illegal, improper or un-

just, justifying the interference of this Court in this revision petition

12 In the result, this revision petition fails and is dismissed

Revision dismissed

1970 CRI. L. J. 621 (Vol. 76, C. N. 148)

(BOMBAY HIGH COURT)

DESHMUKH AND DESHPANDE, JJ

Nana Gangaram Dhore and another, Accused, Appellants v. State, Respondent
Criminal Appeal No 842 of 1966, D/- 21/22-3-1968

(A) Criminal P. C. (1898), Ss. 342, 367 — Murder case — Court can act upon prosecution evidence or confession of accused or both — Statement made under S. 342 partly inculpatory and partly exculpatory — Court, however, cannot act upon such statement. (Para 15)

(B) Evidence Act (1872), S. 3 — Murder case — One prosecution witness, servant of accused at time of incident and at time of giving evidence in Sessions Court — Relationship between witness and accused (his employer) not strained — Witness, held to be an independent and disinterested witness. (Para 18)

(C) Evidence Act (1872), S. 3 — Murder case — Three prosecution witnesses, relations of deceased — Witnesses present near scene of offence and in a position to see assailants — Besides them, there was one disinterested and independent witness — Evidence of these witnesses, held to be natural piece of evidence, and accepted — Fact that individual act was not described, could not be considered to be infirmity. (Paras 22 to 24)

(D) Penal Code (1860), Ss. 34 and 300 thirdly — Murder case — Accused persons A, B and C are brothers, and accused D son of accused A — Accused A, B and C, divided and resided in separate houses — A, B, C and D, seen coming together and gathering near disputed land at one and same time — They carried with them deadly weapons such as iron bar, axe and spear and stick — Accused persons rushing together with such weapons and causing as many as 15 injuries on vital part of the body of deceased — Their intention held to be nothing but to commit murder — Injuries, sufficient in ordinary course of nature to cause death — All four accused could be convicted under S. 302 read with S. 34, in the absence of any legal infirmity. (Paras 25, 29)

(E) Criminal P. C. (1898), S. 423 — Appreciation of evidence — Murder case — Powers of appellate Court — Appellants found guilty having shared common intention with other acquitted accused

persons — Acquittal of these accused held bad — There was nothing to prevent appellate Court from expressing this view.

In an appeal by some of the convicted persons, it is open to the High Court as an appellate Court to examine the entire evidence. The powers of the Appellate Court under Section 423 of the Code of Criminal Procedure are the same as of the trial Court. It is true that the trial Court being a primary Court of fact has the advantage of observing the witnesses. The appreciation of evidence made by such a Court, is entitled to be considered with respect. However, that will be an approach to examine the evidence, but that is not a limitation upon the powers of High Court. If after examining the evidence, the High Court is in a position to say that the findings arrived at are erroneous, contrary to evidence and must be set aside, not only there is no legal prohibition to do so, but in the interest of justice, that must be done

(Para 37)

There is no bar in India to the appellate Court acting under Section 423 of the Code of Criminal Procedure to appreciate the whole evidence in a given case for the purpose of accepting or rejecting the appeal before it. If for that purpose, the evidence examined as a whole shows that the appellants are guilty under Section 34 of the Indian Penal Code having shared a common intention with the other accused who are acquitted, and that the acquittal of these persons was bad, there is nothing to prevent the appellate Court from expressing that view and giving that finding. Such findings if they could be given in a given case would be a proper basis of maintaining the conviction of the appellants before the Appellate Court. Case law disc

(Paras 16 and 44)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 SC 87 (V 52)= | |
| 1965 (1) Cri LJ 120, Manipur Administration v. Thokchom Bira Singh | 36 |
| (1965) AIR 1965 SC 1037 (V 52)= | |
| 1965 (2) Cri LJ 142, Karan Singh v State of Madhya Pradesh | 43 |
| (1964) AIR 1964 SC 170 (V 51)= | |
| 1964 (1) Cri LJ 129, Ajendranath v State of Madhya Pradesh | 42 |
| (1963) AIR 1963 SC 1413 (V 50)= | |
| 1963 (2) Cri LJ 351, Krishna Govind Patil v. State of Maharashtra | 30, 34, 43 |
| (1962) AIR 1962 SC 1211 (V 49)= | |
| 1962 (2) Cri LJ 290, Sunder Singh v State of Punjab | 40 |
| (1956) AIR 1956 SC 51 (V 43)= | |
| 1956 Cri LJ 147, Prabhu Babaji v State of Bombay | 34 |
| (1956) AIR 1956 SC 415 (V 43)= | |
| 1956 Cri LJ 805, Pritam Singh v State of Punjab | 34, 36, 41 |

(1954) AIR 1954 SC 648 (V 41) =
1954 Cri LJ 1668 Marachahli Pakku
v State of Madras 39

V B Deshmukh for Appellants V T
Gambhirwala Asst Govt Pleader for
the State

DESHMUKH J — This is an appeal by original accused Nos 1 and 2 who are convicted under Section 302 read with Section 34 of the Indian Penal Code

2 Originally 5 accused were prosecuted and the charges were under Sections 148 302 read with Section 149 and alternatively under Section 302 read with Sec 34 of the Indian Penal Code were also framed against them

3 The prosecution alleged that there was a long standing dispute between the deceased Khandu and accused No 1 Nana and the members of his family. This dispute related to the ownership and user of survey Nos 1369/1 and 1369/2. Admittedly survey No 1369/1 is a pasture land and is known as lenddara. Survey No 1369/2 is a cultivable land and it is known as Pandiche Waver. The deceased Khandu has two brothers Tukaram and Pandu. The accused No 1 Nana Gangaram Dhore along with one Gopal Takalkar purchased both these lands from Pandurang alone some time in 1948. He claims to be in exclusive possession of these lands as a result of the sale-deed. The exclusive possession as well as title of accused No 1 Nana was being challenged. Khandu alleged that this was a transaction of a conditional sale-deed which was in fact a mortgage. So far as the lenddara the pasture land is concerned it was alleged that Pandu had no right to sell it alone and it still continued to be a family land in joint possession of Khandu and his brothers.

4 This dispute took various shapes and forms. There was first an enquiry before the Revenue Officer for purposes of making entries in the record of rights as there was obstruction to the exclusive possession and user of Khandu. There were proceedings under Section 447 Indian Penal Code. Chapter proceedings also took place. However it appears that there was no incident of assault by and between the parties. In 1961 the accused No 1 Nana filed a civil suit for injunction against Khandu and perhaps his brothers for restraining them from obstructing accused No 1's possession and user of both the lands. Though accused No 1 has denied it, evidence clearly showed that the said suit succeeded only in respect of survey No 1369/2 i.e. the cultivable land but no injunction was granted in respect of the pasture land.

5 The last event that took place before the present incident is the purchase of undivided interest of Gopal Takalkar from his heir by Khandu. Khandu had

actually filed Civil Suit No 38 of 1965 for partition and separate possession of the cultivable land. It appears that the purchase of the undivided interest of the co-owner and the filing of the suit by Khandu was not liked by the accused. Against the above back-ground the present incident took place on August 16 1965. The prosecution witness Babu Pavalya Hilam (P W 10) was a servant of accused No 1 Nana on yearly basis. On August 16 1965 Babu Hilam was directed by accused No 1 to go to the lenddara land for grazing the cattle. Babu Pavalya said that he had not seen this land and could not take the cattle there unless the land was pointed out. Arrangements were made to point out the land to him. He accordingly went to the land and made the cattle graze there. He found that Khandu was also there sitting on the Khed-Wafgaon road. Khandu's cattle were grazing in the pasture land. According to Babu Pavalya Khandu asked him to take the cattle of accused No 1 away from his own cattle as the pasture land was fairly big land. In fact Khandu drove away the cattle of accused No 1 to some other portion. After some time the cattle in the process of grazing came near the road side. At that stage accused Nos 1 and 2 arrived at the scene of offence. Accused No 5 who was grazing some cattle was at a fairly long distance and he was having a stick with him. We may point out that though accused No 5 was involved in this case there is hardly any evidence which brings him near the scene of offence or involves him into the crime. That being so the acquittal of accused No 5 was proper. The prosecution evidence which mainly consists of P W 10 Babu P W 11 Kasabai Tukaram Dhamale P W 12 Sopana Tukaram Bham-bure and P W 13 Dagadabai Pandurang Bham-bure involve principally accused Nos 1 to 4 in the conflict. According to the prosecution the four accused persons rushed at Khandu when all of them were armed with various weapons. Accused No 1 Nana had a stick, accused No 2 Popat had a spear, accused No 3 Ratin had an iron-bar and accused No 4 Bhiku had an axe with him. Accused Nos 1 2 and 3 are brothers and accused No 4 is a son of accused No 1. While going towards Khandu, accused No 1 hurled a stone at him which hit Khandu and he fell down. All the four accused then rushed at Khandu they belaboured him with the various weapons that they carried. Khandu had gone to the land along with his daughter Kasabai. A few minutes before this incident he asked Kasabai to go back to village for taking food. At the time Kasabai had hardly covered a distance of 100-200 paces. As a result of the beating given by the four accused with the weapons in their hands.

Khandu lay prostrate on the ground with his face towards the earth. Seeing the assault Kasabai returned weeping towards her father. She went down to Khed

6. Kasabai went home to Bhamburwadi and informed her paternal uncle Tukaram. Tukaram started with the bullock-cart towards the scene of offence. Tukaram put his brother into the cart who was in a semi-conscious state. He was taken to Khed dispensary. The Medical Officer sent a report to the police station and the police machinery began moving. On the advice of the medical officer, an attempt was made to remove Khandu to Sagoon hospital at Poona. However, by the time the truck carrying him reached the outskirts of Khed, Khandu died. He was brought back to the police station. An offence under Section 302 of the Indian Penal Code was registered and investigation started. All the five accused were arrested in the evening of August 16, 1965. After collecting all the evidence and completing the formalities of inquest panchnama, panchnama of the scene of offence etc., the five accused came to be charge-sheeted as stated earlier.

7. At the trial before the Additional Sessions Judge, the prosecution mainly relied upon the testimony of the four eye-witnesses namely, Babu, Kasabai, Sopana Tukaram and Dagadabai w/o Pandurang. They gave out a story as summarised above.

8. The defence taken by accused Nos 3, 4 and 5 was that they were not present at all at the scene of offence and never participated in the assault. We have already pointed out that even if the prosecution evidence were to be accepted literally, it does not involve accused No 5 into the crime at all. We would hereinafter make no reference to accused No 5, but would have to refer to accused Nos 3 and 4 very often. The defence of accused Nos 3 and 4 was that they were not present at the scene of offence. It was a false case against them.

9. The defence of accused Nos 1 and 2 was that they alone were present at the scene of offence. Khandu always caused nuisance to the accused. On the date of the incident, he had driven his cattle into the groundnut crop of the accused. Accused Nos 1 and 2 along with Laxmibai, the wife of accused No 2, were working in their adjoining field. They asked Khandu to take away the cattle, Khandu however, spoke in threatening language and challenged the accused to drive away the cattle. As soon as accused No 1 went near the cattle to drive them away, Khandu who was carrying a stick, gave stick-blows to accused No 1. As many as 3 or 4 strokes were delivered. A struggle then ensued in which accused

No 1 succeeded in removing the stick from the hand of Khandu. Khandu immediately took out a knife from the pocket of his Bandi and rushed at accused No 2. Accused No 1 then felt that there was an apprehension of danger to the life of accused No 2. Khandu's nephew Sopana who had arrived at the scene of offence for purposes of grazing his sheep, carried an axe with him for the purposes of cutting the branches of the trees. Accused No. 1 snatched that axe from the hand of Sopana Tukaram, and with a view to save the life of his brother, attacked Khandu. He does not quite recollect as to how many strokes he delivered. In short, his defence is that the deceased Khandu was the aggressor. He rushed at accused No 2 with an open knife which legitimately created an apprehension in the mind of accused No. 1, that either grievous hurt would be caused to accused No 2, or his life may be lost. It is because of this apprehension that accused No 1 acted in his right of private defence of person and is protected in law. They further pleaded that no offence was committed by either of them. Not only this is the defence taken by way of making a statement under Section 342 of the Code of Criminal Procedure, but accused No 1 reiterated the same facts on oath by examining himself as a witness under Section 342-A of the Code of Criminal Procedure.

10. The learned Additional Sessions Judge rejected the defence theory of the right of private defence altogether. He held that on the proved facts and circumstances, there was no stick in the hand of Khandu nor any knife. In fact, Khandu was not wearing Bandi at all. He had banian and a shirt on his person. Neither of these two apparel had any pocket from which the knife could be taken out. He, therefore, held that the allegation of knife being taken out and the attempted assault with the knife, is a purely imaginary defence.

11. The learned Additional Sessions Judge believed the prosecution witnesses and more particularly Babu Pavalya who was at the time of the incident as also at the time of giving evidence in Court was a servant in the employment of accused No 1. By repeated reference in his judgment, the learned Judge called Babu as an independent disinterested witness. The other three eye-witnesses, Kasabai, Sopana and Dagadabai are found to be the relations of the deceased Khandu. One is a daughter, the other is a nephew and the third is his sister-in-law, i.e. the brother's wife. In the circumstances, the learned Additional Sessions Judge, felt that their evidence must be examined more carefully. Since he found that Babu Pavalya's evidence was clear and cogent, he also believed the other three

eye-witnesses. However in accepting the testimony of these four witnesses he has relied upon a part of their evidence and not the whole. He found that there was a particular infirmity in the evidence of all the four eye-witnesses i.e. the infirmity was that a general statement of attack by all the four accused persons is made by them but the individual roll of each of the accused or the particular stroke delivered by a particular accused has not been described by them. By a process of reasoning which we have not followed very clearly he has eliminated accused Nos 3 and 4 from the crime i.e. precisely because their individual roll has not been stated benefit of doubt is given to them and they are acquitted.

12 Having come to that conclusion the learned Judge proceeds to consider the statement of the two accused under Section 342 of the Code of Criminal Procedure as also the evidence given by accused No 1 as a witness on his behalf. On that statement under Section 342 or a similar statement on oath given by accused No 1 the learned Judge holds roll of accused Nos 1 and 2 proved in which strokes with axe are delivered by accused No 1. Since he disbelieved the rest of the defence theory about the initial assault by Khandu and the subsequent so-called right of private defence the learned Judge holds attack by accused Nos 1 and 2 proved on the strength of their own statements under Section 342 of the Code of Criminal Procedure. In that manner he holds that the axe injuries which are severe and which are sufficient in the ordinary course of nature to cause death are accepted by accused No 1. He also holds that accused Nos 1 and 2 acted in concert and in furtherance of their common intention. The two accused who are appellants here are convicted in that manner under Section 302 read with Section 34 of the Indian Penal Code.

13 Shri V B Deshmukh the learned counsel for the appellants opened his argument by saying that in view of the conclusion arrived at by the learned Judge the present appellants who are accused Nos 1 and 2 are entitled to acquittal. He says that the prosecution evidence of the eye-witnesses does not speak of an assault with an axe by accused No 1. That evidence alleged use of axe by accused No 4. Accused Nos 3 and 4 have been acquitted and the effect of that acquittal will be that accused Nos 3 and 4 would not be said to have remained present at the scene of offence and will be deemed to have committed no act at all which is an offence. The conviction in criminal trial could be based either upon the prosecution evidence or upon the confession or admission of the accused or on both. The prosecution evidence as led in the Court is complete-

ly inconsistent with the so-called admission or the statement made by accused persons under Section 342 of the Code of Criminal Procedure. If accused Nos 3 and 4 are acquitted then the prosecution evidence which does not attribute the use of axe to accused No 1 cannot lead to the conviction of accused No 1 for making use of an axe. The prosecution evidence therefore at its best will merely prove the presence of accused Nos 1 and 2 but not the use of axe by accused No 1. If the axe is in fact in possession of accused No 4 and the use of axe by accused No 4 is not held proved by the trial Court then the conviction of the present two accused under Section 302 by making use of Section 34 of the Indian Penal Code could not be obtained. On this short ground he says that on the footing of the finding given by the trial Court both the appellants are entitled to an acquittal.

14 He also argued that the statement of the accused made under Section 342 of the Code of Criminal Procedure may be considered by the Court but if there is no prosecution evidence which proves the guilt of the accused persons it is not open to the Court to fall back upon statement under Section 342 of the Code of Criminal Procedure made by the accused for the purposes of obtaining conviction. If that statement is in the nature of confession then the Court may act upon it and convict the accused. If however it is a statement in defence where the commission of the act is accepted only by way of defence on certain other footing then according to him the statement has to be accepted as a whole or rejected as a whole. In other words if the statement consists partly of inculpatory portion and partly of exculpatory portion the Court cannot pick and choose and select that part only where guilt is admitted. In either way neither upon the evidence led in the Court as per finding given by the trial Court nor upon the statement of the accused persons the conviction of either of these persons could be obtained. He also cited before us certain decisions but we propose to refer to this legal position a little later.

15 Before we proceed to the important questions of law which arise in this case we would consider the evidence as led against these two accused and find out whether there is enough evidence to obtain the conviction of these appellants. We will point out at this stage that this is an appeal by the two convicted persons only and there is no appeal by the State against the order of acquittal of accused Nos 3 and 4. We are in agreement with the learned counsel for the appellants that the Court can act only upon the prosecution evidence or the confession of accused or both but it cannot act upon the statement made under Section 342.

Code of Criminal Procedure which is partly inculpatory and partly exculpatory. The peculiar feature of the present case is that the prosecution evidence does not attribute use of the axe to accused No 1. Even then the learned Judge has acted upon the statement of accused No 1. It would not be open to base the conviction upon the statement of accused Nos 1 and 2 which is partly exculpatory and partly inculpatory and this was clearly erroneous. The learned Judge has accepted the prosecution evidence only to the tune of holding the presence of accused Nos 1 and 2 at the conflict. He has given benefit of doubt to accused Nos 3 and 4, though the same evidence is otherwise found generally believable by him. If there is no prosecution evidence at all which shows that accused No 1 caused any injuries with the axe, the finding about the use of axe by accused No 1 could not be based upon the statement of accused No. 1 under Section 342 of the Code of Criminal Procedure which is not in the nature of a confession. The conclusion arrived at by the trial Judge is due to want of clear perception regarding the relative pieces of evidence on which the judgment of Criminal Court could be based. We would, therefore, reject the approach of the trial Court and hold that the conviction of accused Nos 1 and 2 on their statement under Section 342, Code of Criminal Procedure ought not to have been obtained.

16. Since we will point out that there is no legal impediment in the way of this Court sitting as Appellate Court in the matter of examination of the entire evidence and giving findings of fact, we would proceed to examine evidence first, give our findings and then point out how in law those findings can be utilised for the purpose of either acquitting or convicting the accused.

17. Undoubtedly an incident has happened on August 16, 1965, near about the pasture land which is a common property of the deceased Khandu and accused No 1. Though Pandu, the brother of Khandu, had sold both the lands to accused No 1 and Gopala, an attempt of accused No 1 to obtain injunction in respect of both the lands had failed. This is because the cultivable land may belong exclusively to Pandu and accused No 1 would get exclusive title to that land. The pasture land being common property of the family, accused No 1 could not get exclusive title simply because he was a purchaser from Pandu. The Civil Court refused injunction in respect of the pasture land though the injunction was granted in respect of the cultivable land. According to the prosecution, the incident took place on the Khed-Wafgaon Road, where Khandu was sitting. He was watching his cattle by sitting on the road. Exhibit 24, the map of the scene of

offence, shows that a blood patch was found on the road which is described in the panchnama of the scene of offence. It is the uniform statement of all the eye-witnesses that the incident of assault took place at that spot. The accused have tried to shift the scene of offence to the cultivable land viz., survey No 1369/2. The finding of the blood-patch on the road clearly supports the oral evidence led by the prosecution. We would, therefore, hold that the incident took place on the Khed-Wafgaon Road at the red patch shown in the sketch-map (Exhibit 24).

18. We may now point out that out of the four prosecution witnesses, Babu (P. W 10) was a servant of the accused at the time of the incident as also at the time he gave evidence in the Sessions Court. Though accused No 1 tried to suggest that Babu Pavalya was a servant for one year only and was dismissed due to bad behaviour, there is nothing on record to support that suggestion. Babu Pavalya appeared to the learned trial Judge as an independent and disinterested witness. His cross-examination does not show that anything had happened between him and his employer by which the relationship between them could be strained. Babu Pavalya had no axe of his own to grind against his employer. When such a witness comes forward and gives evidence, we are satisfied that the trial Judge was right in believing this witness and describing him as an independent disinterested witness.

19. Kasabai, the daughter of the deceased Khandu, was another natural witness at the scene of offence. She had accompanied her father and had left the scene of offence, a few minutes before the occurrence. She is aged 17. Her father asked her to go back for lunch and then to proceed to other agricultural work. She had started in pursuance of this instruction and had hardly covered a distance of 100 to 200 paces. She heard a row and her attention is attracted. She immediately rushes back to Khandu and sees the pitiable condition in which he is lying in a pool of blood and returns to her paternal uncle Tukaram in the village. There is ample evidence to show that Tukaram arrived at the scene of offence with a bullock-cart and carried Khandu to the medical officer at Khed-Wafgaon. Kasabai, according to us, though a relation of Khandu, is a natural witness.

20. The third witness is Sopana. He was grazing his cattle at the hillock near the lenddara land. He was actually on the Ghat. At about 10 a.m. he heard a row and ran down the hill. The first thing that he saw was that Sopana Maruti Kotwal accused No. 5 was running away. When he went some distance ahead, he saw Khandu lying down injured on the road and accused Nos 1 to 4 running

away. He could clearly see that accused No 1 had a stick, accused No 2 had a spear, accused No 3 had an iron bar and accused No 4 carried an axe with him. Though he is a nephew of the deceased, he is equally a natural witness as he was grazing his cattle near about the scene of offence.

21 Last eye witness is Dagadabai (PW 13). She is the wife of Tukaram, the brother of deceased Khandu. She was working in her own field near Khed Wafgaon Road and was working in the field where there was potato crop and she saw Khandu passing by her field and sitting on the Khed Wafgaon road near the lendara field. After some time she heard a row and got up from the potato crop. She saw Kasabai going towards Bhamburwadi and on going a little ahead saw the four accused persons with weapons in their hands. She could not describe which weapon was carried by whom. All the four accused persons ran away. She speaks about the presence of Sopana who came running near the spot. She then speaks about her husband Tukaram coming to the spot with the bullock cart and one Vithoba Gulane a neighbour helped her and Tukaram to put Khandu in the bullock cart.

22 Even though these three witnesses are the relations of the deceased Khandu, we do not think that being present near the scene of offence and being in a position to see the assailants, they will let go the real culprits and involve the accused persons falsely into the case. It is true that there has been some strained relationship over the land Pandhiche Weaver. That may be alleged against them as a ground for examining their evidence cautiously. However, if Babu is believed as independent witness, there is no reason to discard the testimony of these three witnesses simply because they are relations. Babu also speaks of the presence of these witnesses. If Babu could see the assailants and observe them as the incident took place in broad day light, these three witnesses had an equal opportunity to watch the assailants. In such circumstances, it is difficult to accept that they will let go the real criminals and will involve the accused persons simply because of the conflict over the fields.

23 The above discussion shows that there is considerable direct evidence of eye witnesses in this case. In fact, the learned trial Judge has repeatedly said that Babu is a disinterested independent witness. We were taken through the oral testimony of all these witnesses. Undoubtedly, none of them describes a particular act being committed by a particular accused. In fact, Sopana and Dagadabai heard the row and came running towards the scene of offence. They merely see accused Nos. 1 to 4 running away. Sopana

describes the weapons that were being carried by them. Dagadabai merely states that each one of them had some weapon in his hand but she was not in a position to identify those articles. Babu who was the nearest to the deceased describes that all the four accused committed the assault and delivered strokes with their respective weapons. Kasabai also gives similar evidence. As soon as she heard a row, she looked back and found that four accused persons were assaulting her father. She then described the weapons that were carried by each one of them. We have no reason to disbelieve this evidence given by Babu which is fully supported by the three other eye-witnesses.

24 The learned Additional Sessions Judge has not found this evidence enough to hold that all the four accused were concerned in the assault. The main infirmity pointed out is that the individual act of each of the accused is not graphically described. In other words, this evidence of Babu, particularly which is described as an independent and disinterested, would have been sufficient if he had further said that the axe blow was given on the head, stick blow was given on the back, etc. The event occurred too suddenly and it appears to be of a short duration. The deceased was possibly surrounded by all the four accused. Even though Babu was observing from fairly short distance, he may not have been in a position to observe the particular part of body where a particular stroke with a particular weapon fell. We think that the evidence given by Babu is honest and should be accepted. The evidence of the 3 other witnesses is equally a natural piece of evidence and should be accepted. Simply because if an individual act is not described, that can not be considered to be an infirmity. From the circumstances to which we will presently refer, we will point out that it is possible to hold in this case that the attack was a concerted attack by all the four accused even though on the evidence as it is, it is not possible to locate the responsibility for the fatal blow. There is ample evidence to hold that all the four accused have acted in furtherance of their common intention and that intention has been actually carried into effect. It is irrelevant that on the evidence as it is, responsibility for the fatal blow could not be fixed. The learned Additional Sessions Judge was clearly in error in expecting such evidence about particular strokes and was further in error in thinking that where such evidence does not exist, the offence which is a joint responsibility of every accused person by doing the act in furtherance of the common intention, could not be held proved.

25 The evidence of the four prosecution eye witnesses which we believe clearly shows that there was no im-

date reason for this attack. The evidence of Babu shows that the cattle of accused No. 1 were sent for grazing to that land for the first time on that day. Babu clearly says that he did not know the field. He was required to be guided to reach that field. At any rate, Babu had taken cattle to that field for the first time. Out of the four accused persons, accused Nos 1, 2 and 3 are residents of Khed and accused No 4 is a resident of Bhamburwari. Even though accused Nos 1, 2 and 3 are residents of Khed, statement of accused No 1 shows that they are all divided and reside in separate houses. If that is so, it is difficult to understand how all the four accused should gather together near the lenddara field at one and the same time. Evidence of witness Babu shows that they were seen coming together. When these people come together in that manner and they carry with them deadly weapons such as iron-bar, an axe and spear which are undoubtedly deadly weapons and though the stick carried by accused No 1 may not by itself be described as a deadly weapon, it is certainly a weapon carried by him while he was going in the company of the other three accused with deadly weapons. The evidence of Babu further shows that accused No 1 first hit a stone which hit Khandu and the result was that Khandu fell down on the ground. All the four accused then rushed at Khandu. This shows that there was a pre-conceived plan by which all the four accused made a concerted attack upon Khandu. It does appear that the iron-bar has not actually been used for causing injury on the person of Khandu. According to the Medical Officer Dr. Deshpande, injuries on the person of Khandu are quite possible with stick, a spear and axe and there is no injury which could be said to have been caused by an iron-rod. It may, therefore, be that the iron-rod was not used by accused No 3. However, injuries which could be caused by the other three weapons are actually found by the medical officer. All the four accused, in this manner, have acted in furtherance of the common intention viz., to effect injuries with the various deadly weapons. Intention being mainly a psychological fact has to be gathered from the physical acts committed by the accused persons. If persons rush together with deadly weapons and cause as many as 15 injuries on the vital part of the body, it is difficult to say that their intention was not to commit murder. At any rate even if a charitable view was to be taken, the intention clearly was to cause injury which are actually found on the person of Khandu. Those injuries being sufficient in the ordinary course of nature to cause death, it will have to be held under Section 300. Thirdly, that the offence committed was undoubtedly one of murder.

26. The evidence of the Medical Officer Dr P S. Deshpande (P. W 6) shows that there were 15 injuries on the person of Khandu. Injuries Nos 8 to 15 are incised wounds. Injury No. 8 is on the right eye-brow, injury No 9 is on the border of left external ear, injury No 10 is near injury No 9 over the border of left ear, injury No 11 is just in the middle of the left external ear, injury No 12 is over the upper part of left side occipital scalp with doubtful fracture of subjacent bone, injury No. 13 is on the upper border of left external ear, injury No 14 is over occipital protuberance, and injury No 15 is over the upper part of right occipital scalp 3 inches above upper border of right external ear.

27. It may, therefore, be noted that all the incised injuries are located either on the scalp, or the left ear or on the eye. The object was, therefore, the head of the deceased. The location of injuries may now be noted. Injury No 1 is near the left shoulder blade. Injury No 2 is on the upper half left side back 1" inner to injury No 1. Injury No. 3 is on the left side back. Injury No 4 is over outer and posterior aspects of upper one-third of left arm. Injury No 5 is over left temporal scalp just above upper border of left external ear. Injury No. 6 is on the outer aspect of the right arm, and injury No 7 is one the right side back near vertical mid-line of back.

28. This will show that even the strokes delivered by the stick are aimed at either the upper portion of the back or the shoulder or the head. From the description and the location of the injuries, we are satisfied that this was an attack to inflict injuries on the vital part of the body with deadly weapons.

29. We are, therefore, satisfied that the learned trial Judge was in error in rejecting a part of the prosecution evidence and accepting only a part of the evidence. Non-mentioning of a particular stroke by a particular accused could not be said to be such an infirmity as to discard any part of the prosecution evidence. On the contrary, if the deceased received injuries when he was surrounded by various accused, evidence, as given by the witnesses, appears to be more truthful. Differing from the learned Additional Sessions Judge, we would hold that original accused Nos 1 to 4 acted in furtherance of their common intention which was to commit the murder of Khandu. Since the evidence does not help us to locate responsibility for the particular stroke leading to the death, we may have to conclude that all the four accused could be convicted under Section 302 read with Section 34 of the Indian Penal Code, provided there was no legal infirmity in coming to such a conclusion.

30 The learned counsel for the accused Shri Deshmukh argued that it is not open to this Court to hold that accused Nos 3 and 4 were guilty by reappraising the evidence. The effect of that acquittal will be that this Court will have to proceed on the footing that they were not participating in this crime at all. In order to substantiate this reasoning he relies upon the judgment of the Supreme Court in *Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413. In that case four accused persons were tried under a charge under Section 302 read with Section 34. All of them were also separately charged under Section 302 Indian Penal Code. Accused Nos 1, 3 and 4 pleaded alibi and accused No 2 pleaded a right of private defence. The learned Sessions Judge found that the prosecution witnesses were not speaking the truth and that the version given by accused No 2 was the probable version. In the result he acquitted all the accused. The State preferred an appeal against the order of acquittal under Section 302 read with Section 34. The High Court dismissed the appeal so far as accused Nos 1, 3 and 4 were concerned but allowed it in respect of accused No 2. However conviction of accused No 2 was obtained under Section 302 read with Section 34 of the Indian Penal Code. The conclusion of the High Court in that judgment shows that the High Court was not in a position to conclude that the fatal blow was the blow delivered by accused No 2 who was accompanying the other accused. However some other person besides the accused must have delivered the fatal blow and on that footing conviction of accused No 2 under Section 302 read with Section 34 Indian Penal Code was obtained.

31 The Supreme Court in that case pointed out that the charge framed is specific against the four accused persons. There is neither charge nor proof that there were some other participants in the crime. In a case where the charge is specifically against the four persons and evidence is led against these four persons only it is difficult to reconcile the finding of the High Court with the ultimate conclusion. The Supreme Court points out that in the event of accused Nos 1, 3 and 4 being held not guilty, there was none with whom remaining accused No 2 could share the common intention. While illustrating the impact of Section 34 of different situations the Supreme Court pointed out three possible cases—

(1) A, B, C and D are charged under Section 302 read with Section 34 of the Indian Penal Code for committing the murder of E. The evidence is directed to establish that the said four persons have taken part in the murder.

(2) A, B, C and D and (unnamed) others

are charged under the said sections. Evidence is led to show that the four persons together with others—named or unnamed—participated in the commission of the crime.

(3) A, B, C and D are charged under the said sections but the evidence is directed to prove that A, B, C and D and along with them three others have jointly committed the offence.

32 By giving the above illustrations it is pointed out that in the case of the first illustration since the charge is all as the evidence is led specifically against the four persons if three of them are acquitted the fourth cannot share the common intention with any one of them at all. The case is however different in the matter of 2nd and 3rd illustrations. If on the evidence led a finding could be given that three of them may not have participated but along with the fourth there were others named and unnamed, the conviction by the use of Section 34 could be obtained. A similar position would also be possible in the case of the 3rd illustration where a finding could clearly be given on the evidence that along with any one of the accused there were other participants whose presence is obviously found from the evidence led.

33 22nd March 1968. We do not see how this case could help the appellant. It deals with the situation where certain charges are framed and findings are given on the evidence led. So far as the present appeal is concerned the matter is still being dealt with by a Court of facts and the powers of the Appellate Court having been declared and regulated by the Code of Criminal Procedure there is no prohibition to this Court in reappraising evidence and giving its own findings. We think that the presence or absence in the appeal of certain accused persons who were initially charged in the Trial Court cannot be a governing factor for limiting the appreciation of evidence to the appeal before this Court. Because of the appeal the entire record of the trial Court is before us and for the purposes of deciding the appeal of the appellant we are entitled to appreciate the entire evidence led in the case and give our findings. It is true that an acquittal of accused cannot be converted into conviction unless there is appeal by the State before us. That does not mean that for the purposes of satisfying ourselves about the correctness of the conviction of the appellant we are debarred from coming to the conclusion that the acquitted persons were wrongly acquitted and that the evidence against them was sufficient and also good ought not to have been rejected.

34 The second judgment on which Mr Deshmukh relies is the case of *Prabhu Babaji v State of Bombay* AIR 1956 SC

51 In that appeal, before the Supreme Court the appellants challenged the conviction on the ground that the four other accused persons along with whom he was charged under Section 302 read with Section 34 were acquitted. He could not, therefore, be convicted by use of Section 34 of the Indian Penal Code. Now, the Supreme Court allowed the appeal and set aside the conviction. But the ground on which this judgment proceeds to accept the appeal is that the whole gravamen of the charge as well as the evidence was that the appellant shared the common intention with the specific four persons who were mentioned in the charge. If this is so and if there is neither evidence nor charge that the appellant shared the common intention with some others, it is but logical that he should be acquitted. This case is decided practically on the same principles on which the earlier judgment in AIR 1963 SC 1413 was decided. This would be a case governed by illustration (1) discussed by the Supreme Court in Krishna Govinda Patil's case, AIR 1963 SC 1413.

35. The next judgment relied upon by Mr Deshmukh is Pritam Singh v State of Punjab, AIR 1956 SC 415. In that case, Pritam Singh, the appellant was first tried and acquitted of an offence under S 19 (f) for possessing a revolver. Subsequently, he was also tried under Section 302 along with others and was convicted and sentenced to death. In the appeal before the Supreme Court, it was pointed out that the same evidence led to prove the possession of the revolver by Pritamsingh which was formerly led in his earlier trial under Section 19 (f) of the Indian Arms Act. Since he was acquitted on that evidence, a contrary finding could not be given on the same evidence in the subsequent trial. A principle similar to res judicata in criminal trial will operate and will be a bar to give a contrary finding on the same evidence. The Supreme Court accepted this reasoning and held that the finding arrived at by a competent Court on the same evidence is binding in subsequent proceedings between the appellant and the State. In the subsequent case, the evidence against him would have to be considered regardless of the evidence of the recovery of revolver from him. In other words, the second trial has to proceed on the footing that Pritam Singh is not guilty of possessing the revolver as found in the earlier trial. The rest of the evidence may have to be appreciated on this footing and conclusions drawn. Shri Deshmukh argued that this principle will be attracted in this appeal as accused Nos 3 and 4 have already been acquitted. This finding will have to be accepted as good and on that footing the present appeal will have to be decided. We think that that is not the way in which

that principle is to be operated. The present appeal is not a subsequent proceeding between the State and the acquitted person. The present appeal is not only not a subsequent proceeding, but it is not even a proceeding between the State and the acquitted person. It is the same proceeding between the State and some of the accused who are convicted. An entirely different approach has to be made in cases of this type which we shall presently point out.

36. We may point out one more judgment in the case of Manipur Administration Manipur v Thokchom Bira Singh, AIR 1965 SC 87 cited by Shri Deshmukh at the Bar considering the same principle which is discussed in Pritam Singh's case, AIR 1956 SC 415. The finding given by a competent Court in one criminal trial is no bar to the second prosecution if the same facts constitute another offence. But the earlier judgment on the finding operated as estoppel or res judicata against the prosecution precluding the reception of evidence to disturb that finding of fact. For the same reason mentioned earlier this judgment also cannot help the appellant.

37. According to us, the correct legal position is that in an appeal by some of the convicted persons, it is open to the High Court as an appellate Court to examine the entire evidence. The powers of the Appellate Court under Section 423 of the Code of Criminal Procedure are the same as of the trial Court. It is true that the trial Court being a primary Court of fact has the advantage of observing the witnesses. The appreciation of evidence made by such a Court, is entitled to be considered with respect. However, that will be an approach to examine the evidence, but that is not a limitation upon the powers of this Court. If after examining the evidence, the High Court is in a position to say that the findings arrived at are erroneous, contrary to evidence and must be set aside, not only there is no legal prohibition to do so but in the interest of justice, that must be done.

38. Having indicated the nature of the approach and the powers of this Court as an Appellate Court, we would point out that in this appeal we have come to a definite conclusion that the learned Additional Sessions Judge clearly fell in error in rejecting the eye-witnesses' evidence against accused Nos 3 and 4 and original accused Nos 3 and 4 have been wrongly acquitted. The evidence clearly indicates that the commission of the crime in this case was a joint act of four persons who were none else than the two appellants before us and the two acquitted accused persons. The only question is whether such a finding can be given and should be given in the absence of accused Nos. 3 and 4 before us. If it could be given,

what is the effect of it? According to us there is no statutory bar in arriving at such a finding. It is true that the effect of the present judgment will be to hold that the two acquitted persons were in fact guilty. It might rather appear repugnant on record that those who are acquitted are being held guilty. However the principle of repugnancy on the record which is prevalent in England has no application in this country where the proceedings are controlled by Statutory provisions. Since there is no statutory provision to convert an acquittal into conviction in the absence of an appropriate appeal, the effect of our finding will not result in the conviction of original accused Nos 3 and 4. The effect will only be to confirm the conviction of the appellants before us on the footing that they share the common intention with the two acquitted persons.

39 We may point out a few judgments of the Supreme Court where this question arose and has been decided. The first judgment to which we shall refer is the case of *Marachali Paklu v State of Madras* AIR 1954 SC 643. Seven persons were tried under Section 302 read with Section 149. The Sessions Judge convicted all of them. He had proposed a sentence of hanging against accused Nos 1 and 2 and imprisonment for life against accused Nos 3 to 7. In the confirmation case which was heard along with the appeal by the accused persons the High Court confirmed the conviction as well as execution of accused Nos 1 and 2 but acquitted accused Nos 3 to 7 by giving them benefit of doubt. It was contended before the Supreme Court that the conviction of accused Nos 1 and 2 under Section 302 read with Section 149 of the Indian Penal Code was bad in view of the acquittal of accused Nos 3 to 7. The judgment of the Supreme Court discusses the evidence and points out that the finding of the High Court regarding accused Nos 3 to 7 was difficult to understand. There was ample and cogent evidence establishing the identity of accused Nos 3 to 7. Having come to those findings it was pointed out that there was no scope left for introducing into the case the theory of the benefit of doubt. They therefore held that accused Nos 3 to 7 were wrongly acquitted. A further conclusion drawn is that though their acquittal stands that circumstance cannot affect the conviction of the appellant under Section 302 read with Section 149 of the Indian Penal Code.

40 In another case *Sunder Singh v State of Punjab* AIR 1962 SC 1211 similar argument was addressed to the Supreme Court. That was a case against four accused named Sunder Singh and his sons Lal Singh and Gurmukh Singh along with Rachhpal Singh. It was alleged that they committed murder of Malook Singh

Darbara Singh and Anup Singh at about 11 a.m. in the Abadi of village Habri on January 13 1960. It was alleged that Sunder Singh and Gurmukh Singh were armed with lathis and Lal Singh and Rachhpal Singh were armed with guns. According to the charge framed against accused persons Lalsing fired upon Malook Singh and Darbara Singh and thereby killed him while Pachhpal Singh fired upon Anup Singh and killed him. This firing took place in pursuance of the common intention of all the accused persons. That is how Lal Singh and Rachhpal Singh were charged under Section 302 read with Section 34 of the Indian Penal Code. The learned trial Judge took the view that the evidence adduced against Rachhpal Singh left room for doubt and so having given Rachhpal Singh the benefit of doubt he acquitted him. In the appeal by the remaining three accused the Punjab High Court maintained the conviction of the three appellants. In the matter of sentence the High Court confirmed the sentence of death imposed on Sunder Singh and Lal Singh but reduced the sentence of Gurmukh Singh to one of life imprisonment. Before the Supreme Court the argument was raised that Rachhpal Singh having been acquitted the offence of murder of Anup Singh could not be brought home to the accused by use of Section 34 that is because Rachhpal Singh has been acquitted and there being no appeal by the State Government against him. Reliance was placed upon the provisions of Section 423 (a) of the Code of Criminal Procedure for pointing out that this acquittal could not be converted into conviction in the absence of an appeal. Rejecting this argument it is pointed out that when the High Court was dealing with the appeal of the three appellants it had inevitably to examine the comment made by the counsel against the reliability of the witnesses on the ground that their evidence against Rachhpal Singh had not been accepted by the trial Court and that necessarily meant that the High Court had to apply its mind to that problem as well. The manner in which the High Court has to proceed to examine the evidence in an appeal where some of the original accused persons are only before it the Supreme Court point out thus—

‘If in dealing with the case presented before it on behalf of the appellants it became necessary for the High Court to deal indirectly or incidentally with the case against Rachhpal Singh there is no legal bar at all. It may be that in considering the evidence as a whole the High Court may have come to the conclusion that the evidence against Rachhpal Singh was unreliable and if it had come to such a conclusion it would have examined the said evidence in the light

of this infirmity. On the other hand, after considering the evidence, the High Court may well have come to the conclusion, as it has, in fact, done in the present case, that the evidence against Rachhpal Singh is also good and need not have been discarded. In our opinion, there is no doubt that if in appreciating the points made by the appellants before it the High Court had to consider the whole of the evidence in respect of the accused persons it was free to come to one conclusion or the other in respect of the said evidence, so far as it related to Rachhpal Singh. That is why we think that the point made by Mr. Sethi that Section 423 (1) (a) precluded the High Court from considering the merits of the order of acquittal even incidentally or indirectly cannot be upheld."

41. It was then argued before the Supreme Court that the ratio of Pritam Singh's case, AIR 1956 SC 415 regarding the effect of verdict of acquittal could be utilised by the appellant for restricting the approach of the High Court towards the appreciation of evidence. The Supreme Court points out that the real ratio of that Judgment is that the verdict of acquittal by a Court of competent jurisdiction is conclusive between the said person and the prosecution and it can be challenged or reopened only by an appeal against the said acquittal but not otherwise. Having pointed out that that proposition has no relevance to the appreciation made by the High Court of the evidence as a whole, the Supreme Court also explains what is "indirectly and incidentally" considering the evidence against the acquitted accused. The Supreme Court observed as follows —

"Indeed, as an appellate Court, the High Court has to consider indirectly incidentally the evidence adduced against an accused person who had been acquitted by a trial Court in several cases where it is dealing with the appeals before it by the co-accused persons who had been convicted at the same trial and in doing so, the High Court and even this Court sometimes records its indirect conclusion that the evidence against the acquitted persons was not weak or unsatisfactory and that the acquittal made in that sense be regarded as unjustified"

The only implication of indirectly and incidentally considering the evidence is that the conclusion arrived at in such examination of evidence even if it goes against the acquitted person, cannot have the effect of affecting the acquittal of those persons unless there was substantive appeal against the acquittal. It is only in that sense that the appreciation of evidence as a whole is done indirectly or incidentally, but the evidence can be examined for considering the correctness or otherwise of the conviction of

the co-accused who are appellants before this Court

42. We may now refer to the facts and circumstances of two other cases decided by the Supreme Court where the factual aspect is slightly different but the approach on principle is the same. In *Ajendranath v State of Madhya Pradesh*, AIR 1964 SC 170, there was a prosecution of several persons under S 414 of Indian Penal Code. All of them were acquitted on the ground that the property before the court was not proved to be a stolen property. The State Government appealed only against the acquittal of one of the accused persons. The High Court came to the conclusion that the property before the Court was stolen property and the respondent accused against whom the appeal was filed came to be convicted. In an appeal by the convicted accused before the Supreme Court it was contended that it was not open to the High Court to record the findings about the recovered property to be stolen property when the State Government had not appealed against the other co-accused who had been acquitted on the basis of the finding that the property recovered was not proved to be stolen property. The Supreme Court rejects this argument and points out that the mere fact that the learned Sessions Judge acquitted the other co-accused, on the ground that the property recovered was not proved to be stolen property, did not preclude the State from appealing against the acquittal of the appellant against whom there is better evidence for establishing that he was in possession of the stolen property than the evidence was against the other co-accused. The State could challenge the correctness of the finding of the learned Additional Sessions Judge about the property being stolen property and, consequently the High Court can record its own findings on the question. This case illustrates that who appeals is not the governing factor which limits the powers of appreciation of evidence of the Appellate Court under Section 423 of the Code of Criminal Procedure. Where some of the convicted persons appeal in a case where the others are acquitted, or the State Appeals against only one of the original accused and does not challenge the acquittal of the other persons, the approach of the Appellate Court in examining the evidence is going to be the same. In order to find out the culpability or otherwise of those persons who are before it, the High Court in appeal has to examine the evidence as a whole and come to its conclusion. It may be that only some of the guilty persons are before it. The effect of this finding will be adverse to those who are before it and may not affect the acquittal of other persons.

43. The last case which we would like to refer to is the Judgment of the Supreme

Court in Karansingh v State of Madhya Pradesh AIR 1965 SC 1037. The facts of this case are rather peculiar. It was alleged that the appellant Karan Singh one Ramhans and 6 others jointly committed the crime. Ramhans was absconding when the appellant along with six others were put up before the Sessions Court for trial. The Sessions Court convicted the appellant of the offences under Sections 302, 307 read with Sections 148 and 149 of the Indian Penal Code. However, he gave the six others benefit of doubt and acquitted them. The convicted accused Karan Singh preferred an appeal to the High Court of Madhya Pradesh which was still pending when the absconding accused Ramhans was traced and put up for trial. Before the appeal of Karan Singh came to be heard and decided by the Madhya Pradesh High Court the trial of Ramhans the absconding accused was concluded. He was acquitted. An argument was therefore raised before the Madhya Pradesh High Court that in view of the acquittal of Ramhans the offence of murder by making use of the provisions of Section 149 of the Code of Criminal Procedure could not be brought home to Karan Singh. This argument was rejected by the Madhya Pradesh High Court by pointing out that the evidence in the trial led against Karan Singh when examined by the High Court clearly pointed out that the appellant and Ramhans had committed the offence in furtherance of the common intention. The fact that this fact could not be established against Ramhans in a separate trial which was held subsequently cannot affect the appreciation of evidence which the High Court is bound to do on the evidence before it. Karan Singh appealed to the Supreme Court and reliance was placed on his behalf on the judgments in AIR 1965 SC 1413. Rejecting this argument the Supreme Court observed as follows:

'On the other hand we think that the judgments earlier referred to on which the High Court relied clearly justify the view that in spite of the acquittal of a person in one case it is open to the Court in another case to proceed on the basis of course if the evidence warrants it—that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the later case that the person tried in it was guilty of an offence under Section 34 by virtue of having committed the offence along with the acquitted person. There is nothing in principle to prevent this being done.

41 The last two cases which we have cited deal with situation of facts which are slightly different than the one before us. However the examination of all the judgments above-stated itself leads to the conclusion that there is no bar in this country to the appellate Court acting

under Section 423 of the Code of Criminal Procedure to appreciate the whole evidence in a given case for the purpose of accepting or rejecting the appeal before it. If for that purpose the evidence examined as a whole shows that the appellants are guilty under Section 34 of the Indian Penal Code having shared a common intention with the other accused who are acquitted and that the acquittal of these persons was bad there is nothing to prevent the appellate Court from expressing that view and giving that finding. Such findings if they could be given in a given case would be a proper basis of maintaining the conviction of the appellants before the Appellate Court. This being the correct legal approach we think that on the findings given by us the conviction of the two appellants under Section 302 read with Section 34 is correct and must be upheld.

45 The appeal thus fails and is dismissed.

Appeal dismissed

1970 CRI L J 632 (Vol 76, C N 149)

(CALCUTTA HIGH COURT)

N C TALUKDAR J

Kaviraj Basudevananda Petitioner v
The State Opp Party

Criminal Revn No 381 of 1969 D/
23-6-1969

Penal Code (1860) S 406—Proceedings under — Suit filed in civil court long before institution of proceedings over the same subject matter and decreed — Continuance of proceedings in criminal court would be unwarranted and untenable.

(Par 5)

Chintaharan Roy and Arun Kishore Das Gupta for Petitioner Narayan Ranjan Mukherjee for Opposite Party

JUDGMENT — This Rule must be made absolute

2 The Rule is against an order dated the 12th March 1969 passed by Sri K R Banerjee Magistrate 1st Class Howrah

G R 1011 of 1967

In Case No _____ charg-

T R 141 of 1968

ing the accused-petitioner Kaviraj Basudevananda under Sec 406 of the Indian Penal Code where to be pleaded not guilty and clumed to be tried and fixing two dates for evidence

3 The facts leading on to the present Rule are short and simple. On the 6th April 1967 one Dibakar Chatterjy as the Manager of the Estate of Mr C L Dagar and Sm Ratan Kunwar Debi filed a petition of complaint under Section 406 of the Indian Penal Code against the pre-

HM/JM/D322/69/MBR/B

sent accused Kaviraj Basudevananda, before the Sub-Divisional Magistrate (Judicial), Howrah, and on receipt of the said complaint, the learned Sub-Divisional Magistrate, sent the petition of complaint to the Police for taking cognizance and for investigation. The said complaint, thereupon, was treated as the First Information Report and, after completing the investigation, a charge-sheet was submitted against the accused-petitioner under Sections 420/406 of the Indian Penal Code before the learned Sub-Divisional Magistrate, Howrah. The case was, ultimately, transferred to the file of the present incumbent Sri K R Banerjee, Magistrate, 1st Class, Howrah for disposal. Copies of documents and statements were supplied to the accused and, after hearing the parties, the learned trying Magistrate, by his order dated the 12th March 1969, framed a charge under Sec 406 of the Indian Penal Code against the accused-petitioner. The said charge has been impugned and forms the subject-matter of the present Rule.

4. Mr Chintaharan Roy, Advocate (with Mr. Arun Kishore Das Gupta, Advocate), appearing on behalf of the accused-petitioner, in support of the Rule, has made a two-fold submission. The first contention of Mr Roy is that the present proceedings are unwarranted and untenable, in view of the two earlier suits in the Civil Court now pending, namely, one in the court of the learned Munsif, 5th Court at Howrah and the other in the Hon'ble High Court over the said properties. Mr Roy argued in this context that the cause of action is essentially civil in nature and the criminal proceedings are an abuse of the process of the Court. The second contention of Mr Roy is that the date of the incident is, *ex facie*, significant being the 24th day of March, 1948 and for agitating such an old matter, the criminal court is, certainly, not the proper forum. Mr. Narayan Ranjan Mukherjee, Advocate, appearing on behalf of the State has submitted that there is nothing on the record to show that there is a suit pending in the High Court and that there is no bar in law to the institution of the present criminal proceedings, merely because, over the same property a suit in the civil court at Howrah is pending. With regard to the second contention raised by Mr Roy, Mr Mukherjee has submitted that it is, undoubtedly, unusual but not illegal and he left the matter to the discretion of the Court.

5. Having heard the learned Advocate appearing on behalf of the respective parties and on going through the materials on record, I find that there is a considerable force behind the submissions of Mr Chintaharan Roy. On or about the 15th December, 1965, long before the in-

stitution of the present criminal case under Sec 406 of the Indian Penal Code, Smt Ratan Kunwar alias Ratan Kunwar Debi as well as Kaviraj Basudevananda, the present petitioner, jointly instituted Title Suit No 233 of 1965 in the court of the learned Munsif, 5th Court at Howrah against one Sidheswar Chakravorty for khas possession of the suit properties evicting the said Sidheswar Chakravorty and it was clearly averred therein that the property was possessed by the plaintiff No 1 Smt Ratan Kunwar Debi by virtue of a declaration made by the plaintiff No 2, Kaviraj Basudevananda. The said suit, thereafter, was decreed and the present criminal case was filed much after the said civil suit. This would appear from paragraphs 1 and 2 of the petition affirmed in this Court by one Tara Pada Ghose. There is no demurrer on the part of the State. I, however, do not find any material on the record to support Mr Roy's other submission in this context that there is also a suit pending in the Hon'ble High Court over the said issue. Be that as it may, it is abundantly clear that the relief prayed for in the instant proceedings in the criminal court is a civil one and for a proper determination of the issue that has been raised, the criminal court is perhaps, not the proper forum. Having regard to the fact that over the same subject-matter a suit was also filed in the civil court and the same has been decreed, a continuance of the present proceedings in the criminal court would be unwarranted and untenable. I uphold the first contention raised by Mr. Roy on behalf of the accused-petitioner.

6. The second ground taken by Mr. Roy is also on a strong footing. The charge itself brings to light the intriguing fact that the cause of action is alleged to have taken place so far back as on the 24th day of March, 1948. It is pertinent in this context to refer to the said charge which is as follows—

"That you, on or about the 24th day of March, 1948, being entrusted by Smt Ratan Kunwar Debi and/or her husband Sohanlal Daga alias Seth, since deceased, with property to wit cash amounting to Rs 1,04,000/- or Rs 70,000/- dishonestly used that property in violation of the legal contract, express or implied, which you made touching the discharge of such trust and thereby committed an offence punishable under Sec 406 of the Indian Penal Code and within my cognizance."

It is passing strange that a complaint is made in the criminal court with regard to an offence purported to have taken place so far back as on the 24th March, 1948. Much water had flowed down the Ganges since that time and has been followed by civil suit which has also been decreed. Mr Mukherjee has contended

that there is no legal bar to the institution of such a case. The question however is one of principle and the question is not essentially of legality but also of propriety. Therefore in the facts and circumstances of the present case I hold that a continuance of the present criminal proceedings in the court below on such a charge would not be proper and maintainable.

7 In the result I make the Rule absolute set aside the charge that was framed under Sec 406 of the Indian Penal Code on the 12th March 1969 by Sri K R Banerjee Magistrate 1st Class Howrah G R Case No 1011 of 1967

in TR 141 of 1968 and I quash the relative proceedings pending before in Rule made absolute

1970 CRI L J 634 (Vol 76 C N 150)

(CALCUTTA HIGH COURT)

T P MUKHERJI J

Osman Gani Petitioner v Tahirannessa Begum Opp Party

Criminal Revn No 707 of 1965 D/- 28-7-1966

Criminal P C (1898) S 188(6) Proviso — Applicability — Husband served with notice of petition under S 488 — Husband filing written statement but later not appearing — Ex parte order made — Proviso not applicable — His petition for setting aside order rejected — Rejection correct

Where a husband served with notice of the application under S 488 of the Criminal P C files written statement but later does not appear and an ex parte order is passed S 488(6) proviso does not apply. The rejection of his petition for setting aside the order is correct.

(Paras 5 and 6)

It is an ex parte order passed under the circumstances mentioned in S 488(6) proviso which is liable to be set aside.

(Para 4)

When the husband is served with notice of the proceeding there is no question of his wilfully avoiding service. When he files written statement there is also no question of his wilfully neglecting to attend the court. When he fails to appear later S 488(6) proviso which is attracted where the opposite party cannot be made to or does not attend the court at all, does not apply to him. Hence an ex parte order made in such a case is not liable to be set aside under the second part of S 488(6) proviso.

(Para 5)

The rejection therefore of his petition for setting aside such order is correct.

(Para 6)

Biswanath Bhattacharya for Petitioner
Chunta Haran Roy and Arun Krishna Das Gupta for Opposite Party

ORDER — The husband in a proceeding under Sec 488 Cr P C obtained this Rule against the order of the learned Magistrate rejecting his prayer made under the proviso to Sec 488(6) of the Code for setting aside an ex parte order for payment of a maintenance allowance of Rs 50/- per month to his wife.

2 The materials on record show that the petitioner was served with notice of his wife's application under Sec 488 Cr P C and that he also appeared in court and filed his written statement but thereafter did not appear. The proceeding ended in an ex parte order directing payment of maintenance allowance as stated above. Six months thereafter the petitioner appeared in court and applied under the proviso to Sec 488(6) for setting aside the ex parte order. The learned Magistrate refused to entertain the prayer on the ground of limitation.

3 The learned Advocate appearing in support of the petitioner contends that Sec 5 of the Limitation Act would apply to the case and that the learned Magistrate fell into an error in finding that Sec 5 of the Limitation Act would not apply and that the application was barred by limitation.

4 Sec 488(6) of the Code requires that evidence in connection with a proceeding under the section should be taken in presence of the other party or his pleader. The proviso appended to the clause says however that if the Magistrate is satisfied that the other party is wilfully avoiding service or wilfully neglecting to attend the court he may proceed to hear and determine the case ex parte. It is an order passed ex parte under the above circumstances which is liable to be set aside for good cause shown on an application made within three months from the date thereof. The question is whether the second part of the proviso which refers to setting aside of the ex parte order is at all attracted to the facts of the present case.

5 As I have already stated the present petitioner was served with notice of the proceeding. So there was no question of his wilfully avoiding service. He attended court and also filed his written statement as is admitted in paragraph 3 of his present application. Thus there was no question of his wilfully neglecting to attend the court either. Therefore the present petitioner did not appear personally but his lawyer appeared on some occasions before the Magistrate and the learned Magistrate proceeded with the

case The proviso in my view is not attracted to cases where the opposite party having been served with notice appears in court, proceeds to contest the application, but does not appear on the last date when evidence is recorded. If we consider together the two circumstances of 'wilfully avoiding service' and 'wilfully neglects to attend the court' as they appear in the Proviso to Section 488(6) the reasonable interpretation of the proviso would be that it is attracted to cases where the opposite party cannot be made to or does not attend the court at all. If the opposite party before the Magistrate attends court and thereafter fails to appear, the proviso in my view would not be attracted and an order made in the case in the petitioner's favour would not be liable to be set aside under the second part of the proviso.

6. In the above view of the matter the question of limitation would hardly arise in the present case. The application of the petitioner for setting aside the ex parte order has in my view been rightly rejected. The Rule accordingly stands discharged.

Petition dismissed

1970 CRI. L. J. 635 (Vol. 76, C. N. 151)

(DELHI HIGH COURT)

I D DUA, C J

Ram Singh, Petitioner v The State, Respondent

Criminal Revn No 582 of 1968 D/- 13-1-1969, against order of Addl S J. Delhi, D/- 23-12-1968

(A) Defence of India Rules (1962), Rr. 126-P (2) (iv) (as amended in 1963), 126-I (7) (b) — Mere possession of gold in excess of permissible limit is not offence — It is acquisition in excess of such limit which constitutes offence.

(Para 5)

(B) Evidence Act (1872), Ss. 26, 25 — Expression "Custody of Police" — Meaning of — Confession made to Excise Officer in presence of Police Officer is inadmissible — Conviction solely on basis of such confession is illegal.

Whereas S 25 renders inadmissible a confession made by an accused to the police, S 26 goes further and enacts that a confession made by a person, while he is in the custody of the police, even to a third person, who may not be a police officer, is inadmissible unless it is made in the immediate presence of a Magistrate. The reason underlying these two sections is obvious, namely, that the influence of the police is presumed to affect the voluntary nature of the confession and, therefore, its reliability. The law

is imperative in excluding what comes from an accused person in the custody of the police if it incriminates him. Courts in this country have been so jealous of the voluntary nature of the confession that they have construed the word "custody" not necessarily to mean custody after formal arrest, but it has been held to extend to a state of affairs in which the accused can be said to have come into the influence of a police officer or has been even under some form of police surveillance or restrictions on his movements by the police. (Para 5)

A conviction for acquisition of gold in excess of permissible limit based solely on confession of accused made to Excise Authority in presence of Police Officer is illegal as such confession is inadmissible. AIR 1956 Kutch 1, Ref to (Para 5) Cases Referred: Chronological Paras (1956) AIR 1956 Kutch 1 (V 43) = 1956 Cri LJ 217, Jagjit Singh v.

State of Kutch

4

Gurcharan Singh, for Petitioner, V D Misra, for Respondent.

ORDER:— In this revision, the petitioner challenges his conviction by Shri H L Sikka, Sub-Divisional Magistrate, New Delhi under Rule 126-P (2) (iv) of the Defence of India Rules as amended in 1963 and sentence of six months' rigorous imprisonment and a fine of Rs 200/-. affirmed on appeal by the learned Additional Sessions Judge Delhi, by means of his order dated 23-12-1968. The circumstances leading to the initiation of this case are stated in the complaint dated 4-8-1965 (Exhibit P A) made by the Assistant Collector of Central Excise, Delhi. According to this complaint, on 24-3-1964 Inspector of Police, Incharge Kotwali Police Station Chandni Chawk, Delhi, detained Ram Singh s/o Doonger Singh on suspicion that he was carrying contraband gold on his person. On being searched in the presence of the Central Excise Officers and independent witnesses, 13 gold Passas of 10 grammes each were recovered from him. The passas bore inscription of Manulal Chaman Lal & Co., Bombay. On interrogation Ram Singh s/o Doonger Singh stated that he had purchased these Passas on the same day from Ram Singh s/o Jaggu Mal Dalal. The latter Ram Singh was also interrogated and on 24-3-1964 he admitted having sold 13 Passas to the former Ram Singh s/o Doonger Singh. These 13 Passas were a part of 16 Passas which had been brought to Ram Singh s/o Jaggu Mal by someone for disposal the remaining three Passas having been retained by Ram Singh s/o Jaggu Mal for the purposes of his niece's marriage. On search of the person of Ram Singh s/o Jaggu Mal, three Passas of 10 grammes each with similar inscription were also recovered. Both Ram Singhs were made

accused persons Ram Singh s/o Doonger Singh being accused No 1 and Ram Singh s/o Jaggu Mal accused No 2. Then occurs the following averment in the complaint—

4 That since the accused No 1 could neither produce a valid permit from the Gold Control Administrator for the acquisition of the 13 Passas of gold nor any proof to the effect that the same had been declared under the gold control rules and accused No 2 also could not produce a valid permit from the aforesaid authority for the 3 Passas recovered from him the gold recovered from both was seized under Rule 126-L of the Defence of India Rules 1963. The gold Passas seized from both the accused have since been confiscated by the Asstt Collector Central Excise Division Delhi under R 126-M of the Defence of India (Amendment) Rules 1963 vide his adjudication order C Nos Gold/8/64/13588 90 and Gold/8/64/17535-87 dated 4th July 1964.

5 The complainant submits that accused No 1 and accused No 2 had in their possession or under their control 13 Passas weighing 170 grammes and 3 Passas of gold weighing 30 grammes respectively which they had bought or otherwise acquired or accepted in contravention of the Defence of India Rules 1962 and Defence of India (Amendment) Rules 1963 and hence they have committed an offence punishable under Rule 126-P (2) (i) idid.

2 Shri Omesh Saigal the learned Magistrate dealing with the case discharged Ram Singh s/o Jaggu Mal on 15-12-1965 after recording the evidence led by the prosecution holding that the said accused had with him the quantity of gold permissible under the law. Charge under Rule 126-H (d) of the Defence of India (Amendment) Rules was however framed against Ram Singh s/o Doonger Singh because prima facie the case was found to have been made out against him by the learned Magistrate.

3 The learned Sub-Divisional Magistrate dealing with the case against the present petitioner (Ram Singh s/o Doonger Singh) considered the evidence of the prosecution and observed that there was no doubt about 13 Passas of gold having been recovered by the Inspector of the Central Excise from the present petitioner on 24-3-1964. The plea of the accused that he had only five Passas of gold whereas the remaining 8 Passas of gold were in the possession of two of his brothers was not believed by the learned Sub-Divisional Magistrate on the ground that before the Assistant Collector of Central Excise this plea had not been taken. The possession of 13 Passas of gold each weighing 10 grammes is held by the learned Sub-Divisional Magistrate to be in excess of the permissible limit of

50 grammes as mentioned in R 126 I (7) (b) of the Defence of India (Amendment) Rules 1963. The accused questioned the admissibility of his statements recorded by the Central Excise Authorities on the ground that at that time the police officers were also present but the learned Magistrate did not express any opinion on this objection on the view that the recovery of gold from the accused was in excess of the permissible limits. On this basis the present petitioner was convicted under Rule 126-P(2) (iv) and sentenced as mentioned above.

4 On appeal the learned Additional Sessions Judge noted the following four points argued on behalf of the counsel for the appellant—

1 Absence of reliable evidence of the recovery of 13 Passas of gold from the accused.

2 The confessional statement of Ram Singh accused made before the Excise and Police Officers is not admissible in evidence as the same is hit by Secs 24 25 of Evidence Act.

3 The prosecution has failed to produce Durga Parshad a recovery witness in the case and the presumption for his non-production should be taken against the prosecution and.

4 The defence version which is proved from a reliable evidence smashes the prosecution theory particularly when it is supported by the evidence of Ram Singh Dalal who was co-accused in the case. After considering the submissions of the counsel for the accused the Court below felt no doubt that there were contradictions with regard to calling of Ram Singh Dalal the sending of information to Customs the manner in which recovery witnesses were called and the manner in which recovery was effected on 13 Passas of gold from the accused and the preparation of the recovery memos. These discrepancies were however not considered so serious as to be fatal to the prosecution case because the recovery of 13 Passas was not denied by the accused himself his plea being that five Passas belonged to him and the remaining 8 Passas to his two brothers. The Court then upheld the broad facts that—

(1) the accused was found in possession of 13 Passas of gold (2) these were recovered from his person (3) these were recovered in the presence of witnesses and Excise Staff (4) the same was seized vide recovery memo signed by the PWs (5) at his instance Ram Singh s/o Jaggu Mal was apprehended from whom similar three Passas were recovered and (6) his confessional statement in his own hand. All these facts taken together according to the lower Appellate Court establish that the Passas in question were recovered from the possession of the accused. The statement of the accused Exhibit

P W 2/D which was challenged on the ground that the same was hit by Sections 24 and 25 of the evidence, was admitted in evidence on the ground that Excise Inspector was not a police officer, and the presence of the S H O was immaterial. Reliance for this view was placed on Jagjitsingh Tannasingh v State of Kutch, AIR 1956 Kutch 1. Recovery of the gold in question was held to have been amply proved and the defence evidence having been rejected and relying on the confession of the accused-petitioner, the appeal was disallowed.

5. On revision in this Court, after hearing arguments of both sides on 8-1-1969, I set aside the accused-petitioner's conviction and acquitted him by a short order, reserving detailed reasons to be given later and it is by means of the present order that I am giving my reasons in support of the order of acquittal. It has been contended before me that mere possession of 13 Passas of gold is not an offence and this is not disputed before me on behalf of the State. Rule 126-P (2) (iv) of the Defence of India Rules reads as under.—

"126-P Penalties—(1) * * * *

(2) Whoever,—
* * *

(iv) buys or otherwise
acquires, or ac-
cepts gold in con-
travention of any
provision of this
Part,
* * *

shall be punishable with imprisonment for a term of not less than six months and not more than two years and also with fine."

It is, therefore, clear that the Courts below are wrong in convicting the present petitioner under this rule merely for possession of the gold in question. I need not go into the provisions of the rules in question for possession because it is not disputed that mere possession of 13 Passas of gold is not an offence. It is only its acquisition which is an offence. For the acquisition, apart from the confession of the accused-petitioner, there is no other evidence on which reliance has been placed on behalf of the prosecution before me. The question, therefore, turns on the admissibility of the confession and this controversy lies within a very narrow compass. It is not disputed that the present petitioner was in custody of the police when he made the confession. Section 26 of the Indian Evidence Act, in unequivocal terms, provides that no confession made by any person, whilst in the custody of a police officer, shall be proved as against such person unless it is made in the immediate presence of a Magistrate. Section 25 of the said Act renders unprovable against a person accused of any offence

a confession made to a police officer. Whereas Section 25 renders inadmissible a confession made by an accused to the police, Section 26 goes further and enacts that a confession made by a person, while he is in the custody of the police, even to a third person, who may not be a police officer, is inadmissible unless it is made in the immediate presence of a Magistrate. The reason underlying these two sections is obvious, namely, that the influence of the police is presumed to affect the voluntary nature of the confession and, therefore, its reliability. The law is imperative in excluding what comes from an accused person in the custody of the police if it incriminates him. Courts in this country have been so jealous of the voluntary nature of the confession that they have construed the word "custody" not necessarily to mean custody after formal arrest, but it has been held to extend to a state of affairs in which the accused can be said to have come into the influence of a police officer or has been even under some form of police surveillance or restrictions on his movements by the police. I do not consider it necessary to refer to the evidence for the prosecution because before me, apart from the confession, it is conceded there is no other reliable evidence in regard to the acquisition of the gold in question. It is true that a passing reference has been made at the bar to the evidence suggesting that the searching officer who searched the person of the present accused-petitioner, was himself not searched. This suggestion appears to be used for the argument that the present accused-petitioner's search was irregular and, therefore, not to be relied upon, but on the view that I have taken of the case in hand I express no opinion thereon. I also consider it unnecessary to refer to some decided cases cited at the bar because the legal position seems to me to be fairly well settled.

6. The conviction of the petitioner is thus set aside and as he has already been ordered to be released, no further order to this effect need now be made.

Revision allowed

1970 CRI. L. J. 637 (Vol. 76, C. N. 152)
(ORISSA HIGH COURT)

G. K. MISRA AND B. K. PATRA, JJ

Jogi Sahu, Appellant v State, Respondent

Criminal Appeal No 108 of 1966, D/- 16-10-1968, against order of S. J., Cuttack, D/- 24-3-1966.

Evidence Act (1872), Ss. 3 and 118 — Criminal P. C. (1898), S. 367 — Appreciation of evidence — Murder — Child wit-

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ness the only eye witness — Victim of tutoring — Two different versions one before committing Court and another before Sessions Judge — No corroborating evidence to connect accused with murder — No reliance can be placed on such evidence — Conviction cannot stand — Court of fact can examine both versions — But when two conflicting versions are given and on evidence witness stands as condemned liar Court needs corroboration in support of statement on which conviction is to be sustained — Penal Code (1860), S 302 (Para 4)

D C Mohanty for Appellant Standing Counsel for Respondent

G K MISRA, J — The appellant has been convicted under Section 302 IPC and sentenced to imprisonment for life. The prosecution case in short is that on 15-4-1965 sometime in the afternoon the appellant put a bamboo Funkanala on the throat of his wife (deceased) stood on either side of the Funkanala with his two legs by holding a Khunta (big wooden pole fixed to the ground) and as a result of this she died of strangulation. The defence is one of denial.

2 The Doctor (PW 4) clearly stated that the death of the deceased was due to asphyxia as a result of strangulation of her neck resulting in the fracture of the larynx. His evidence has not been dislodged in cross-examination and no attempt has been made before us to establish that the finding of the doctor is not warranted by the post-mortem report and examination. The learned Sessions Judge correctly held that the death was homicidal as a result of strangulation.

3 The only question for consideration is whether the appellant is responsible for the death of the deceased. PW 7 the daughter of the appellant and the deceased is the only eye-witness. She is 11 to 12 years old. The learned Sessions Judge after putting some questions to her was satisfied that she was in a position to understand the questions and answers. Before the learned Sessions Judge she clearly supported the prosecution story that the appellant strangled the deceased by standing on the bamboo Funkanala on both sides after placing it on the throat of the deceased. Before the committing Court she however gave a completely different story. She clearly stated that her father did not kill her mother and that Krushna Bhanja and Dina Padhan killed her. It is to be noted that the admitted prosecution case is that a few days before this incident this Krushna Bhanja severely assaulted the deceased whereafter she was bed-ridden. The prosecution story is that as she continued ill for a fairly long time the appellant who is a beggar by profession wanted to get rid of her. In the committing

Court PW 7 also stated that her father did not kill her mother by placing a bamboo Funkanala on her neck and standing over the same. In the Sessions Court she stated that her version in the committing Court was untrue and that she made such a statement as a result of tutoring by Krushna Bhanja.

4 We are thus confronted with a very difficult situation that a child witness who at one stage was the victim of tutoring has given two different versions one before the learned Sessions Judge and another before the committing Court which has been treated as evidence under Section 288 Cr P C. The law on the point is now well settled. Though two different versions have been given it is open to a court of fact to examine both the versions. If the court is satisfied that the evidence before the Sessions court implicating the accused is true that statement can be preferred to the statement made before the committing Court subsequently resiled and vice versa. But generally when two conflicting versions are given and on the evidence the witness stands as a condemned liar the court needs corroboration in support of the statement on which the conviction is to be sustained. In this case we do not find any corroborating evidence to connect the appellant with the murder. We are not prepared to place reliance on her evidence in the sessions court without corroboration. Not only she is a child witness but on her own statement she was tutored at the earlier stage when she stated that her father was not the author of the murder. For the aforesaid reasons we place no reliance on the evidence of PW 7. There being no other evidence the conviction cannot be maintained.

5 In the result the order of conviction and sentence passed by the learned Sessions Judge is set aside and the Criminal Appeal is allowed. The appellant be set at liberty forthwith.

6 PATRA J — I agree

Appeal allowed

1970 CRI L J 638 (Vol 76, C N 153)
(ORISSA HIGH COURT)

A MISRA J

Bairagi Rout and others Petitioners v
Brahmananda Das Opposite Party

Criminal Revn No 114 of 1967 D/-
28-8-1969 against order of Addl S J
Puri D/- 17-12-1966

Penal Code (1860) S 379 — Plots in
low lying area demarcated by ridges —
Single sheet of water covering such plots
— Fish in such water cannot be subject
matter of theft

L1/LM/F243/69/SNY/M

Fish can be the subject-matter of theft only where they are kept in an enclosed tank which restrains them from their natural liberty of moving in the water beyond the limits of the enclosure. If it is found that they are unable to escape from the enclosed tank, they, no doubt, can become subject-matter of theft but not otherwise (Para 8)

Plots belonging to various owners in a low-lying area can constitute one sheet of water even though ridges are installed by one of the plot holders around his plot. The existence of ridges of such small height as constitute demarcations between one plot and another cannot eliminate the possibility of the entire low-lying area constituting one sheet of water during certain months in the year. Hence when such plots are covered by one sheet of water, it follows that the fish could not have been restrained from escaping from one plot to the water covering the neighbouring plots. As such, the possession of fish cannot be said to be exclusive possession of any single plot holder. Therefore, they cannot constitute subject-matter of theft (Para 8)

M Mohanty, for Petitioners, R C Patnaik, for Opposite Party

ORDER:— Each of the five petitioners has been convicted under Ss 143 and 379 IPC and sentenced to a fine of Rs 100/-, and in default, to undergo RI for fifteen days under S. 379 IPC, while no separate sentence has been awarded under S 143 IPC.

2. The prosecution case is that on 12-1-1964, petitioners came in a body and in prosecution of their common object committed theft of fish from complainant's tank on plot No 320 in village Dharmakirti. The motive attributed to the petitioners is that they indulged in the aforesaid act at the instigation of the Mohant of Sidha Muth who was ill-disposed towards him. In defence, petitioners denied to have committed theft of fish from the complainant's tank and allege that plot No 320 belonging to him along with plots Nos 273 to 276 and the intervening plot No 322 constitute a ghai covered by one sheet of water without any separate embankments for the tanks on any of these plots. Therefore according to them, they have not committed theft of fish from complainant's enclosed tank. The courts below, on a consideration of the evidence, found that on the date of occurrence, petitioners caught fish, as alleged by the complainant and that the complainant's tank on plot No 320 is protected by separate bundhs, and as such, does not constitute one continuous sheet of water along with the adjoining plots. On these findings, petitioners were convicted and sentenced, as stated above.

3. Mr. Mohanty, learned counsel for petitioners assails the convictions on various grounds. It is contended by him that the courts below should not have accepted the interested testimony of the PWs, that the complainant's version is highly improbable, that there is absence of proof of specific acts attributable to individual petitioners and that a gross error has been committed in rejecting on untenable grounds the defence version of the entire area including plot No. 320 constituting one sheet of water. It is further urged that the motive attributed by the complainant to the petitioners having failed, the complainant's case should have been disbelieved. On the other hand, learned counsel for opposite party contends that the courts below have given due weight to the evidence of the PWs after considering the suggestion of interestedness or otherwise attributed to them and the catching of fish having been proved and it having been established that plot No 320 has got separate bundhs, the conviction is fully justified.

4. The courts below, no doubt, have found that the testimony of PWs 1, 3 and 5 is interested. At the same time, they have accepted their testimony as it finds corroboration from the testimony of PWs 2 and 4. Of course, PW 4 is not a witness originally named in the complaint petition, but this has not been considered as sufficient to discard his testimony. So far as P.W. 2 is concerned, apart from a suggestion that he is related to the complainant, there is nothing else to show that his testimony is interested. When both the courts have preferred to rely on the evidence of the PWs about catching of the fish on the date of occurrence by the petitioners, I do not find any valid reason to differ from them.

5. The next contention of Mr Mohanty is that the complainant's version should have been rejected as highly improbable on the ground that such a large quantity of fish weighing about four maunds could not have been caught in such a small area, there is no evidence as to the manner in which such a large quantity of fish was disposed of and that the conduct of the complainant in not reporting at the P.S. is incompatible with the truth of the prosecution version. I do not find any merit in these contentions. Even a small area may contain a large quantity of fish which depends on various other factors. The manner in which the fish caught was disposed of is not very material to determine whether there was a catch or not and non-lodging of a report at the PS does not necessarily militate against the truth of the complainant's version.

6. Next it is urged by Mr Mohanty that there is no evidence ascribing specific acts at the time of occurrence to individual petitioners. The prosecution case

is that petitioners in a body indulged in catching fish. It cannot be reasonably expected nor is it possible to lead evidence in such circumstances as to the quantity of fish caught by each of the petitioners and the extent of success achieved by each. The evidence is that all of them were engaged in catching fish. Therefore I do not find any merit in this contention also.

7 The only other point which deserves consideration urged by Mr Mohanty is the manner in which the courts below have rejected the defence version about the entire area including plot No 320 forming one sheet of water. There is no dispute that plot No 320 is recorded as a tank and it belongs to the complainant. Equally there is no dispute that other plots in that neighbourhood such as plots Nos 273 to 276 belonging to the Mohant are also recorded as tanks. The only plot intervening between the plots constituting Mohant's tanks and plot No 320 is plot No 322 which according to the defence is a low-lying land and as such the entire area constitutes one sheet of water. In support of this contention defence examined DW 1 who is the Tahsildar of the Muth. He has deposed that all these plots constitute one ghai covered by one sheet of water though it spreads over the area containing different plots belonging to different owners. The trial Court rejected his testimony on the ground that when his evidence differs from the entries in the record-of-rights and the plots had not been verified on the spot, his evidence cannot be relied upon. The lower appellate Court has rejected the defence version with the observation that the very fact that complainant's plot No 320 has been recorded separately as a tank and similarly some of the plots belonging to the Muth have been separately recorded as tanks would go to show that they are identifiable as such at the spot and these plots including the complainant's plot cannot constitute one sheet of water.

8 During arguments it is not seriously disputed by learned counsel for opposite party that it is possible in any low-lying area for a number of plots belonging to different owners being covered by one sheet of water. The mere fact that they are recorded as separate plots of different owners cannot exclude the possibility of the entire area being covered by one sheet of water. The courts below have erred in rejecting the defence version and the evidence of DW 1 simply on the ground that because the underlying area is recorded as different plots in the name of different owners it will not be possible for the entire area forming one sheet of water. The positive evidence of DW 1 is that the water of

the ghai spreads over all these plots including plot No 320.

The evidence shows that the area in which these plots are situated is a low-lying area. Though different plots have been recorded as tanks in the settlement records the defence version is that the water spreads over all these plots for want of protective embankments of sufficient height for each plot. The PWs have deposed that plot No 320 has got ridges. The expression "ridge" is ordinarily used in relation to agricultural fields and usually of lesser height constituting demarcations between one plot and another. The existence of ridges of such small height cannot eliminate the possibility of the entire low-lying area constituting one sheet of water during certain months in the year. The grounds on which this version of the defence has been rejected by the courts below as already stated are not tenable. Therefore there is no valid reason for rejecting the evidence of DW 1 that the said area constitutes one sheet of water during a part of the year. Having come to this conclusion the question arises whether petitioners can be said to have committed theft of fish on the date of occurrence when it has been found that they actually caught fish there.

This aspect assumes importance because fish can be the subject-matter of theft only where they are kept in an enclosed tank which restrains them from their natural liberty of moving in the water beyond the limits of the enclosure. If it is found that they are unable to escape from the enclosed tank they no doubt can become subject-matter of theft but not otherwise. In the present case when various plots including plot No 320 are covered by one sheet of water it follows that the fish could not have been restrained from escaping from plot No 320 belonging to the complainant to the water covering the neighbouring plots. As such the possession of fish cannot be said to be exclusive possession of the complainant. Therefore they cannot constitute subject-matter of theft. This being my finding petitioners cannot be found guilty for the offence of theft of fish nor by their going there to catch fish in a body it can be said that they shared the common object of committing an offence. On these findings the conviction of petitioners cannot be sustained.

9 Hence I allow the revision set aside the convictions and sentence of the petitioners and direct that they be acquitted of the charges.

Revision allowed

1970 CRI. L. J. 641 (Vol. 76, C. N. 154)

(ORISSA HIGH COURT)

S ACHARYA, J.

Pitambar Pradhan and others, Petitioners v. State, Opp. Party.

Criminal Revn No. 452 of 1968, D/- 23-6-1969, against order of S J, Balasore, D/- 21-8-1968.

Criminal P. C. (1898), Ss. 118, 117(1) — Magistrate may consider matters not mentioned in notice, while ordering security.

The words "to take such further evidence as may appear necessary" in sub-section (1) of Section 117 Cr. P Code indicate that the Magistrate may take further evidence relating to other incidents, and need not confine himself only to the subject-matter of the notice issued to the persons proceeded against. Consideration of such other matters may enable the Magistrate to form his opinion that it is necessary to require such delinquents to execute bonds for keeping the peace. Leaving out such evidence may result in the missing of vital materials which could have properly moulded the Magistrate's opinion. AIR 1963 Pat 312, Rel on. (Para 2)

Cases Referred: Chronological Paras

(1963) AIR 1963 Pat 312 (V 50) =

1963 (2) Cri LJ 312, Matuki Mah-ton v. State

2

Sovesht Roy, for Petitioners, R K Patra, for Standing Counsel, H Kanungo and R N. Mohanty, for Opposite Party.

ORDER:— This revision application is against the order of the Sessions Judge, Balasore, affirming in appeal, by slightly modifying, the order of the Magistrate to furnish security under Section 118 Cr P C, only with respect to these four petitioners.

2. The first point urged by Mr. Roy on behalf of the petitioners was that both the courts were wrong in taking into consideration extraneous matters which were not the subject-matter of the notice. There is nothing in Section 117 Cr P Code to support Mr Roy's contention. Rather the words "to take such further evidence as may appear necessary" in sub-section (1) of Section 117 Cr. P Code indicate that the Magistrate may take further evidence relating to other incidents, and need not confine himself only to the subject-matter of the notice issued to the persons proceeded against. Consideration of such other matters may enable the Magistrate to form his opinion that it is necessary to require such delinquents to execute the bond for keeping the peace. Leaving out such evidence may result in the missing of vital materials which could have properly moulded the Magistrate's opinion. A similar ques-

tion came up for discussion in Matuki Mah-ton v State, AIR 1963 Pat 312, wherein it was held by Kamala Sahai, J that—

"..... I have not the slightest doubt that the Magistrate is fully entitled to consider, in an inquiry under S 117, evidence relating to incidents which take place while the proceeding is pending or, in other words all incidents included or not included in the information originally given to the Magistrate, on the basis of which he draws up a proceeding"

In this view of the matter this contention of Mr Roy fails

3. It was next contended that there was no finding of overt acts against the petitioners in the long interval between 9-6-1965, the initiation of the proceeding, and 26-10-1967, the date of the order, and as such no inference could be drawn that breach of the peace was apprehended justifying a final order in the proceeding. Having perused the appellate as well as the Magistrate's order, I find that both the courts below have dealt with in detail the two items of station diary entries, i.e., Entry No 460 dated 26-5-64 (Ex 1) and entry No 48 dated 3-12-64 (Ex. 2), which were the subject-matter of the proceeding against the petitioners. Both the courts have also taken into consideration items of evidence relating to other incidents which followed thereafter. Eleven witnesses were examined in support of the proceedings and one on behalf of the petitioners. On a lengthy and proper evaluation of the evidence of these witnesses, and assessing the case against each one of the persons proceeded against, the Magistrate found that they took the law completely into their own hands for the last few years, and were committing several overt acts from time to time and were likely to commit further such acts and mischief against the 1st party, causing breach of peace and disturbance of public tranquillity in their locality, unless they were bound down to keep peace. In appeal the learned Sessions Judge, on a re-appraisal of the evidence on record in a proper and elaborate manner, came to a definite finding that there was apprehension of breach of peace in the village unless the four petitioners were bound down, and hence he confirmed the order of the learned Magistrate only with respect to these four petitioners. In this view of the matter this contention of Mr. Roy does not in any way advance the petitioners' case.

4. Mr Roy at last submits that these petitioners since 26-10-1967, the date on which the Magistrate passed the order, have been very careful in maintaining the peace, and there is at present no apprehension that these persons are likely to commit a breach of the peace. If that be so, while holding that the order passed against the petitioners is lawful and good,

and can be given effect to even now I may only observe that it is left to the petitioners to approach the Magistrate for a reconsideration of his order in the light of the situation and conditions existing at present and in that case the Magistrate may suitably consider the prayer made by the petitioners. With these observations the revision petition is dismissed.

5 The records of the case be sent back immediately to the Magistrate's Court. The petitioners are hereby directed to appear before the Magistrate within 15 days of this order and the interim bonds furnished by them in accordance with my order dated 23-1-1969 will remain effective till the date of their appearance before the said Court.

Order accordingly.

1970 ORI L J 642 (Vol 76 C N, 155)

(PATNA HIGH COURT)

G N PRASAD J

D S Bhorla and another Petitioners v N Singh Opposite Party

Criminal Revn No 60 of 1969 D/- 12-2-1969 from order of Munsif Magistrate First Class Gaya D/- 17-12-1968

(A) Railway Protection Force Act (1957) Section 20 (3) — Accused Havildar commanded to assist Railway Officer in checking ticketless travellers — Railway Officer and accused assaulting complainant a ticket collector — Requirement of Section 20 (3) not complied with — Held his prosecution as instituted without compliance of the provision of Section 20 (3) was not valid (Para 7)

(B) Criminal P C (1898) Section 197 — Commission of offence by public servant — Sanction — Act of servant must be within the range of his official duty

It is well settled that to attract the provisions of Section 197 (1) of the Code the offences alleged to have been committed by a public servant must have some relation to the discharge of his official duty. No question of sanction can arise unless the act complained of is an offence but where the act complained of constitutes an offence the point to be determined is whether it was committed in the discharge of official duty. It is only where an offence is alleged to have been committed by a public servant that the Court is called upon to address itself to the question whether his act falls within the scope of the section or not. It must, therefore be assumed for the limited purpose of deciding the question of sanction that the accused did commit the offence at the relevant time and place. Starting with this assumption, the enquiry which has to be made is whether his

act was within the range of his official duty or wholly unconnected therewith. If it was wholly unconnected with his official duty then Section 197 (1) is inapplicable. But the section must come into play if the criminal act was within the scope of his official duty even though it may have been done by him in excess or in dereliction of his official duty. Case law discussed (Paras 9-10)

The protection afforded by Section 197 (1) would be available to him unless it appears that he took undue advantage of his official position and committed a crime which had no relation whatsoever to his official duty. Therefore even though there was no obstruction or resistance in the performance of the duties of a public servant the Magistrate has to apply his mind to all the attendant circumstances to determine this point (Para 10)

Cases Referred Chronological Paras

(1967) AIR 1967 Goa 121 (V 54) =	
1967 Cri LJ 1304 Prabhakar V	
Sinari v Shankar Anant Verlekar	11
(1966) AIR 1966 SC 220 (V 53) =	
1966 Cri LJ 179 Bagnath v State of M P	9
(1965) AIR 1965 SC 588 (V 52) =	
1965 (1) Cri LJ 499 Somchand Sanghvi v Bihbhi Bhusan Chakravarty	11
(1964) AIR 1964 SC 269 (V 51) =	
1964 (1) Cri LJ 161 Nagra v State of Mysore	12
(1956) AIR 1956 SC 44 (V 43) =	
1956 Cri LJ 140 Matajog Dobey v H C Bhari	9
(1955) AIR 1955 SC 287 (V 42) =	
1955 Cri LJ 857 Shreekanthiah Ramayya Munipalli v State of Bombay	9
(1939) AIR 1939 FC 43 (V 26) =	
40 Cri LJ 468 Hori Ram Singh v Emperor	9

S N Bhattacharya and K D De for Petitioners T K Jha and Bishwanath Agrawal for Opposite Party

ORDER There are two petitioners before me. The first petitioner D S Bhorla is an Assistant Traffic Superintendent of the Eastern Railway posted at Dehri-on-Sone. The second petitioner Jamuna Rai is a Havildar of the Railway Protection Force of the Eastern Railway. Both the petitioners are accused in a complaint case No 382 of 1968 which has been instituted against them by N Singh, a Ticket Collector of Gaya Railway Station of the Eastern Railway. This complaint was filed by the Ticket Collector on the 23rd May 1968 by way of a protest petition against the police investigation in G R P Case No 26 (III) 68. The subject matter of the complaint is a certain incident which took place at the main gate of

the Gaya Railway Station at about 10 A M on the 30th March, 1968

2. According to the allegations made in the petition of complaint, while the complainant was on duty at the above time and place, he detected an unbooked child passenger in the company of a Third Class passenger going out of the wicket of the platform. The complainant challenged the said passenger and asked him to pay the requisite charge amounting to Rs 110. The amount was paid. What happened thereafter has been stated in paragraphs 4, 5, and 6 of the complaint petition in the following terms—

"4 That while your petitioner was taking out the EFT Book from his pocket for issuing necessary receipt to the passenger, accused No 1, who was in Sada dress, all on a sudden, came near the gate and caught hold of your petitioner's collar and began to abuse the petitioner. The accused also assaulted the petitioner with slaps and fists

5 That the accused No 2, who was also in Sada dress, joined the accused No 1 and gave blows on the back and chest of the petitioner.

6. That both the accused persons thereafter forcibly dragged the petitioner away from the main gate with the result that the petitioner's shirt was torn and his number plate 2816 was lost and the gate remained unattended."

It has then been stated that the complainant raised alarm whereupon the witnesses intervened and saved the complainant. Then it has been stated in paragraph 8

"That after release the petitioner issued the necessary EFT for the above unbooked child."

(It may be mentioned here that 'EFT' stands for 'Excess Fare Ticket')

3. The Munsif Magistrate, to whom the case was sent for disposal after the order of the learned Sub-divisional Magistrate dated the 7th June, 1968, whereby he took cognizance against the petitioners of offences under Sections 323, 500 and 504 of the Indian Penal Code, was called upon to decide as to whether the prosecution against the petitioners could be proceeded with without sanction of the requisite authority under Section 197 of the Code of Criminal Procedure so far as the first petitioner is concerned and in face of Section 20 of the Railway Protection Force Act (Act XXIII of 1957), so far as the second petitioner is concerned.

4. By the impugned order, passed by the learned Magistrate on the 17th December, 1968, the learned Magistrate has come to the conclusion that—

"No sanction under Section 197, Cr P. C. is required for prosecution of accused Nos 1 and 2 for the acts as alleged in the complaint petition"

I wish to make it clear at this very stage that there was no third accused before

the learned Magistrate apart from the two petitioners. The learned Magistrate has not referred to the Railway Protection Force Act, 1957, at all, and, therefore, he has not dealt with the case of the second petitioner in the light of the provisions of the said Act

5. The occasion for the presence of the petitioners at the scene of the alleged occurrence is not in controversy before me, nor this was in controversy before the learned Magistrate, as indicated in paragraph 4 of the impugned order. It is also not in dispute that the first petitioner is a Class I Railway Officer of the Central Government and that he was at the relevant time on his official duty of making surprise checking by way of supervision of the works of the ticket collectors dealing with ticketless travellers or unbooked passengers. The second petitioner had been commanded by his superior officers to assist the Assistant Traffic Superintendent for checking duty against ticketless travelling. The question for consideration, therefore, is whether in this background, the provisions of Section 197 of the Code of Criminal Procedure were attracted in the case of the first petitioner, and, whether the provisions of Section 20 of the Railway Protection Force Act, 1957, became applicable so far as the second petitioner is concerned

6. So far as the case of the second petitioner is concerned, it is enough to refer to the relevant provisions of the Act of 1957. Section 11 of that Act provides that—

"It shall be the duty of every superior officer and member of the Force—

(a) promptly to execute all orders lawfully issued to him by his superior authority;

(b) to protect and safeguard railway property"

(c) ** ** *

(d) to do any other act conducive to the better protection and security of railway property."

Section 12 of the Act empowers a member of the Force to arrest without warrant or order of a Magistrate—

"(a) any person who has been concerned in an offence relating to railway property punishable with imprisonment for a term exceeding six months, or against whom a reasonable suspicion exists of his having been so concerned, or,

(b) any person found taking precautions to conceal his presence within railway limits under circumstances which afford reason to believe that he is taking such precautions with a view to committing theft of, or damage to, railway property"

Section 15(1) of the Act provides—
 "(1) Every superior officer and member of the Force shall, for the purpose of this Act, be considered to be always on

duty and shall at any time be liable to be employed in any part of the railways throughout India'

Finally we come to Section 20 sub-section (1) of which is in the following terms—

In any suit or proceeding against any superior Officer or member of the Force for any act done by him in the discharge of his duties it shall be lawful for him to plead that such act was done by him under the orders of a competent authority

Sub-section (3) of Section 20 which is directly relevant for the present purpose, reads—

Notwithstanding anything contained in any other law for the time being in force any legal proceeding whether civil or criminal which may lawfully be brought against any superior officer or member of the Force for anything done or intended to be done under the powers conferred by or in pursuance of any provision of this Act or the rules thereunder shall be commenced within three months after the act complained of shall have been committed and not otherwise and notice in writing of such proceeding and of the cause thereof shall be given to the person concerned and his superior officer at least one month before the commencement of such proceeding

7 As already stated the second petitioner had been commanded to assist the Assistant Traffic Superintendent in the work of checking ticketless travelling. By reason of Section 15 he must be deemed to have always been on duty. In view of sub-section (3) of Section 20 the prosecution against the second petitioner could only have been commenced after a prior notice of one month in writing of such proceeding and of the cause thereof to the petitioner himself as well as to his superior officer. This requirement of S 20 (3) of the Act had not been complied with and it must therefore follow that his prosecution as instituted is not valid

8 I will now turn to the case of the first petitioner. Section 197 of the Code of Criminal Procedure so far as it is relevant is in the following terms—

(1) When any public servant who is not removable from his office save by or with the sanction of the Central Government, by him while acting or purporting to act in the discharge of his official duty no Court shall take cognizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Union of the Central Government and

(b) "

The substantial question for consideration, therefore is whether while the alleged offences are said to have been com-

mitted by the first petitioner he was 'acting or purporting to act in the discharge of his official duty'

9 The scope and ambit of Section 197 of the Code of Criminal Procedure have been the subject of a series of judicial decisions and the principles which must be borne in mind while dealing with the question as to whether the provisions of Section 197 of the Code are attracted in the circumstances of a particular case are no longer in dispute. It is well settled that to attract the provisions of S 197 (1) of the Code the offences alleged to have been committed by a public servant must have some relation to the discharge of his official duty. No question of sanction can arise unless the act complained of is an offence but where the act complained of constitutes an offence the point to be determined is whether it was committed in the discharge of official duty. As pointed out by the Supreme Court in the case of *Matajog Dobey v H C Bhari*, AIR 1956 SC 44

There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty as this question will arise only at a later stage when the trial proceeds on the merits

Their Lordships have further pointed out—

"What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty though possibly in excess of the needs and requirements of the situation"

A reference has been made therein to the observations of their Lordships of the Supreme Court in the case of *Hori Ram Singh v Emperor* AIR 1939 FC 43. There Sulauman J observed at page 51

"The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction

At page 56 of the report, Varadachariar J observed

There must be something in the nature of the act complained of that attaches it to the official character of the person doing it"

A reference has also been made to *Shree-kantiah Ramayya Municipalli v State of Bombay* AIR 1955 SC 207 where Bose J made the following observations

"Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly, it can never be applied, for of course, it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it."

Dealing with the same matter, in the case of *Bajinath v. The State of Madhya Pradesh*, AIR 1966 SC 220 Ramaswami, J., made the following observations:—

"It is not every offence committed by a public servant that requires sanction for prosecution under Section 197 (1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties, but if the act complained of is directly concerned with his official duties so that, if questioned it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act which is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable."

10. Before the learned Magistrate an argument was advanced on behalf of the complainant that it was no part of the official duty of the first petitioner to abuse and assault a man who was also on official duty. While it is true that such act can never form part of the official duty of a public servant, it is not right to suggest that the applicability of Sec 197 (1) of the Code is automatically excluded where an offence is alleged to have been committed by a public servant. The truth is, the section presupposes that some offence has been committed by a public servant. To put it differently, it is only where an offence is alleged to have been committed by a public servant that the Court is called upon to address itself to the question whether his act falls within the scope of the section or not. It must therefore, be assumed, for the limited purpose of deciding the question of sanction, that the first petitioner did commit the offence of abusing and assaulting the complainant at the relevant time and place. Starting with this assumption, the enquiry which has to be made is, whether his act was within the range of his official duty or wholly unconnected therewith.

If it was wholly unconnected with his

official duty, then Section 197 (1) is inapplicable. But the section must come into play if the criminal act was within the scope of his official duty even though it may have been done by him in excess or in dereliction of his official duty, which was the duty of supervising the work of the complainant in dealing with unbooked passengers. The learned Magistrate seems to have been under the impression that unless resistance or obstruction had been offered by the complainant, the first petitioner cannot be said to have been acting in course of his official duty in committing the criminal act attributed to him. In my judgment, this is not a correct approach to the problem. Resistance or obstruction is not invariably essential to attract the provisions of Section 197 of the Code. Even where there has been no resistance or obstruction to a public servant in the discharge of his official duty the public servant may, when challenged, maintain that what he did was by virtue of his office, and his stand may be upheld even if it is found that he had overstepped the needs and requirements of the situation. The protection afforded by Section 197(1) would be available to him unless it appears that he took undue advantage of his official position and committed a crime which had no relation whatsoever to his official duty. Therefore, even though there was no obstruction or resistance in the performance of the duties of a public servant, the learned Magistrate ought to have applied his mind to all the attendant circumstances under which the first petitioner is alleged to have indulged in abuse and assault upon the complainant. I should also observe here that it is now well settled that for deciding the question as to whether an offence was committed in the course of official duty or not, the facts and circumstances of the decided cases can afford no solution. That is a question which must be decided upon the facts of each particular case.

11. Let us then visualise the circumstances leading to the present incident. The first petitioner had been deputed to supervise the work of the complainant with particular reference to unbooked passengers. As the allegations stand, he had seen the complainant holding up one unbooked child passenger in the company of another passenger who held a third class ticket. The complainant had also recovered a sum of Rs. 110 from that passenger. This recovery necessitated the issue of a receipt from the Excess Fare Ticket Book. The alleged offence of abuse and assault took place before the necessary receipt was made out by the complainant, as required under the rules. It was possible, as alleged in the complaint petition, that the complainant was

on the point of bringing out his EFT Book from his pocket for the purpose of making out the necessary receipt for the passenger. But the fact remains that even according to the complainant he had not made out the receipt for the unbooked passenger from whom he had already recovered the unbooked or excess fare.

It was before that stage that the first petitioner is supposed to have indulged in abuse and assault upon the complainant. In order to determine whether the act falls within the ambit of Sec 197(1) or not a vital question which the court must investigate is what could possibly have been the reason for the first petitioner to have acted in such a manner. Was he actuated with any ill will or malice towards the complainant so as to suggest that taking advantage of his official position he had sought to teach the complainant a lesson? If so he could not be said to have been acting in discharge of his official duty. But there is absolutely no allegation of any antecedent ill will or grudge between the parties. Nor there is any suggestion that the act was committed by the first petitioner in order to derive any monetary or any other kind of advantage from the complainant.

It is difficult to imagine that the first petitioner had thought of deriving any personal satisfaction by abusing and beating the complainant in the manner alleged. It would in my opinion be more reasonable to say that the first petitioner had somehow formed the impression that the complainant was not discharging his duties properly and he thought it proper to intervene may be with undue haste so that the unbooked passenger from whom the fare was recovered might not in the mean time disappear from the scene thus leaving no tangible evidence of the fact that a sum of Rs 110 had been recovered from him by the complainant. It may be that the complainant would have ultimately made out the necessary receipt for the said unbooked passenger. But if the petitioner acted in haste or under extra exuberance in his anxiety to ensure that the complainant did his duty of accounting for the money which he had realised from the unbooked passenger then it would not be reasonable to say that he had ceased to act in course of his official duty. His case would still fall within the ambit of having acted in course of his official duty though in excess of such duty or in dereliction thereof. The act was undoubtedly done by the first petitioner as a result of his direct involvement flowing from his official position and performance of his duty of supervising the work of the ticket collector. Further it can well be imagined that when the first petitioner had abused the complainant under the impression though

it may have been erroneous that he had not duly accounted for the money realised from the passenger then there was some altercation between the two.

It seems to me that at the initial stage of the occurrence the complainant was not aware of the official capacity of the first petitioner. I say so because in paragraph 4 of the complaint petition it has been stated that the first petitioner was then in plain clothes and in paragraph 9 it has been stated that it was only at a later stage that it was disclosed that the first petitioner was an Assistant Traffic Superintendent and this had not been disclosed earlier. If there was a retort on the side of the complainant as one would naturally expect in the circumstances then the first petitioner who had intervened in the work of the complainant in his official capacity would reasonably be deemed to have been acting in virtue of his office even at the next stage when he is supposed to have indulged in physical violence towards the complainant. The act of assault alleged to have been committed by the first petitioner was obviously in close sequence of his official act of intervention with the work of the complainant under some impression that he had not accounted for the money as he should have done. Under these circumstances the act of the first petitioner is easily traceable to his official duty though in excess or in dereliction of such official duty. Here I should make it clear that on the face of the complaint petition it has not been stated that there was any altercation or retort from the complainant when the first petitioner had abused him. But in considering the question as to whether a particular case falls within the ambit of Section 197 of the Code the Court is not precluded from looking beyond the strict terms of the allegations made in the complaint for as pointed out in the case of *Somchand Sanghvi v Bibbuti Bhuvan Chakravarty* AIR 1963 SC 533—

It is true that for considering whether Section 197 Cr P C would apply the Court must confine itself to the allegations made in the complaint. But that does not mean that it need not look beyond the form in which the allegations have been made and is incompetent to ascertain for itself their substance.

In my opinion the act of the first petitioner even on the footing that it was in excess of his official duty or committed in dereliction of his duty was an act committed by him in discharge of his duty as a public servant since the act of criminal assault cannot be explained upon any rational basis except that it was on account of undue anxiety on the part of the first petitioner to ensure that the money was properly accounted for without any loss of time. I should add that

the learned Magistrate has taken the view that the present case is parallel to the facts of the case of Prabhakar V Sinari v Shankar Anant Verlekar, AIR 1967 Goa 121 That, however, was a case of gross abuse of official position which was blatantly beside the scope of the duty of the public servant concerned. In the present case, it appears that, so far as the first petitioner is concerned, he had assaulted the complainant only with slaps and fists. I must make it clear that I am not here finding any justification or defence for the act committed by the first petitioner. I am also not recording any finding that the allegations against him are true. I am merely examining the quality of the act which has been attributed to him and which, if proved, would constitute an offence. In my opinion, the learned Magistrate was in error in thinking that the present case tallies with the facts in the Goa case. In my view, this is not a case of total absence of nexus between the criminal act attributed to the first petitioner and his duty as a public servant. I, therefore, hold that the case of the first petitioner falls within the ambit of the provisions of Section 197(1) of the Code of Criminal Procedure.

12. Since the requisite sanction for the prosecution of the first petitioner has admittedly not been accorded, the question arises as to what order should be made in this case. In my opinion, as indicated in Nagraj v. State of Mysore, AIR 1964 SC 269, the prosecution which has been instituted against the petitioners must be dropped. In the result, I set aside the order of the learned Magistrate and make the rule absolute, as indicated above.

Order accordingly

1970 CRI. L. J. 647 (Vol. 76, C. N. 156)

(PATNA HIGH COURT)

B. P. SINHA, J.

Most Indrasana Kuer, Petitioner v Sia Ram Pandey and others, Opposite Parties

Criminal Revn No 2445 of 1968, D/- 6-2-1969, against Order of S J Arrah, D/- 10-9-1968.

(A) Penal Code (1860), S. 386 — Extortion — What amounts to.

In extortion the will of the victim has to be overpowered by putting him in fear of injury. Forcibly taking any property will not come under this definition. It has to be shown that the person was induced to part with the property by putting him in fear of injury. (Para 3)

Where the statement of the victim clearly indicates that the accused persons forcibly took the thumb impression and

not that she had delivered the papers containing her thumb impression to them, it could not be said that the offence of extortion was committed. AIR 1941 Pat 129, Foll (Para 3)

(B) Penal Code (1860), S. 390 — Robbery — Commission of assault and theft in same transaction — When amounts to robbery — (Penal Code (1860)), S. 391 — Theft independent act of same members of unlawful assembly — No offence of dacoity).

From the definition of robbery it is quite clear that there should be use of force or attempt to use force for the purpose of committing theft or in carrying away or attempting to carry away property obtained by theft. Mere fact that the assault and the theft took place in the same transaction is not enough. The assault must be to facilitate commission of theft. AIR 1954 Pat 157 & AIR 1953 Sau 85, Foll (Para 4)

Where the dominant object of the unlawful assembly was to forcibly obtain the thumb impression of the victim and not to commit theft and theft was an independent act of some of the accused, it could not be said that offence of dacoity was committed. (Para 4)

Cases Referred: Chronological Paras

(1954) AIR 1954 Pat 157 (V 41) =

1954 Cri LJ 215, Pati Kumhar v. Ahiv Kumhar 4

(1953) AIR 1953 Sau 85 (V 40) =

1953 Cri LJ 909, Maghaji v. State 4

(1941) AIR 1941 Pat 129 (V 28) =

42 Cri LJ 361, Jadunandan Singh v Emperor 3

(1931) Criminal Revn No 125 of

1931 (Pat), Ramyad Singh v Emperor 3

Negendra Prasad Singh and Shivanand Prasad, for Petitioner; Lakshman Saran Sinha and Ramkumar Sharma, for Opposite Parties

ORDER:— Petitioner Most Indrasana Kuer lodged a first information report before the police on 24-12-1965 with regard to an incident which took place on 22-12-1965. Her allegations were that on the date of occurrence the opposite party variously armed came to her house, assaulted her and forcibly took her thumb impression on several pieces of paper. When on hulla her brother Jugal and Pujari Satyadeo Ojha along with other persons arrived they assaulted Jugal and Satyadeo as well and forcibly took thumb impression of Satyadeo also on some pieces of paper. They also removed two boxes containing ornaments and cash along with other articles belonging to the informant. It appears that during the course of investigation a protest petition was filed on 4-1-1966. After completion of investigation, police submitted a final report. But

on the basis of the protest petition already filed earlier Most Indrasana Kuer was examined on solemn affirmation on 4-12-1966 Subsequently the subdivisional Magistrate took cognizance of the case on 14-12-1966 and the case was transferred to the file of Shri S L Singh Honorary Magistrate 1st class Arrah for disposal It appears that subsequently the case was transferred to the file of Shri N K Singh with first class powers After some witnesses were examined it appears a contention was raised on behalf of the complainant that the case was one under Section 395 of the Indian Penal Code which is exclusively triable by a Court of session After hearing the parties the learned Magistrate rejected the contention of the complainant by his order dated 1-1-1968 The learned Magistrate framed charges under Ss 323 342 352 380 and 452 of the Indian Penal Code (hereinafter referred to as the Code) only Being aggrieved the complainant filed a revision application before the Sessions Judge for directing further enquiry Having failed there the complainant has filed this revision application

2 The contention of the learned counsel for the petitioner is that the facts stated in the evidence of the witnesses clearly indicate that offences under Sections 386 and 395 of the Code which are exclusively triable by a Court of session are made out in this case and as such the learned Magistrate should have framed charges under those two sections as well after adopting the procedure prescribed under Chapter XVIII of the Code of Criminal Procedure The point for consideration therefore is whether on the facts of this case prima facie offences under Sections 386 and 395 of the Code are made out

3 Section 386 of the Code runs as follows—

Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine

'Extortion has been defined in Section 383 of the Code as follows—

'Whoever intentionally puts any person in fear of any injury to that person, or to any other and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security commits extortion'

So one of the necessary ingredients of the offence of extortion is that the victim must be induced to deliver to any person any property or valuable security etc That is to say the delivery of the property must

be with consent which has been obtained by putting the person in fear of any injury In contrast to theft in extortion there is a element of consent of course obtained by putting the victim in fear of injury In extortion the will of the victim has to be overpowered by putting him in fear of injury Forcibly taking any property will not come under this definition It has to be shown that the person was induced to part with the property by putting him in fear of injury The illustrations to the section given in the Code make this perfectly clear In this connection reference can be made to a decision of this Court in Jadunandan Singh v Emperor AIR 1941 Pat 129 In that case also the victims were assaulted and their thumb impressions were forcibly taken In view of the facts quoting the following observation in a division bench decision of this Court in Ramvad Singh v Emperor Criminal Revn No 125 of 1931 (Pat)

"If the facts had been that the complainant's thumb had been forcibly seized by one of the petitioners and had been applied to the piece of paper notwithstanding his struggles and protests then I would agree that there is good ground for saying that the offence committed whatever it may be was not the offence of extortion because the complainant would not have been induced by the fear of injury but would have simply been the subject of actual physical compulsion

It was held—

"It is clear that this definition makes it necessary for the prosecution to prove that the victims Narain and Sheonandan were put in fear of injury to themselves or to others and further were thereby dishonestly induced to deliver papers containing their thumb impressions The prosecution story in the present case goes no further than that thumb impressions were forcibly taken from them The details of the forcible taking were apparently not put in evidence The trial Court speaks of the wrists of the victims being caught and of their thumb impressions being then 'taken' The lower Courts only speak of the forcible taking of the victim's thumb impression and as this does not necessarily involve inducing the victim to deliver papers with his thumb impressions (papers which could no doubt be converted into valuable securities) I must hold that the offence of extortion is not established

Now it has to be seen from the evidence of this case whether the ingredients of extortion are there Indrasana Devi (P W 7) has stated that the accused persons abused her and on protest accused Naulakh Pandey ordered that she be turned out from the house and her thumb impression be taken on blank pieces of

paper, upon this Chanderma Pandey and Sia Ram Pandey forcibly took her thumb impression on 8 to 10 pieces of blank paper. She does not say that she was forced by putting her in fear of injury to give her thumb impression on blank pieces of paper and deliver those papers to the accused. Her statement clearly indicates that the accused persons forcibly took the thumb impression and not that she had delivered the papers containing her thumb impression to them. This is further apparent from the statement of P. W. 5 who has said that accused Chanderma caught hold of the hand of the complainant and accused Sia Ram took her thumb impression. Therefore, the facts of this case do not indicate that the complainant was induced to deliver the papers containing her thumb impression to the accused persons. The necessary ingredient of extortion is, therefore, wanting. Hence, prima facie no case under Section 386, I. P. C. has been made out.

4. So far as the contention of the petitioner that the facts constitute offence under Section 395, I. P. C. is concerned, I see no merit in it as well. It is said that theft was one of the dominant objects of the unlawful assembly of these members of the opposite party and for the purpose of committing that theft force was used and as such the offence of dacoity is made out. Dacoity is commission of robbery by 5 or more persons. When 'theft' becomes 'robbery' has been stated in Section 390 of the Code thus—

"Theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of restraint."

From the definition, it is quite clear that there should be use of force or attempt to use force for the purpose of committing theft or in carrying away or attempting to carry away property obtained by theft. Mere fact that the assault and the theft took place in the same transaction is not enough. The assault must be to facilitate commission of theft.

In this connection reference can be made to a decision of a division bench of this Court in *Pati Kumhar v Ahiv Kumhar*, AIR 1954 Pat 157. There it was observed as under:—

"It is not in every case where theft has been committed as well as assault that the transaction becomes robbery. The assault must be found to have been committed for the purpose of committing the theft, or in carrying away or attempting to carry away property obtained by theft."

The same view has been expressed in a decision in *Maghaji v. State*, AIR 1953 Sau

85. There a number of persons entered the house with the idea to take revenge and there was assault and while going away one of the culprits took away the gun of the victim. It was held that the assault was not for facilitating the commission of theft, etc., it had no relation to the removal of gun and as such the offence was mere theft. Here, from the evidence of Indrasana Devi it does not appear that the object of the unlawful assembly of the members of the opposite party was to commit theft by causing hurt or fear of hurt etc. The Mossomat has said that accused Naulakh ordered that the complainant be turned out of the house and her thumb impression be taken on piece of blank paper. This was done just to wreak vengeance because of the Mossomat executing deed in favour of son of her brother in respect of her property thereby depriving the opposite party of the prospect of getting it as revisioners. She does not say that the order was to take away her property as well. There is no such allegation in the complaint petition. It appears that theft was an independent act of some of the accused persons and it was not the dominant purpose of the unlawful assembly. Threat was not given for that purpose. That being so, no offence under Section 395 of the Code is made out on the statements of the witnesses.

5. The revision application, therefore, fails and is dismissed.

Revision dismissed.

1970 CRI. L. J 649 (Vol. 76, C N. 157)

(PATNA HIGH COURT)

G N PRASAD, J

Badri Sah, Petitioner v State of Bihar
Opposite Party.

Criminal Revn No 1456 of 1968 D/-
5-2-1969, against Order of 2nd Addl S J
Motihari D/- 10-5-1968

Prevention of Food Adulteration Act (1954), S. 16 (1) (a) — Prosecution under — Prevention of Food Adulteration Rules (1955), Rr. 18. 7 (1) — Specimen impression of seal not sent to analyst—There was nothing with which Public Analyst could perform his duty of comparing seal on packet of black pepper forwarded to him for analysis — Total non-compliance with Rr. 18 and 7 (1) — It is fatal to prosecution case — Case law discussed.

(Paras 7, 8)

Cases Referred: Chronological Paras
(1968) 1968 BJLR 308, Gopal Sao v State of Bihar 8
(1968) Criminal Revn No 1868 of 1967, D/- 21-8-1968 (Pat) Anand Mohan Choudhary v State 8

GM/HM/D145/69/SSG/B

(1968) Criminal Revn No 945 of
1968 D/- 6-12-1968 (Pat) Chedisah
v State 8
(1966) AIR 1966 Ker 70 (V 53) =
1966 Cri LJ 416 Cannanore Municipality v Pandavalappil Kannan 8
J K Prasad and Rajendra Kishore
Prasad for Petitioner R N Tewari for
Opposite Party

ORDER — The petitioner has been convicted under Section 16 (1) (a) of the Prevention of Food Adulteration Act 1954 for having sold or stored for sale adulterated black pepper (Kali Murch). The trial Court had sentenced him to undergo rigorous imprisonment for nine months and to pay a fine of Rs 1000 or in default to undergo rigorous imprisonment for two months more but in appeal the sentence has been reduced to rigorous imprisonment for three months and a fine of Rs 500 or in default rigorous imprisonment for one month more.

2 It appears that on the 31st January, 1967 the Health Officer of Motihari Municipality (P W 1) purchased a sample of black pepper from the grocery shop of the petitioner situated in Mohalla Meena Bazar and after observing the requisite formalities he forwarded one packet of the article in sealed cover to the Public Analyst at Patna. The report of the Public Analyst was to the effect that the sample of the black pepper was adulterated. Accordingly with the sanction of the Chairman of the Municipality the present prosecution was instituted against the petitioner.

3 The petitioner put forward a defence that he had been falsely implicated by the Health Officer (P W 1) who was inimically disposed towards him and who had really not taken the sample of black pepper from his shop.

4 The defence was negatived by both the Courts below. The Courts below have accepted the prosecution case and have convicted the petitioner in the manner already indicated.

5 Two contentions were put forward on behalf of the petitioner in this Court. The first contention of the learned Counsel is that there is no evidence in this case at all to the effect that rule 18 of the Prevention of Food Adulteration Rules (hereinafter referred to as the Rules) was complied with by the Health Officer (P W 1) and/or that the Public Analyst had performed the duty enjoined upon him under sub-rule (1) of R 7 of the Rules. To appreciate the contention of the learned Counsel the relevant rules may be quoted. Rule 18 is in the following terms —

18 Memorandum and impression of seal to be sent separately —

A copy of the memorandum and a specimen impression of the seal used to

seal the packet shall be sent to the public analyst separately by registered post or delivered to him or to any person authorised by him.

The relevant portion of R 7 is in the following terms —

7 Duties of a public analyst — (1) On receipt of a package containing a sample for analysis from a Food Inspector or any other person the Public Analyst or an officer authorised by him shall compare the seals on the container and the outer cover with specimen impression received separately and shall note the contention of the seals thereon.

Having regard to the point thus put forward on behalf of the petitioner I have looked into the evidence of P W 1 and I find that he had definitely not complied with Rule 18. In substance the evidence of P W 1 is that in respect of this particular matter he had prepared four copies of what he described as 'paper'. One each of those copies was put by him in each of the three packets of the black pepper evidently as contemplated by Section 11 of the Act. The fourth copy of the said memorandum was retained by him in his possession and it was produced from his custody in Court and marked Ext 5. This evidence of P W 1 leaves no room for doubt that he had not complied with Rule 18. He has nowhere said that he had forwarded a specimen impression of the seal which he had used for the purpose of sealing the packet forwarded to the Public Analyst either separately by registered post or by any messenger or otherwise. The specimen impression of the seal would have to be sent along with a copy of the memorandum in form VII. But since the only other copy of the memorandum which P W 1 had prepared was still in his possession the conclusion is irresistible that no copy of the said memorandum could possibly have accompanied any specimen impression of the seal for the purpose of being forwarded to the Public Analyst as required by Rule 18.

6 If as the evidence clearly shows a specimen impression of the seal was not forwarded to the Public Analyst as enjoined by Rule 18 then there was nothing in the possession or at the disposal of the Public Analyst on the basis of which he could have performed the duty enjoined upon him under Rule 7 (1) of comparing the seal on the packet which had been forwarded to him with the specimen impression of the seal which he could have received separately. Therefore it is obvious that Rule 7 was not complied with in this case at all.

7 Learned Counsel for the State relied upon the report of the Public Analyst (Ext 6) wherein it was mentioned that the sample of black pepper purchased from the shop of the petitioner for analysis was

received "properly sealed and fastened" and that the Public Analyst had "found the seal intact and unbroken". Relying upon this report (Ext 6), learned Counsel has argued that that the present case is covered by the decision of a learned Single Judge of the Kerala High Court in Food Inspector, Cannanore Municipality v Pandavalappil Kannan, AIR 1966 Ker 70 where reference was made to certain decisions of the Gujrat and Allahabad High Courts, and it was observed "none of those decisions are applicable to the facts of this case where the performance of the act of sampling, sealing and forwarding of the article by the Food Inspector as well as the act of ascertaining the seal to be intact by the Food Analyst are proved and the only presumption to be drawn is that those acts themselves were performed in accordance with the prescribed form and procedure, which fact itself was not challenged in the course of the enquiry" But the Kerala decision can be of no assistance in the present case in view of the positive indication in the evidence of P W 1, to which I have already referred, that there was nothing with which the Public Analyst could have performed the duty of comparing the seals on the packet of black pepper forwarded to him for analysis with the specimen impression thereof received separately.

In Gopal Sao v State of Bihar, 1968 BLJR 308, there was at least the evidence of the Sanitary Inspector of Aurangabad Notified Area Committee to the effect that he did send a memorandum and a specimen impression of the seal used to seal the packet to the Public Analyst. Even then, this Court held that the presumption envisaged by Section 114 (e) of the Evidence Act could not be raised in favour of the prosecution. In the instant case, far from there being any evidence of the Health Officer (P. W. 1) that he had sent a memorandum and a specimen impression of the seal to the Public Analyst, there is clear indication on the record that neither the memorandum nor the specimen impression of the seal was made available to the Public Analyst to enable him to perform the duty enjoined upon him under Rule 7. It must, therefore, be held that there was total non-compliance of Rules 18 and 7 (1) of the Rules in the present case.

8. It has been consistently held in this Court that non-compliance of the requirements of Rules 17 and 7 is a fatal defect in the prosecution case. Apart from Gopal Sao's case, 1968 BLJR 308, to which I have already referred, the same view has been expressed by Anwar Ahmad, J in Anand Mohan Choudhary v State, Criminal Revn No 1868 of 1967, D/- 21-8-1968 (Pat) and by B P Sinha, J in Chhedi Sah v State Criminal Revn No 945 of 1968, D/- 6-12-1968 (Pat). Learned Coun-

sel for the State contended that Rr. 18 and 7 of the Rules are merely directory, but the learned Counsel has not been able to bring to my notice any decision contrary to the decisions of this Court just referred to.

9. For the aforesaid reasons I must hold that the conviction recorded against the petitioner cannot be sustained.

10. In this view, it is not necessary to go into the other question, relating to the validity and the proof of the sanction for the prosecution which has been raised on behalf of the petitioner.

11. In the result, the conviction and the sentence are set aside and the rule is made absolute.

Rule made absolute

1970 CRI. L. J. 651 (Vol. 76, C. N. 158)
(PUNJAB & HARYANA HIGH COURT)
GURDEV SINGH AND
S S SANDHAWALIA, JJ.

The State, Appellant v Nanak Chand,
Respondent

Criminal Appeal No 848 of 1966, D/-
29-5-1969

Shops and Establishments — Punjab Shops and Commercial Establishments Act (15 of 1958), Ss. 9, 26 — Notification under S. 9 as amended by Act 25 of 1958 — Section 9 substituted by amending Act 1 of 1964 — Notification must be deemed to have been issued under re-enacted Section 9 and any violation thereof could be punishable under S. 26 — (Punjab General Clauses Act (1 of 1898), S. 22) — (General Clauses Act (1897), Section 24).

On comparison of the provisions of Section 9 (as amended by Act 25 of 1958) of the Punjab Shops and Commercial Establishments Act 1958, under which (Labour Department) Notification No 2435-Lab-I-61/11527, dated 25th April, 1961 was issued, with Section 9 as substituted by the amending Act 1 of 1964 it will be seen that the authority conferred upon the Government by these two provisions to issue notification fixing opening and closing hours is identical and not in any way inconsistent. In these circumstances Section 22 of the Punjab General Clauses Act is attracted and as enacted therein, the relevant notification, dated 25th April, 1961, must be deemed to have been issued under the re-enacted Section 9 and any violation thereof could be punishable under Section 26 of the Act. AIR 1959 Punj 69 & AIR 1954 Pat 371 (FB) & AIR 1956 Andh Pra 24, Rel on (Para 5)

Cases Referred: Chronological Paras
(1959) AIR 1959 Punj 69 (V 46) =
1959 Cri LJ 232, R B Ram Rattan
Seth v State

HM/JM/D425/69/MBR/D

(1956) AIR 1956 Andh Pra 24 (V 43)
 =1956 Cri LJ 29 In re Lingareddy Venkatarreddy 5
 (1954) AIR 1954 Pat 371 (V 41) =
 1954 Cri LJ 1187 (FB) State v Kunja Behari Chandra 5
 D D Jain for Advocate General Haryana for Appellant G S Chawla for Respondent

GURDEV SINGH J — This order will dispose of six criminal appeals (Nos 848 849 850 852 and 854 of 1966) which involve a common question of law for decision. The respondents in all these cases are running shops or commercial establishments in Ambala Cantonment. They were prosecuted under Section 26 read with Section 9 of the Punjab Shops and Commercial Establishments Act 15 of 1958 (hereinafter called the Act) for keeping their establishments open beyond the hours prescribed by the Punjab Government (Labour Department) notification No 2435-Lab-I-61/11527 dated 25th April 1961. This notification was issued under the third proviso to Section 9 of the Act which as amended by Punjab Act 25 of 1958 read as follows on that day —

9 Opening and closing hours — No establishment shall save as otherwise provided by this Act open earlier than ten o'clock in the morning or close later than eight o'clock in the evening

Provided that any customer who was in the establishment before the closing hour may be served during the period of fifteen minutes immediately following such hour

Provided further that the State Government may by order and for reasons to be recorded in writing allow an establishment attached to a factory to open at eight o'clock in the morning and close at six o'clock in the evening

Provided further that the State Government may by notification in the official Gazette fix such other opening and closing hours in respect of any establishment or class of establishments for such period and on such conditions as may be specified in such notification

2 As a result of further amendment of the Act by Punjab Shops and Commercial Establishments Act 1 of 1964 in place of this section the following section bearing the same number was substituted

9 Opening and closing hours — Government shall by notification fix the opening and closing hours of all classes of establishment and different opening and closing hours may be fixed for different classes of establishments and for different areas.

Provided that Government may allow an establishment attached to a factory to observe such opening and closing hours as the Government may direct

3 Admittedly no notification under this new section applicable to the respondents shops or establishments situate in Ambala Cantonment was in existence on the day the respondents were prosecuted as none had been issued after the Act was amended in the year 1964. The prosecution rested its case on the notification dated 25th April 1961 to which reference has been made earlier. It provides that

All shops and commercial establishments in the State of Punjab except those for which separate timings had been fixed shall not open earlier than 9 O'clock in the morning and close later than 745 O'clock in the evening

4 The Judicial Magistrate First Class Ambala who tried the respondents however acquitted them being of the opinion that no notification having been issued under Section 9 of the Act as it stood as a result of the amendment of the year 1964 the respondents had not committed any offence and the notification issued prior to the amendment was no longer operative on the day the amending Act came into force. In coming to this finding the learned Magistrate appears to have ignored Section 22 of the Punjab General Clauses Act which provides —

'Where any Punjab Act is repealed and re-enacted with or without modification then unless it is otherwise expressly provided any appointment notification order scheme rule form or bye-law made or issued under the repealed Act shall so far as it is not inconsistent with the provisions re-enacted continue in force and be deemed to have been made or issued under the provisions so re-enacted unless and until it is superseded by any appointment notification order scheme rule form or bylaw made or issued under the provisions so re-enacted

5 The notification for the violation of which the respondents were prosecuted was issued under Section 9 of the Act. On comparison of that provision as it stood at the time this notification was issued with Section 9 as substituted by the amending Act 1 of 1964 it will be seen that the authority conferred upon the Government by these two provisions to issue notification fixing opening and closing hours is identical and not in any way inconsistent. In these circumstances Section 22 of the Punjab General Clauses Act is attracted and as enacted therein the relevant notification dated 25th April 1961 must be deemed to have been issued under the re-enacted Sec 9 and any violation thereof could be punishable under Section 26 of the Act. In *R B Ram Rattan Seth v State AIR 1959 Pun 69* *Falshaw J* (as he then was) held that the Indian Metalliferous Mines Regulations of 1926 framed under Section 29 of the Indian Mines Act 1923 which had since been repealed and replaced by the

Indian Mines Act of 1952 and under which no rules and regulations had by then been framed, were kept alive by Section 24 of the General Clauses Act, which is similarly worded as Section 22 of the Punjab General Clauses Act. This view is in consonance with the view taken by a Full Bench of the Patna High Court in *State v. Kunja Behari Chandra*, AIR 1954 Pat 371 (FB) and by a Division Bench in *re Lingareddy Venkatareddy*, AIR 1956 Andh Pra 24. It is thus obvious that the premises on which the trial Court has proceeded to acquit the respondents is wrong and the orders of their acquittal cannot be sustained. Since the Court below has not recorded any finding on merits, the cases must go back. We, accordingly, accept the appeals, and setting aside the impugned orders, remit the cases to the Chief Judicial Magistrate, Ambala, for trial in accordance with law.

6. S. S. SANDHAWALIA, J.: I agree.

Appeal allowed

1970 CRI. L. J. 653 (Vol. 76, C. N. 159)

(RAJASTHAN HIGH COURT)

L N CHHANGANI AND

L S MEHTA, JJ.

Ramchander and another, Appellants v
State of Rajasthan, Respondent

Criminal Appeal No 698 of 1966 and
Criminal Jail Appeals Nos 762 and 763 of
1966, D/- 2-4-1969, against Judgment of
S J. Ganganagar, D/- 24-9-1966

(A) Evidence Act (1872), S. 3 — Appreciation of evidence — Fact that a witness has a close interest in complainant's party or is a distant relation cannot detract from value of his evidence — His evidence cannot be discarded on that ground especially when no enmity has been proved to exist between him and the accused as would induce him to give false evidence — AIR 1968 SC 1438, Rel. on. (Para 5)

(B) Criminal P. C. (1898), S. 423 — Appreciation of evidence by trial Court — Interference by appellate Court — Evidence Act (1872), S. 3.

The appellate Court should not ordinarily interfere with the trial Court's opinion as to the credibility of a witness, as the trial Judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions were answered, whether with honest candour or with doubtful plausibility, and whether after careful thought, or with reckless glibness; and he alone can form a reliable opinion as to whether the witness had emerged with credit from cross-examination (Para 7)

(C) Penal Code (1860), S. 34 — Common intention — Meaning of — Burden of proof is on prosecution — Inference of common intention is a question depending on facts of each case.

Common intention within the meaning of Sec 34, Indian Penal Code, implies a pre-arranged plan. To convict the accused of a crime with the help of S 34, I.P.C. the burden is upon the prosecution to prove that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult, if not impossible to procure direct evidence to establish the intention of an accused person. Intention has to be inferred from his act or conduct or other relevant circumstances of the case. There is also a distinction between the same or similar intention and common intention and an inference of common intention within the meaning of the term in S. 34, I.P.C., should not be reached, unless it is a necessary inference deducible from the circumstances of the case (Para 10)

Common intention referred to in S 34 pre-supposes a prior meeting of the minds. This does not mean that there must be a long interval of time between the formation of the common intention and the doing of the Act. It is also not necessary to adduce direct evidence of the common intention. The common intention may conveniently be inferred from the surrounding circumstances and the conduct of the parties. The existence of the common intention shared by the accused persons is, on ultimate analysis, a question of fact. At any rate, the crucial circumstance is that the plan must precede the act constituting the offence. (Para 10)

When there is no indication whatever of premeditation or of a pre-arranged plan, the mere fact that the two accused were seen at the spot or that the two accused fired as a result of which one person died and two others received simple injuries could not be held sufficient to prove or to infer a common intention (Para 10)

(D) Penal Code (1860), S. 307 — Attempt to commit murder — Use of fire-arm — Person firing a gun at another — Intention to kill may be inferred — Fact that person fired at escaped unhurt or received minor injuries cannot negative intention to kill — Prosecution has still to discharge its burden of proving intention contemplated by S. 300.

In cases of attempt to commit murder by fire-arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires and something happens to prevent the shot taking serious turn, offence under S. 307, I. P. C is

brought home. If a person fires at another it would ordinarily mean that he wants to kill that person. The fact that the person fired at was not killed does not necessarily mean that he had no intention to kill that man. A person may at times be excited and for that reason he may not be able to hit properly or the aim may be missed because the person aimed at may move aside. That does not however mean that S 307 IPC will have no application to a case like this AIR 1965 SC 843 & AIR 1961 SC 1782. Rel on (Para 13)

When the persons fired at received only minor injuries the burden is still upon the prosecution to establish that the intention of the appellant in causing the particular injury to them was of one of the three kinds referred to in S 300 IPC. Unless the prosecution discharges the burden of offence under S 307 IPC cannot possibly be brought home to the accused. (Para 13)

Cases Referred Chronological Paras

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| (1968) AIR 1968 SC 1438 (V 55)=
1969 Cri LJ 6 Bhupendra Singh
v State of Punjab | 5 |
| (1965) AIR 1965 SC 843 (V 52)=
1965 (1) Cri LJ 766 Sarju Prasad
v State of Bihar | 12 |
| (1961) AIR 1961 SC 1782 (V 48)=
1961 (2) Cri LJ 828 Om Prakash
v State of Punjab | 12 |
| (1945) AIR 1945 PC 118 (V 32)=
46 Cri LJ 689 Mahbub Shah v
Emperor | 10 |
| (1943) AIR 1943 PC 159 (V 30)=
1943 All LJ 580 Valarshak Seth
Apcar v Standard Coal Co Ltd | 7 |
| (1932) AIR 1932 Bom 279 (V 19)=
33 Cri LJ 613 Wasudeo Balwant
Gogate v Emperor | 12 |
| (1913) 15 Bom LR 991=2 Bom Cri
C 159 Marty v Emperor | 12 |
| (1892) ILR 14 All 58=1891 All WN
176 Queen Empress v Niddha | 12 |
| (1867) 4 B H C R (Cri C) 17 Reg v
Francis Cassidy | 12 |
| O C Chatterji for Appellants A. K.
Mathur Asstt Govt Advocate for Res-
pondent | |

MEHTA J — By his judgment dated September 24 1966 Sessions Judge Ganganagar convicted the accused Ramchander under Section 302 read with S 34 IPC and sentenced him to imprisonment for life. He was also convicted under Section 307 Indian Penal Code and sentenced to rigorous imprisonment for five years. Both the sentences were ordered to run concurrently. By the same judgment Budhram was convicted under S 302 IPC and sentenced to imprisonment for life. He was also convicted under S 307 read with S 34 Indian Penal Code and sentenced to suffer rigorous imprisonment for five

years. Both the sentences were directed to run concurrently.

2 Prosecution story can be summarised in this way. There were two factions in the village Lalewala Police Station Padampur District Ganganagar. The accused Budhram and Ramchander belonged to one faction. Jeera and others owed allegiance to the other rival group. It is alleged that Budhram and Ramchander gave false evidence against Jeera and others in some litigation. On December 29 1965 PW 5 Hansraj s/o Bagrawat a relation of Jeera and PW 6 Jagdish s/o Jeera left their fields at about 3 pm with their camels loaded with sugar-canes and when they passed in front of Ramchander's house his son Budhram and his wife rebuked them and asked them as to how they could venture to pass that way. Both the persons told Budhram and his mother that they had every right to make use of the public way. This was followed by further altercations between Budhram and his mother on the one side and Hansraj and Jagdish on the other. In the course of quarrel Hansraj was beaten. He sustained eight injuries which were simple in nature. Jagdish too hit Budhram's mother with a sugarcane which he was holding in his hand. Thereafter Jeera his son Shanker Bagrawat and his son Hanuman left their fields for their village Lalewala at about 4-30 pm.

On their reaching the vicinity of the house of Hazari they heard a gun fire from behind. They turned back to discern as to what the matter was. They noticed that Ramchander and Budhram stood at a distance of about thirty steps from them. Budhram was armed with a double barrel gun. Ramchander was equipped with a single barrel gun. Budhram then immediately fired and hit Shanker. The victim sustained an injury on his forehead as a result of which he after falling down expired instantaneously. Subsequently Ramchander also fired his gun hitting Bagrawat and his son Hanuman. Hanuman received injuries on his right shoulder. Bagrawat sustained injuries near his neck. Soon after Jeera raised an alarm. Ramjas came from the side of a 'Digi' Brijlal and Sohanlal also arrived there. The accused persons then ran away towards their house. First information report of the occurrence was lodged by Jeera that very day at about 8-30 pm with the Police Station Padampur which is at a distance of about 17 miles away from the spot of occurrence. On receipt of the report a case was registered under Sections 302 and 307 IPC and investigation followed. The police prepared site plan Ex. P 2 description memo of the corpse of the deceased Shanker Ex. P 4 description memo of the spot Ex. P 8 seizure memo of the 12 bore

gun Ex P. 11 information memo regarding the recovery of another 12 bore gun Ex. P. 12, and its recovery memo Ex P. 13 Bagrawat was examined by the Medical Officer, General Hospital, Ganganagar, Dr S N. Vyas, P. W. 11, on December 29, 1965 Following injuries were found on his person—

1. Oval lacerated gun shot wound $\frac{1}{2}$ " x $\frac{1}{3}$ " on the left side neck and space between it and the tip of left shoulder region, the margins were inverted

2. Oval lacerated gun shot wound on $\frac{1}{2}$ " x $\frac{1}{2}$ " on the left side neck between it and the tip of the left shoulder region $3\frac{1}{2}$ " x $3\frac{1}{2}$ " to the injury No 1 with overt margins

Hanuman was also examined by the above-named Doctor on the aforesaid date and the following injuries were noticed on his person—

1. Oval lacerated gun shot wound $\frac{1}{3}$ " x $\frac{1}{3}$ " on the right shoulder region with inverted margins The shirt over the wound was torn.

2. Oval lacerated gun shot wound $\frac{1}{2}$ " x $\frac{1}{2}$ " on posterior aspect of the right shoulder region $3\frac{1}{2}$ " behind injury No 1 with overt margins

Autopsy of the dead body of Shanker was carried out by Dr Kamal Nayan, P W. 12, Medical Officer, State Dispensary, Ghamurwali The dead body had had the following injury.

$2\frac{1}{2}$ " x $2\frac{1}{2}$ " punctured wound piercing the skull at the inner angle of the left eyebrow.

According to the Doctor, that injury was a gun shot one The skull at the bottom of the said wound was fractured The wound had gone into the cranial cavity and bullet was found lying in that cavity near the occipital bone Membrane of brain at the site of the bullet entrance was punctured, below the wound in the skull at the exit behind the left cerebral hemisphere. Bullet had passed through the whole antero posterior length of the left cerebral hemisphere causing laceration and haemorrhage In the opinion of the Doctor the death was due to shock, caused by the injury to the brain, as a result of the bullet passing through the brain substance. After necessary investigation the accused Ramchander and Budhram were challaned by the police in the Court of Sub-Divisional Magistrate, Karanpur

The said Magistrate conducted inquiry in accordance with the provisions of Section 207-A, Criminal P. C. and committed the accused to the Court of Sessions Judge, Ganganagar, to face trial under Ss 302 and 307 read with Section 34, I P. C for having committed the murder of Shanker by shooting him dead and for having made an attempt to commit murder on the lives of Hanuman and Bagrawat by causing gun

shot injuries to them Commitment of Ramchander under Sec 25 and that of Budhram under Section 27 of the Indian Arms Act was also made The two accused denied to have committed the offences alleged to have been committed by them by the prosecution In support of its case, the prosecution examined 12 witnesses in his statement, recorded under Section 342, Criminal P. C., Budhram said that he was not present on the spot at the time of occurrence He pleaded alibi The other accused Ramchander stated that at about 5.30 p. m., on the date of the incident, Bagrawat, Hanuman, Shanker, Ramjas and Hansraj came to him Bagrawat and Ramjas were armed with guns and the others were in possession of Gandasis and when they were about 80 steps away from his house, Bagrawat threw a challenge at him and fired his gun. Thereafter Ramjas also fired his gun The accused then picked-up his gun and put the same on the wall and fired at from both the barrels Budhram was not present at that time at his residence His wife was, however, there. He then ran away to 58 L N B in the night the police reached the spot and he surrendered himself to it The trial Court disbelieved the explanation furnished by Ramchander and, relying upon the prosecution evidence, convicted and sentenced both the accused, as stated above

3. Aggrieved against the above verdict, the two accused have filed the present appeals Contention of learned counsel for the appellants is two fold His first complaint is that when the complainants' party wanted to assault the accused with weapons, it was Ramchander, who armed with a licensed double barrel gun, fired it in exercise of the right of private defence and that Budhram has been falsely implicated in the case for having murdered Shanker. That plea, according to learned counsel, taken by the accused Ramchander both in the committing and in the trial Courts has been consistent and the same should not have been lightly brushed aside by the Court below Learned counsel's another grievance is that the trial Court went wrong in applying the provisions of Section 34 to the case of Ramchander in respect of the offence under S 302, I P. C and to the case of Budhram for offence under Section 307, I P C

4. As for the first point, it is true that Ramchander stated before the committing Court that Bagrawat and Ramjas were armed with guns. Jagdish, Hanuman and Hansraj were in possession of Gandasis Hansraj, Jagdish, Hanuman and Ramjas came to his house to assault him at about 4 p. m Budhram was not present then His wife inflicted a lathi blow to Hansraj and let loose his dog Subsequently Shanker, Hanuman, Bagrawat, Ramjas and Hansraj again came to his house. Bagrawat

shouted that he would put an end to his life and fired at him. Then Ramjas also fired his gun. Thereafter he picked up his gun for which his son had obtained a licence and warned Bagrawat's party to refrain from proceeding further. The complainants party instead of withdrawing again fired at him. Thereupon he also fired his gun twice and ran away. In the trial Court the plea taken by the accused Ramchander was that at about 4 p m he and his wife were at his house Jagdish and Hansraj came there. His dog began to bark. He then came out and Hansraj began to grapple with him. He had a stick in his hand and he hit Hansraj with it. Then both of them went away saying that they would see to it. At about 5.30 p m Bagrawat Hanuman Shanker Hansraj and Ramjas again came. Bagrawat, and Ramjas were armed with guns. Others were having Gandasis. Bagrawat threw a challenge and fired his gun. Thereafter Ramjas also fired his gun. He then picked up his own gun and when the assailants proceeded further towards him and when Bagrawat again fired his gun he too fired his double barrel gun. At that time Budhram was not present at his house. He then ran away to 58 L N B. In the committing Court the accused stated that at the initial stage Hanuman Ramjas Jagdish and Hansraj came to his house at about 4 p m, and assaulted him. In the trial Court the accused stated that only Jagdish and Hansraj came to him at about 4 p m. In the committing Court the accused said that his wife hit Hansraj with a lathi but before the trial Court he said that he had struck a lathi blow to Hans Raj. In the committing Court the accused said the Bagrawat threw a challenge when he again came and said that he would be put to death. There is no such mention in his statement before the trial Court. In the trial Court he said that Bagrawat threw a challenge and fired his gun. In the committing Court he said that on the second visit of the complainants party he told Bagrawat and others to withdraw. But there is no such mention in his statement before the trial Court. He did not state before the committing Court that Bagrawat made the second fire but in the trial Court he said so. In the light of material differences in the two statements it is difficult to conclude that Ramchander took consistent plea throughout. Ramchander besides producing himself into the witness box, as D W 1 has not led any evidence in support of his plea. The prosecution examined P W 1 Jeeraj P W 2 Hanuman P W 3 Ramjas and P W 4 Bagrawat. Of these witnesses Hanuman and Bagrawat were hit on the spot.

5. According to the Doctor S N Vyas P V 11 Bagrawat received two gun shot injuries and so also Hanuman. Their

presence on the spot therefore cannot be doubted. Jeeraj P W 1 Hanuman, P W 2 and Bagrawat P W 4 owed allegiance to one party. This fact is mentioned even in the first information report wherein it is given that Budhram and Ramchander belonged to the opposite camp and they purjured against the informant. There is no specific allegation against Ramjas P W 3. He belongs to a different village Rdimalsar. His fields are towards the east of Lalewala. When he was returning from his fields at about 5 p m he found that Jeeraj Hanuman, Shanker and Bagrawat were standing near the house of Hazari. He heard a gun fire and went near Jeeraj and others. Budhram was armed with a double barrel gun and Ramchander with a single barrel gun. Budhram fired and hit Shanker as a result of which the latter fell down on the spot. Then Ramchander also resorted to firing and hit Bagrawat and Hanuman. He was about ten steps away from Shanker when he was hit. Jeeraj P W 1 has stated on oath that Ramjas is not his relative. Hanuman, P W 2 has said that Hetram is his real brother. Ramjas's sister's daughter was married to Hetram. Thus according to Hanuman Ramjas is his distant relation. Nothing has been made out in the cross-examination of the prosecution witnesses from which it can be inferred that Ramjas bore any illwill or enmity against the accused persons. He may be a distant relation of Hanuman but that does not detract from the value to be attached to his evidence. He might be interested in seeing that the real culprit of the crime are convicted. But it cannot be expected of him to adopt a course by which some innocent person would be substituted for the person who actually perpetrated the crime and that too when no enmity as such has been proved to have existed between the witness and the accused. A would induce him to give false evidence. As has been observed in *Bhupendra Singh v State of Punjab* AIR 1968 SC 1438 his feelings might be strongest against the real culprits but on account of this fact the evidence of an interested witness cannot be discarded on the mere ground of his having close interest in the complainants party.

6. The statement of Ramjas P W 3 gets full corroboration from the testimony of Jeeraj P W 1 who lodged the first information report. Ex P-1 soon after the occurrence. Hanuman P W 2 who was injured on the spot and Bagrawat P W 4 who also sustained two gun shot wounds on the scene of the crime. According to these three witnesses Jeeraj his son Shanker and Bagrawat, his son Hanuman, Jagdish son of Jeeraj and Hansraj son of Bagrawat, had gone to the field of Bagrawat. Hansraj and Jagdish left the field earlier. The remaining persons left

the agricultural land at about 4.30 p. m. for village Lalewala and when they reached the house of Harari, they heard a gun fire from behind. The witnesses turned back and noticed that Budhram and Ramchander were standing with guns in their hands. Budhram was having a double barrel gun and Ramchander was in possession of a single barrel gun. Budhram fired at Shanker, who was hit on the forehead and died on the spot. Ramchander then fired his gun which hit both Bagrawat and Hanuman. Then the accused ran away towards their house. The statement of the witness Jeera is further corroborated by the first information report filed at the police station, Padampur, on December 29, 1965, at 8-30 p. m. that is within 3½ hours of the time of the occurrence.

The police station, Padampur, is at a distance of about 17 miles away from Lalewala. The testimony of the above named witnesses also gets corroboration from the medical evidence, Dr. Kamal Nayan, P. W. 12, conducted the autopsy of the dead body of Shanker. He noticed 2" x 2" punctured wound, piercing the skull at the inner angle of the left eye brow. The skull at the bottom of the wound was fractured. The wound had gone into the cranial cavity and a bullet was found lying in the cranial cavity near the occipital bone. Membrane of brain at the site of the bullet entrance were punctured below the wound. Bullet had passed through the whole antero posterior length of the left cerebral hemisphere causing laceration and haemorrhage. In the opinion of the Doctor the death was due to shock caused by the injury of the brain as a result of the bullet passing through the brain substance.

7. Learned counsel for the appellants has strenuously argued that when Ramchander was in possession of a double barrel gun, he could have fired it from both the barrels one after the other and there was no earthly reason why Budhram should also pick up another gun and fire it at the complainants' party. This fact, no doubt, has been stated by Ramchander, but that statement is negatived by the above prosecution eye-witness account, in which the trial Court placed complete reliance. The appellate Court should not ordinarily interfere with the trial Court's opinion as to the credibility of a witness, as the trial Judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions were answered, whether with honest candour or with doubtful plausibility, and whether after careful thought, or with reckless glibness, and he alone can form a reliable opinion as to whether the witness had emerged with credit from cross-examination vide *Valarshak Seth Apcar v Standard Coal Co. Ltd* AIR 1943 PC 159. Having regard to the fact that the above

named four witnesses divulged consistent story in regard to the occurrence, it would be improper to travel in the realm of conjectures and surmises and reach the conclusion that the story as unfolded by the prosecution witnesses is not immune from doubt and that the inconsistent plea taken by the accused Ramchander is credible. The version of the accused Ramchander is further belied by the circumstance that the actual fight took place not exactly on the front portion of his house, but at a distance of about 68 steps away from his house vide Exs. P. 2 and P. 8. If the things had taken place as deposed by the accused Ramchander, he would not have gone to chak No 58, L. N. P. after the incident, but he would have gone to the police station concerned to make report.

8. The testimony of the four witnesses, Jeera, P. W. 1, Hanuman, P. W. 2, Ramjas, P. W. 3 and Bagrawat, P. W. 4, further gets support from P. W. 5, Hansraj, son of Bagrawat and P. W. 6, Jagdish, son of Jeera. They have stated that both of them left their fields on camels at about 3 p.m. Their camels were loaded with sugar-canes. When they reached the frontage of the house of Budhram, Budhram and his mother came out, they told them as to how they happened to pass that way. Their reply was that it was the public way. Budhram, then hit Hansraj. In retaliation Hansraj also hit Budhram's mother with a sugar-cane. Jagdish ran away to Ridmalsar. Hansraj was examined by Dr. Kamal Nayan, P. W. 12, who certified that he had noticed eight injuries on his person.

9. It is also plain from the medical evidence that the injury which Shanker had received and which was 2" x 2" on his forehead was caused by a bullet. Wounds, which Hanuman and Bagrawat received, were pellet injuries. First fire was made with bullet, which hit Shanker and shot him dead. The second gun fire was made with pellets by Ramchander. There is no reason why the veracity of the four witnesses should be doubted in this regard. It is true that the twelve bore double barrel gun was licensed in the name of Budhram and he used it. It is also correct that the recovery of the double barrel gun was effected through Ramchander, but that would not throw any suspicion on the prosecution story. The reason is simple. Both the son and the father, Budhram and Ramchander, lived jointly and it was within the knowledge of Ramchander where his son had put the double barrel gun. In the earliest version of the occurrence, as contained in the first information report, it is also mentioned that both the accused had individually fired their guns. We are, therefore, inclined to accept the finding of the trial Court that double barrel gun was used by Budhram, with which he shot dead Shanker, and that Ramchander

handled the single barrel gun with which he hit Hanuman and Bagrawat

10 Coming now to the applicability of common intention within the meaning of Section 34 Indian Penal Code implies a pre-arranged plan. To convict the accused of a crime with the help of Sec 34 I P C the burden is upon the prosecution to prove that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to establish the intention of an accused person. Intention has to be inferred from his act or conduct or other relevant circumstances of the case. There is also a distinction between the same or similar intention and common intention and an inference of common intention within the meaning of the term in Section 34 I P C should not be reached unless it is a necessary inference deducible from the circumstances of the case. *vide* Mahbub Shah v Emperor AIR 1945 PC 118. Where as here there is no indication whatever of premeditation or of a pre-arranged plan, the mere fact that the two accused were seen at the spot or that the two accused fired as a result of which one died and two others received simple injuries could not be held sufficient to prove or to infer a common intention. Common intention referred to in Sec 34 pre-supposes a prior meeting of the minds. This does not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. It is also not necessary to adduce direct evidence of the common intention. The common intention may conveniently be inferred from the surrounding circumstances and the conduct of the parties. The existence of the common intention shared by the accused persons is on ultimate analysis a question of fact. At any rate the crucial circumstance is that the plan must precede the act constituting the offence.

11 In this case there is no evidence on the record from which inference can be drawn with regard to the pre-arranged plan or prior concert. A Court cannot obviously make out a case for the prosecution in regard to which there is no basis. The two accused certainly were on the spot at the time of the firing but this fact alone by itself cannot be held sufficient to prove the common intention. It can well be that one of the accused persons suddenly fired at Shanker and shot him dead without common intention. This possibility has not been eliminated by any positive evidence on the record. In such a situation the other accused could not have been convicted of the offence of murder with the help of Section 34 I P C. It seems to us that the trial Court has failed to appreciate this aspect of the case. Its verdict in regard to the applicability of Section 34

I P C has to be modified inasmuch as accused Ramchander could not have been convicted under Section 302 read with Section 34 I P C. It was only Budhrum, who alone was guilty of the offence under Section 302 I P C. Budhrum also could not have been convicted under Section 307 read with Section 34 Indian Penal Code. Both the accused are guilty of the offences committed by them individually.

12 Now the question remains as to under what section of the Indian Penal Code Ramchander is to be convicted. From the evidence on the record it is abundantly apparent that Ramchander fired his gun and hit Hanuman and Bagrawat. This is borne out by the evidence of the above-named four witnesses as also by the medical evidence discussed above. It is a common ground that the act for which Ramchander has been convicted under Section 307 Penal Code consisted of causing injuries to Hanuman and Bagrawat with gun shots. Learned counsel for the appellants contends that as the injuries were of a simple nature and as they were not such as were in the ordinary course of nature likely to result in death of the two victims offence falls not under Section 307 but under S 324 Penal Code. According to learned counsel before a person can be found guilty of an offence of attempt to commit murder the burden is upon the prosecution to prove that the actual act which Ramchander is shown to have committed was such as would in the ordinary course of nature have resulted in death. In this connection it may be pointed out that it was no doubt held in *Reg v F Cassidy* (1867) 4 Bom HCR (Cri C) 17 which was followed in *Martu v Emperor* (1913) 15 Bom LR 991 that for a person to be convicted under Section 307 Penal Code the act done must be an act done in such circumstances that death might be caused if the act took effect that is to say the act must be capable of causing death in the natural and ordinary course of things. These decisions however were not followed by the same High Court in the case of *Wasudeo Balwant Gogte v Emperor* AIR 1932 Bom 279. In that case Beaumont, C J referring to Cassidy's case 1867-4 BHCR (Cri C) 17 observed —

But equally certain is it that no death will result if the accused fires a revolver at his enemy in such circumstances that in fact whether through defect of aim, or the activity of the target the bullet and the intended victim will not meet. If however Section 307 does not cover the case of a man who fires a gun at his enemy with intent to kill him but misses his aim it is difficult to see how the section can ever have any operation.

Again in *Queen Empress v Niddha*, (1892) ILR 14 All 58 it was held that

"But if you have an act done with a sufficiently guilty intention and knowledge and in circumstances which do not from their nature afford a defence to a charge of murder and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accused's control which prevented that result, then it seems to me that the case falls within Section 307."

Both these cases came up for consideration by their Lordships of the Supreme Court in *Om Prakash v State of Punjab*, AIR 1961 SC 1782. In that case though Cassidy's case was not expressly dissented from, the actual view taken by their Lordships of the Supreme Court was more in consonance with the one taken by Beaumont, C. J. in *Gogte's case*, AIR 1932 Bom 279 (Supra) and the view taken by the Allahabad High Court in *Niddha's case*. In *Gogte's case* AIR 1932 Bom 279 no injury was in fact occasioned to the victim, Sir Earnest Hotson, the then Acting Governor, due to certain obstruction. Even so, the assailant Gogte was held by the Court guilty under Sec. 307 as his act of firing a shot was committed with a guilty intention and knowledge and in such circumstance that but for the intervening fact it would have amounted to murder in the normal course of events. These cases again received consideration by the Supreme Court in *Sarju Prasad v. State of Bihar*, AIR 1965 SC 843. His Lordship Mudholkar, J., speaking for the Court, said:

"The mere fact that the injury actually inflicted by the appellant did not cut any vital organ of Shanker Prasad is not by itself sufficient to take the act out of the purview of Section 307."

13. Having said all this, we must point out that the burden is still upon the prosecution to establish that the intention of the appellant Ramchander in causing the particular injury to Hanuman and Bagrawat was of one of the three kinds referred to in Section 300, I P C. Unless the prosecution discharges the burden, offence under Section 307, I P C cannot possibly be brought home to the accused. The state of the appellant's mind has to be inferred from the surrounding circumstances. It is in the prosecution evidence that both Hanuman and Bagrawat were not on good terms with the appellant. It is also in the prosecution evidence that before the occurrence Hansraj and Jagdish had had altercations with Budhram and his mother and when Hansraj was beaten, he also retaliated and beat Budhram's mother with a sugar-cane. For the determination of the existence of a motive, this happening is a relevant circumstance. In cases of attempt to commit murder by fire-arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done

by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires and something happens to prevent the shot taking serious turn, offence under Section 307, I P C is brought home. If a person fires at another, it would ordinarily mean that he wants to kill that person. The fact that the person fired at was not killed does not necessarily mean that he had no intention to kill that man. A person may at times be excited and for that reason he may not be able to hit properly, or the aim may be missed because the person aimed at may move aside. That does not however, mean that Section 307, I P C will have no application to a case like this. We, therefore, hold that the conviction of the accused Ramchander under Section 307, I P C, made by the trial Court, is correct.

14. In the result, we partly accept the appeal of Budhram and, while maintaining his conviction under Section 302 and the sentence of imprisonment for life awarded to him on that count, we set aside his conviction under Section 307/34, I P C, and the sentence of rigorous imprisonment for five years. We also partly accept the appeal of Ramchander and, while, maintaining his conviction under Section 307, Indian Penal Code, and the sentence of rigorous imprisonment for five years, we set aside his conviction and the sentence of life imprisonment under Section 302, read with S 34, I P C.

Order accordingly

1970 CRI. L. J. 659 (Vol. 76, C. N. 160) =
AIR 1970 ANDHRA PRADESH 176
(V 57 C 24)

ANANTHANARAYANA AYYAR, J.

The Public Prosecutor, Appellant v. Hindustan Motors Ltd, Respondent.

Criminal Appeal No. 500 of 1966, D/-10-4-1968, against order of Munsif Magistrate, Nalgonda, D/-2-11-1965.

(A) Andhra Pradesh Motor Vehicles Taxation Act (5 of 1963), S. 3 — Andhra Pradesh Motor Vehicles Taxation Rules, R. 17—Chassis taken along public road for building bodies and ultimate sale — Activity is 'use on public roads in the State' — Vehicle liable to tax — Failure to pay tax punishable under R. 17.

Chassis plying on the public roads of Andhra Pradesh State being taken for purpose of building bodies thereon and ultimate sale to others amount to use on public roads in the State within the meaning of S. 3 of the Andhra Pradesh Motor Vehicles Taxation Act, and the vehicle is liable to tax. Taking them without paying tax would be offence punishable under R. 17 of the Rules W.P. Nos 1456 of 1965 and 66 of 1966, D/-6-10-1967 (Andh Pra), Foll. (Para 6)

HL/JM/D703/68/TVN/D

(B) Criminal P C (1898), Ss 245, 4 (v) 263 and 417 — Order of discharge, held really one of acquittal — (Andhra Pradesh Motor Vehicles Taxation Rules, R 17)

The accused was charged with an offence punishable under R. 17 of the Andhra Pradesh Motor Vehicles Taxation Rules under which the maximum punishment which could be awarded was Rs 50. While so, the Magistrate disposed of the case by discharging the accused.

Held that the order though described as discharged was really one of acquittal. The case was a summons case under S. 4 (v) of Criminal P C and the resultant order could not be one of discharge but acquittal. Hence an appeal would lie. Section 262 Criminal P C provided the procedure for trial of summons cases even in summary trials.

(Paras 3 and 5)

Cases Referred Chronological Paras
(1967) W.P. Nos 1456 of 1965 and 66 of 1966 D/6-10 1967 (Andh Pra) 6

M N Narasimhareddy, for Addl Public Prosecutor for Appellant, B K. Seshu for Respondent

JUDGMENT — The Motor Vehicles Inspector Nalgonda, filed a petty case charge-sheet against Hindustan Motors Ltd. Uttara Para Hughli district West Bengal alleging that on 30.10.1965 near Korlapad on the National Highway No. 9 he (the Motor Vehicles Inspector) had found eleven chassis being taken along the public road without having paid any tax on any of the chassis and that therefore the accused committed an offence under S. 3 of the Andhra Pradesh Motor Vehicles Taxation Act of 1963 read with Ss. 4 and 11 of the said Act.

2. It was admitted by the accused that the eleven chassis were taken without bodies on the public road towards Madras without payment of tax in Andhra Pradesh State. But it was pleaded that the chassis were taken to Madras for purpose of building bodies and for ultimate sale thereafter. Section 3 of the Andhra Pradesh Motor Vehicles Taxation Act of 1963 runs as follows —

"The Government by notification from time to time direct that a tax shall be levied on every motor vehicle used or kept for use in a public place in the State."

The learned Magistrate held as follows — "In my opinion the said chassis were neither used or kept for use in a public place in the State nor the respondent is liable for prosecution for the alleged contravention of the above sections. The chassis are neither used nor kept for use in this State except that they are admittedly passing through this State. Hence the respondent is discharged."

3. The learned Public Prosecutor treated the judgment of the learned Magistrate as judgment of acquittal though the learned Magistrate stated that he discharged the accused. The learned Public Prosecutor ac-

cordingly filed this appeal against the acquittal.

4. In the charge sheet, the Motor Vehicles Inspector has stated that the accused is liable for punishment under Rule 17 of the Andhra Pradesh Motor Vehicles Taxation Rules. This rule runs as follows —

"Whoever commits breach of any provision of these rules shall be punishable with fine which may be extended to Rs 50."

5. In view of the maximum sentence which can be awarded under this rule the case is a summons case as defined under sub-section (v) of Section 4 of the Code of Criminal Procedure. The learned Magistrate obviously followed the summons procedure. Consequently there cannot be any discharge in the case and what the learned Magistrate mentioned as "Discharge" was obviously a mistake in expression for "Acquittal" of the accused. Section 262 Criminal P C, lays down the procedure for trial of summons cases even in summary trial. It provides that the procedure prescribed for summons procedure shall be followed in summons case. So I agree with the learned Public Prosecutor in treating the judgment of the lower Court as judgment of acquittal.

6. In an unreported judgment D/6-10-1967 in W.P. Nos 1456, etc. of 1965 and 66 etc. of 1966 (Andhra Pradesh) of this High Court it has been held that the chassis which ply on the public roads of Andhra Pradesh State being taken on public road by a dealer for purpose of building bodies and ultimate sale to others means use on public roads in the State and that the vehicle is liable to tax. This is a direct decision on the question concerned in the present case. Therefore the accused has committed an offence mentioned in the charge sheet and is liable for punishment under Rule 17 of the Andhra Pradesh Motor Vehicles Taxation Rules.

7. I, therefore, set aside the acquittal of the accused and convict the accused and sentence him to pay a fine of Rs 50. Time for payment, two weeks.

Appeal allowed

1970 CRI L J 660 (Vol. 76, C N 161) =
AIR 1970 BOMBAY 166 (V 57 C 29)
(NAGPUR BENCH)

J R VIMADALAL J

Jagdishprasad Kashiprasad and others Applicants v The State of Maharashtra and another Opponents

Criminal Revision Appellate No 180 of 1968 D/26-2-1969

(A) Evidence Act (1872), Ss 114 Illus (g) and 3 — Non-examination of some of the prosecution witnesses — Adverse inference, when can be drawn — Appreciation of evidence.

KM/KM/170/69/LGC/P

A party asking the Court to draw against the other party an adverse inference of the nature indicated in Illustration (g) to Section 114 of the Evidence Act by reason of the non-examination of a witness by that party must, whether the proceeding be a civil or a criminal one, lay the foundation for it by eliciting evidence which would show that the witness in question was available to the other party for the purpose of giving evidence at the time of the hearing. That evidence may be elicited, either in the course of the cross-examination of the witnesses examined by the other side (e.g., the investigating officer in a criminal case), or by leading evidence to that effect. Unless that foundation is laid, no question of drawing an adverse inference as indicated in Illustration (g) to Section 114 arises at all.

(Para 3)

Even if an adverse inference were to be drawn, it would be for the Court to weigh the evidence of such of the witnesses as have been examined before it as against that adverse inference and, if those witnesses are found to be reliable, the Court would be perfectly justified in convicting the accused persons.

(Para 3)

(B) Criminal P. C. (1898), S. 367 — Evidence Act (1872), S. 3 — Seven accused persons — Three accused given benefit of doubt by reason of their names being not mentioned in F. I. R. — That cannot lead to conclusion that other accused persons named in F. I. R. which furnished valuable corroboration to evidence of complainant and the witness should also be acquitted.

(Para 4)

A. K. Khanna, for Applicants; P. G. Palshikar, Addl. Govt Pleader, for Opponent No 1.

JUDGMENT: This is an appeal filed by four of the original seven accused persons against their conviction by the Judicial Magistrate, First Class, Khamgaon, which was confirmed by the Additional Sessions Judge, Khamgaon, on appeal.

2. The short facts of the case are that on the 16th of January 1967 the complainant Mahadeo found that one of his bullocks was missing from the Kotha and he ultimately traced the bullock to the cattle pound from where it was got released. The prosecution story is that he was then proceeding by bus to Shegaon to report the matter to the police when he was waylaid by the four applicants before me, along with original accused Nos 1, 2 and 3, who fell upon him and started beating him with sticks, with the result that he received a number of injuries and fell down unconscious on the road. According to the prosecution, when he regained consciousness, Mahadeo found Semadhan, Vishanu, Shriram and Deorao near him, and he was carried to the police station where he lodged his report and then sent for medical treatment. In view of the report made by Mahadeo, the accused persons were arrested and were put up for trial before the Judicial

Magistrate First Class, Khamgaon. The said Magistrate, however, gave accused Nos. 1, 2 and 3 the benefit of doubt by reason of the fact that their names were not mentioned by Mahadeo in the report which he had lodged at the police station, but he convicted accused Nos 4 to 7 who are the applicants before me of the offence under Section 323 of the Indian Penal Code and sentenced them to rigorous imprisonment for 15 days and to pay a fine of Rs 25 each. He, however, acquitted all the accused persons of the offence under Section 147, as well as the offence under Section 149 read with Section 325 of the Indian Penal Code. On appeal to the District Court by accused Nos 4 to 7, their conviction as well as the sentences imposed upon them by the trial Magistrate were confirmed. Accused Nos. 4 to 7 have thereafter filed the present revision application.

3. There is no substance whatsoever in this application in so far as the conviction of these accused rests upon the evidence given by Mahadeo, which is amply corroborated by the evidence of witness Samadhan, both of whom have rightly been believed by the lower Courts. The only ground urged before me has been that though four persons were mentioned by Mahadeo in the list as eye witnesses only two of them were examined. One of whom has stated that he came up subsequent to the actual incident. Mr. Khanna has therefore contended that an adverse inference should be drawn against the prosecution, but I am afraid that cannot help the accused. Even if an adverse inference were to be drawn, it would be for the Court to weigh the evidence of such of the witnesses as have been examined before it as against that adverse inference and, if those witnesses are found to be reliable, the Court would be perfectly justified in convicting the accused persons. Moreover, in the present case, no basis has been laid in the course of the evidence for drawing an adverse inference by reason of the non-examination of the two eye witnesses. A party asking the Court to draw against the other party an adverse inference of the nature indicated in Illustration (g) to Section 114 of the Evidence Act by reason of the non-examination of a witness by that party must, whether the proceeding be a civil or a criminal one, lay the foundation for it by eliciting evidence which would show that the witness in question was available to the other party for the purpose of giving evidence at the time of the hearing. That evidence may be elicited, either in the course of the cross-examination of the witnesses examined by the other side (e.g., the investigating officer in a criminal case), or by leading evidence to that effect. Unless that foundation is laid, no question of drawing an adverse inference as indicated in Illustration (g) to Section 114 arises at all.

4. The only other point which was urged was that since the other three accused per-

sons one of whom was supposed to be main accused have been acquitted there is no reason why accused Nos 4 to 7 should have been convicted on the same evidence I am afraid there is no substance in that contention of Mr Khanna either for the simple reasons that accused Nos 1 to 3 have merely been given benefit of doubt by reason of their names not being mentioned by Mahadeo in the report which he has lodged in the police station which has been recorded as a first information report That cannot therefore necessarily lead to the conclusion that the other accused whose names have actually been mentioned in the first information report which furnishes valuable corroboration to the evidence of Mahadeo and Samadhan should also be acquitted The conviction of accused Nos 4 to 7 imposed by the lower Courts is therefore clearly correct and this revision application must fail I am somewhat surprised at the very lenient sentence that has been imposed upon these accused persons by the Courts below but having regard to the fact that no notice of enhancement has yet been issued I have not thought it fit to interfere in the matter at this stage The accused persons should surrender to their bail

Application dismissed

1970 CRI L J 662 (Vol 75, C N 162) =

AIR 1970 CALCUTTA 216 (V 57 C 40)

N C TALUKDAR J

Dhirendra Nath Sen and another Petitioners v Rajat Kantu Bhadra Opp Party

Criminal Revn No 1244 of 1967 D/- 29-8-1969

(A) Criminal P C (1898) S 198 — 'Person aggrieved — Defamation of a spiritual head of certain community — Individual person of that community is not a person aggrieved — Cognizance of offence taken on a complaint by such individual is illegal.

If a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at, before he can maintain a prosecution for defamation In short the grievance of the complainant should not merely be the one shared by every member of an organised society Where therefore the editor of a paper writes an editorial which is highly defamatory of the spiritual head of a certain community, an individual of that community is not an aggrieved person within the meaning of Section 198 Criminal P C. The mere fact that the feelings of the complainant have been injured in consequence of a defamatory statement made against his religious head affords him no ground

LM/AN/G100/69/GGM/M

under the law to prosecute the accused for defamation (1858) 1 F & F 347 & (1944) AC 116 & (1948) 1 KB 580 & AIR 1925 Cal 1121 & (1935) 36 Cr LJ 408 (Sind) & AIR 1937 All 677 & (1935) 36 Cr LJ 116 (Oudh) & AIR 1965 SC 1451 Rel on (Para 4)

(B) Penal Code (1860) S 500 — Complaint for alleged defamation in respect of an Ashram, an incorporated body — Complainant an individual claiming to be a member bringing complaint — Allegations not disclosing any defamation of the Ashram thereby touching complainant as a member thereof — No action under S 500 lies AIR 1955 SC 196 Rel on. (Para 5)

(C) Penal Code (1860) Ss 499 and 500 — Defamation — Essentials

The concept of defamation is very old and the Penal Code makes no distinction between the written and spoken defamation. The term defamation includes both libel and slander. The classical definition of the term however is as has been given in the case of (1882) 8 QBD 491 as a 'False statement about a man to his discredit'. This definition has been approved of in a series of decisions. The concept of defamation is indeed a mixed concept partly subjective and partly objective and the institutions of the proceedings must be against the background of Section 198 of the Criminal P C Upon ultimate analysis however whether the impugned publication is defamatory or not is a question of fact and the same must abide a full-fledged trial (1936) 52 TLR 669 & (1882) 8 QBD 491 Rel on (Para 6)

Cases Referred Chronological Para:

(1965) AIR 1965 SC 1451 (V 52) =

1965 (2) Cri LJ 434 Sahib Singh Mehra v State of UP

(1955) AIR 1955 SC 196 (V 42) =

1955 SCA 258 = 1955 Cri LJ 526

H N Rishbud v State of Delhi

(1948) 1948-1 KB 580 = 1948-1 All

ER 450 Braddock v Bevins

(1944) 1944 AC 116 = 170 LT 362

Knupffer v London Express

Newspaper Ltd

(1937) AIR 1937 All 677 (V 24) =

38 Cri LJ 1086 Ankaraju Subhara-

rava v Batuk Prasad

(1936) 52 TLR 669 = 80 SJ 703 Sim

v Stretch

(1935) 36 Cri LJ 116 = 152 Ind Cas

478 (Oudh) Jagadish Narain v

Nawab Sham Ara Begum

(1935) 36 Cri LJ 408 = 153 Ind Cas

443 (2) (Sind) Hosseinbhoi

Ismaili v Emperor

(1935) 36 Cri LJ 975 = 156 Ind Cas

567 (Sind) Hosseinbhoi Ismaili

v Emperor

(1925) AIR 1925 Cal 1121 (V 12) =

26 Cri LJ 1539 Pratap Chandra

Guha v King Emperor

(1882) 8 QBD 491=51 LJ QB 380,
 Scott v. Sampson 6
 (1858) 1 F & F 347=75 ER 758, East-
 wood v. Holmes 4
 Ajit Kumar Dutt, Prasun Chandra
 Ghosh and Birendranath Banerjee, for
 Petitioners, Arun Kumar Jana, for Opp.
 Party.

ORDER:— This Rule is for quashing the proceedings under Section 500 of the Indian Penal Code, pending before Sri K. K. Roy, Magistrate, 1st Class, Cooch Behar, in Case No. CR. 28 of 1966 under Section 500 I.P.C. as not maintainable in law and on merits.

2. The facts leading on to the Rule are chequered but can be put in a short compass. The complainant, Rajat Kanti Bhadra, who described himself as a member of the Shoulmari Ashram, filed a complaint under Section 500 I.P.C. in the Court of the learned Sub-Divisional Magistrate, Cooch Behar against two accused persons viz., Sookomal Kanti Ghosh, Editor of a Bengali Daily called the "Jugantar" and Dhirendranath Sen, the printer and publisher of the same. The unpugned publication is an item of news purported to have been served by the P.T.I. and U.N.I. and appeared in the issue of the Jugantar dated the 7th December, 1965, under the sub-heading "Shoulmari Sadhu", the English translation whereof is as follows: "The Foreign Minister stated that the Sadhu of Shoulmari who calls himself Subhas Chandra Bose, is not Netaji and the Government has not the least doubt about this fact that he is not". It was averred that the said newspaper which was published in Calcutta, was widely distributed in West Bengal, including Cooch Behar, within the jurisdiction of the abovementioned court. The learned Magistrate examined the complainant on solemn affirmation and sent the case for judicial enquiry and report to Sri I. Sundas, Magistrate, 1st Class, Cooch Behar. The latter after examining the complainant and four other witnesses observed on 16-3-1966 that no cognizance can be taken of the offence under Section 500 I.P.C. as there was a non-conformance to the provisions of Section 198 of the Code of Criminal Procedure, inasmuch as the complainant is not the person aggrieved within the meaning of that section, and dismissed the complaint under Section 203 of the Code of Criminal Procedure, sending back the record to Sri S. K. Banerjee, Magistrate, 1st Class, Cooch Behar. On a perusal of the said report, Sri S. K. Banerjee, Magistrate, 1st Class, Cooch Behar by his order dated the 18th March, 1966, dismissed the complaint under Section 203 of the Code of Criminal Procedure. The complainant thereupon preferred a revisional application under Section 436 of the Code of Criminal Procedure before the learned

Sessions Judge, Cooch Behar for setting aside the order of the trying Magistrate dismissing the complaint and for holding a further enquiry into the complaint filed. Sri H. N. Sen, Sessions Judge, Cooch Behar, by his order dated the 30th September, 1968, allowed the said application and directed a further enquiry into the complaint referred to above. The learned trying Magistrate, on receiving back the records sent the case to Sri G. C. Chatterjee, Magistrate, 2nd Class, Cooch Behar, for judicial enquiry and report by his order dated the 6th January, 1967. Four witnesses were examined by the learned enquiring Magistrate who ultimately submitted a report on 26-6-1967 holding that there was a prima facie case against the accused persons under Section 500 I.P.C. On the 12th July, 1967, Sri N. N. Pal, Magistrate, 1st Class, Cooch Behar, perused the report of the judicial enquiry and summoned both the accused under Section 500 I.P.C. This order as also the proceedings based thereupon have been impugned by the two accused-petitioners and the present Rule was obtained.

3. Mr. Ajit Kumar Dutt, Advocate (with Messrs Prasun Chandra Ghosh and Birendranath Banerjee, Advocates) appearing on behalf of the accused-petitioners in support of the Rule, has made a three-fold submission. The first contention of Mr. Dutt which is one of law and goes to the very root of the case, inter alia is that the cognizance of the case as taken by the learned Magistrate has been bad in law and without jurisdiction vitiating the resultant proceedings because of a non-conformance to the mandatory provisions of Section 198 of the Code of Criminal Procedure inasmuch as the present complainant is not "some persons aggrieved" within the meaning of Section 198 of the Code. In support of his contention, Mr. Dutt referred to the averments made in the petition of complaint which relate to the Sadhu of Shoulmari only and also to several authorities as well as some reported decisions on the point. The second contention of Mr. Dutt raises an interesting point of law viz., that even if it be assumed that the petition of complaint discloses a defamation of the Ashram, thereby touching the complainant as a member thereof, no action would lie under Section 500 I.P.C., as the Ashram is an indeterminate body. To establish his point on this behalf, Mr. Dutt referred to the allegations made in the petition of complaint and to the contents of the impugned publication itself. The third and the last contention of Mr. Dutt is however one of fact and relates to merits viz., that the impugned publication is not in any way defamatory and in any event the proceedings are not maintainable in the absence of the two

news agencies which served the news item. When the case was called on for hearing nobody appeared on behalf of the complainant-opposite party and after the matter was heard in part it was adjourned in the interests of justice to give an opportunity to the complainant-opposite party to appear through some other learned Advocate as it appeared from the records that the learned Advocate who had originally been engaged and filed the paper was elevated to the Bench. Ultimately an administrative notice had to be issued and Mr Arun Kumar Jana Advocate appearing on behalf of the complainant-opposite party made his submissions. Mr Jana submitted in the first instance that the objections raised on behalf of the accused-petitioners as to whether there has been a proper cognizance under Section 193 of the Code of Criminal Procedure or whether the present complaint merely discloses the defamation of an indeterminate body or whether the impugned publication is not at all defamatory and not maintainable in the absence of the two news agencies are ultimately questions of fact to be determined in a full-fledged trial and therefore the prayer for quashing at this stage is premature. With regard to the first submission of Mr Dutt Mr Jana contended that there has been no non-conformance to Section 193 of the Code of Criminal Procedure because the defamation alleged relates to the head of the institution His Holiness Srmat Saradanandjee touching thereby all the members of the Ashram who are his disciples. In this context he submitted that the impugned publication having lowered the Head of the Ashram in public estimation has also so lowered the complainant who is but a member of the said Ashram and is as such a person aggrieved within the meaning of Section 193 of the Code of Criminal Procedure. Mr Jana next submitted that the second contention of Mr Dutt is also not maintainable inasmuch as the defamation alleged relates not to an indeterminate body but to an Ashram the religious head whereof viz. His Holiness Srmat Saradanandjee was defamed touching thereby the present complainant also as his disciple. As to the third and last contention of Mr Dutt Mr Jana joined issue and submitted that the point whether the impugned publication is defamatory or not is based ultimately on fact and is but premature at this stage without a full fledged trial.

4 Having heard the learned Advocates appearing on behalf of the respective parties and on going through the legal materials on the record I will now proceed to determine the various points raised. As to the first contention raised by Mr Dutt that the cognizance taken by the

learned Magistrate has been bad in law because of a non-conformance to the mandatory provisions of Section 193 of the Code of Criminal Procedure the steps of Mr Dutt's reasoning are that the impugned publication has not in any manner directly or indirectly defamed the Ashram or the complainant as its member or even any other member of the said Ashram that the complainant in the facts and circumstances of the case could not in law bring an action for libel merely on the ground that his feelings have been injured that the complaint has been filed by a person who does not come within the ambit of the expression "some persons aggrieved" within the meaning of Section 193 of the Code of Criminal Procedure and that there having been a clear non-conformance to the mandatory provisions of the statute the resultant proceedings stand vitiated and should be quashed at the earliest stage. In this connection Mr Dutt made an ancillary submission that in any event the Shoulmari Ashram being an unincorporated body or association of individuals the complainant as its member has no cause of action and could not in law bring an action for libel as the person aggrieved. Mr Jana's reply to the first point raised by Mr Dutt in a short compass is that the defamation complained of in this case is not of an indeterminate body but it relates to the Head of the Institution His Holiness Srmat Saradanandjee thereby touching all the members of the Ashram as being his followers and that when the religious head is lowered in public estimation, the disciples amongst whom the present complainant is one are also so lowered. The complainant therefore is a 'person aggrieved' within the meaning of Section 193 of the Code of Criminal Procedure and there is consequently no defect in cognizance. In support of the respective contentions on the first point as referred to above various authorities have been cited and a reference has also been made to several reported decisions. In Halsbury's Laws of England (3rd Edn Edited by Viscount Simonds) Vol 24 page 5 paragraph 6 it has been observed under the heading Group Defamation that A class of persons cannot be defamed as a class nor can an individual be defamed by general reference to the class to which he belongs. A similar view was taken by Gatlley in Libel and Slander (4th Edn) at page 115 wherein there is a discussion relating to the defamation of a class and it has been stated that where the words complained of reflect on a body of class of persons generally such as lawyers clergymen publicans or the like no particular member of the body or class can maintain an action. The observations of Mr Justice Willes in the case of

Eastwood v. Holmes, (1858) 1 F & F 347 at p 349 have been approved of and a reference was further made to the case of O. Brien v. Eason reported in (1913) 47 Ir LT wherein Lord Justice Holmes and Lord Justice Cherry observed that the dictum of Willes J in the case of (1858) 1 F & F 347 "was sound law and strictly applicable". A reference in this connection may also be made to Odgers "on Libel and Slander" (6th Edn) at page 123 wherein it has been stated that "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff". It was further observed at page 124 that "so if the words reflect impartially on either A or B, or on someone of a certain member of class, and there is nothing to show which one was meant, no one can sue". It would therefore appear that there is an imprimature of authorities on the point that there will be no action of libel, if the body defamed is indeterminate, unless and until an individual is referred to. As to the case law on the point, I will refer in the first instance to the case of Kunpffer v London Express Newspaper, Ltd, (1944) AC p 116 wherein Lord Porter observed at pp 123 and 124 that "this case raises once again the question which is commonly expressed in the form; 'can an individual sue in respect of words which are defamatory of a body or class of persons generally?'" The answer as a rule must be 'No,' but the inquiry is really a wider one and is governed by no rule of thumb. The true question always is; "was the individual, 'or were the individuals, bringing the action personally pointed' to by the words complained of?". The next case on the point is the case of Braddock v. Bevins (1948) 1 K. B 580 wherein the Master of the Rolls, Lord Greene delivering the judgment of the court, observed at page 588 that "No one of these is named in the alleged libels and before any one of them can succeed he must show that the alleged libels were or one of them was published of himself. In establishing this there are two stages. First, he must satisfy the judge as a matter of law that the words are capable of referring to himself as a particular identifiable individual and secondly, if he succeeds in this he must satisfy the jury that the words do so refer to himself". It was further observed at page 599 that "the words appear to us to be a mere generalisation and on applying the principles laid down by the House of Lords in 1944 AC 116 the appeal of these three appellants fails". I may refer in this context to the Nil Darpan case tried by the Supreme Court of Calcutta, cited in Mayne's Criminal Law of India wherein the words impugned as stated are "I present the indigo planters' mirrors to the indigo

planters' hands". Chief Justice Sir Barnes Peacock observed thereupon that "this certainly appears to me to represent to the indigo planters that if they look into this paper they would see a true representation each of himself". Mr. Justice B. B. Ghose in his dissentient judgment in the case of Pratap Chandra Guha Roy v King-Emperor, AIR 1925 Cal 1121 referred to the same and observed at page 1127 that "the true rule appears to be that if a person complains that he has been defamed as a member of a class he must satisfy the court that the imputation is against him personally and he is the person aimed at, before he can maintain a prosecution for defamation". Mr Dutt relied upon the observations made in the abovementioned case by Mr. Justice Buckland to whom the case was referred to as the third Judge, on a difference of opinion between Mr Justice Newbould and Mr. Justice B B Ghose, viz, that exception 2 to Sec 499 IPC is intended to include a company or an association or collection of persons as such within the word "person" as used in the definition, so that the latter should not be limited to individuals. It is doubtful if the police force at a particular place is an association or collection of persons as is contemplated in Exception 2, Section 499 I.P.C. and that the police force as such cannot complain of any imputation as regards its personal reputation. Mr. Justice Buckland agreed with the observation of Mr Justice B B Ghosh that the true rule in such cases is that when a person complains of defamation as a member of a class he must satisfy the Court that the imputation is against him personally before he can maintain a prosecution for defamation. The next case referred by Mr. Dutt is the case of Hosseinbhoj Ismailji v. Emperor, (1935) 36 Cri LJ 408 (Sind), wherein it was observed by the Additional Judicial Commissioner Mr. Mehta that only such person as has directly or indirectly suffered in his own reputation by the defamation complained of can set the machinery of the law Courts into motion. In short, the aggrivement of the complainant should not merely be the one shared by every member of an organised society. Where, therefore, the editor of a paper writes an editorial which is highly defamatory of the spiritual head of a certain community, an individual of that community is not an aggrieved person within the meaning of S 198, Criminal Procedure Code. Mr Dutt further referred to another case (1935) 36 Cri LJ 975 (Sind) viz, the case of Hosseinbhoj Ismailji v. Emperor, wherein the Judicial Commissioner Ferrers and the Additional Judicial Commissioner Rupchand held that where the person defamed, namely the High Priest of a community, is a male adult and does not come

within the proviso to Section 198 Criminal Procedure Code it is for him to complain and for nobody else whether on the strength of his written authority or otherwise. The mere fact that the feelings of the complainant have been injured in consequence of a defamatory statement made against his religious head affords him no ground under the law to prosecute the accused for defamation. In the case of *Ankaraju Subbaraya v Batuk Prasad* AIR 1937 All 677 Mr Justice Ganga Nath referred with approval to *Odgers on Libel and Slander* (6th Edn) at pages 123 and 124 and the case of AIR 1925 Cal 1121 mentioned above and observed at page 678 that if a well-defined class is defamed each and every member of that class can file a complaint. In other cases the defamatory words must refer to some ascertained and ascertainable person and that person must be the complainant. Where the words reflect on each and every member of a certain number or class each or all can sue. If the words reflect impartially on either A or B or on someone of a certain number or class and there is nothing to show which one is meant no one can sue.

If a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation. It will be pertinent in this context to refer also to the decision of the Supreme Court in the case of *Sahib Singh Mehra v State of Uttar Pradesh* AIR 1965 SC 1451 wherein Mr Justice Raghubar Dayal delivering the judgment of the court observed at page 1453 that 'explanation 2 provides that it may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. The language of Explanation 2 is general and any collection of persons would be covered by it. Of course that collection of persons must be identifiable in the sense that one could with certainty say that this group of particular people has been defamed as distinguished from the rest of the community. Mr Jana appearing for the opposite party referred to the case of *Jagdish Narain v Nawab Shams Ara Begum* (1935) 36 Cr LJ 116 (Oudh) and the observations made therein by Mr Justice Zia-ul-Hasan relating to the provisions of Section 198 of the Code of Criminal Procedure as to cognizance. The facts however are clearly distinguishable and the principles ultimately laid down there viz. that the provisions of the said section are mandatory are not disputed in the present case. It accordingly does not help the contention of Mr Jana advanced in this behalf. I respectfully agree with the principles laid down by

the authorities referred to above as also with the observations made in the cases cited before and I hold that the interpretation sought to be given by Mr Jana to the provisions of Section 198 of the Code of Criminal Procedure is untenable as it seeks to cloak the same with too wide a meaning much beyond the intention of the legislature. There has been in fact no proper cognizance in this case as enjoined under Section 198 of the Code of Criminal Procedure and the first contention of Mr Dutt succeeds.

5 The second contention of Mr Dutt also stands on a strong footing. The impugned publication as submitted by him relates to the Head of the Shoulmari Ashram His Holiness Srmat Saradanandjee described as 'the Sadhu of Shoulmari' and not to the present complainant personally and that in the petition of complaint also there is no allegation that the complainant has been in any way defamed personally. The facts and circumstances again Mr Dutt urged do not disclose any defamation of the Ashram either directly or indirectly and in any event the Shoulmari Ashram being an unincorporated body or association of individuals the complainant as one of its members could not in law bring an action for libel. I have gone through the petition of complaint in this connection and have given my anxious consideration to the averments made therein but I find that there is neither any imputation against the complainant personally nor any defamation against the Ashram as such. Even if it be assumed that the petition of complaint discloses a defamation of the Ashram thereby touching the complainant as a member thereof no action would lie under Section 500 IPC as the Ashram is an indeterminate body. I agree therefore with the submission of Mr Dutt that the present proceedings are an abuse of the process of the court and the objection thereto having been taken at the earliest stage the same should be quashed in the interests of justice. In this context a reference may be made to the observations of the Supreme Court in the case of *H N Rishbud v State of Delhi* 1955 SCA 258 = (AIR 1955 SC 196) wherein Mr Justice Jagannadhas delivering the judgment of the court observed at page 269 that when the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage the Court while not declining cognizance will have to take the necessary steps to get the illegality cured and the defect rectified by ordering such reinvestigation as the circumstances of an individual case may call for. When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been

caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under S. 537 Cr P C, of making out that such an error has in fact occasioned a failure of justice". It was ultimately held that "To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused". I uphold therefore the second contention also of Mr. Dutt.

6. The third and last contention of Mr Dutt relates to merits viz, that the impugned publication is not in any way defamatory and that the proceedings are not maintainable in the absence of the two news agencies which served the news item. So far as the second part of the contention is concerned, it is not maintainable inasmuch as there is no bar in law to the institution of a proceeding for defamation against the present accused without the two news agencies being made co-accused therein. The first part of the contention again is based ultimately on facts and the same is indeed premature at this stage. It may be pertinent in this context, to ascertain what defamation is and the ingredients thereof. Many definitions have been attempted but none has been found exhaustive. The concept of defamation is as old as the hills and the Indian Penal Code makes no distinction between the written and spoken defamation and the term defamation includes both libel and slander. The classical definition of the term however has been given by Mr. Justice Cave in the case of *Scott v Sampson*, (1882) 8 QBD 491 as a "false statement about a man to his discredit". This definition has been approved of in a series of decisions including that of *Sim v Stretch*, (1936) 52 TLR 669 at p 671 where Lord Atkin observed that "would the words tend to lower the complainant in the estimation of the right thinking members of the society generally". The concept of defamation is indeed a mixed concept partly subjective and partly objective and the institution of the proceedings must be against the background of Section 198 of the Code of Criminal Procedure. Upon ultimate analysis however, whether the impugned publication is defamatory or not is a question of fact and the same must abide a full-fledged trial. I hold accordingly that the third contention of Mr Dutt is premature at this stage.

7. In the result, I make the Rule absolute, and I quash the criminal proceedings under Section 500 I.P.C. pending before

Sri K K Roy, Magistrate, 1st Class, Cooch Behar, in C R Case No 28 of 1966
Rule made absolute.

1970 CRI. L. J. 667 (Vol. 76, C. N. 163) =

AIR 1970 DELHI 95 (V 57 C 21)

HARDAYAL HARDY, J.

B G Goswami, Appellant v State, Respondent

Criminal Appeal No 103 of 1967, D/-29-10-1969, from order of Spl J, Delhi, D/-24-5-1967.

Prevention of Corruption Act (1947), Ss. 4(1), 5(2), and 5(1)(d) — Offence under S. 5(2) read with S. 5(1)(d) and S. 161 Penal Code — Presumption under S. 4(1) when can be drawn, indicated — Held on facts that presumption under S. 4(1) applied to the case and guilt of the accused had been established beyond reasonable doubt — (Penal Code (1860), S. 161).

The presumption under Section 4(1) of Prevention of Corruption Act (1947) applies only if it is established that the accused had actually accepted the currency notes. On the other hand, if the prosecution evidence falls short of what is required to prove that fact or if it is found that money had either been planted or foisted on him by means of a deception or a trick then the presumption under Section 4(1) can obviously not be pressed into service for the purpose of establishing his guilt (Para 6)

In a prosecution for offences under S. 5(2) read with S. 5(1)(d) of the Prevention of Corruption Act and S. 161 of the Penal Code the accused contended that he was duped into pocketing the currency notes under the cover of bills and that there was as a matter of fact no acceptance of money at all. He sought to support the contention from the statement of complainant who admitted that the accused refused to have the notes in restaurant in the first instance, but he accepted the same when they were handed over to him along with the bills. But the witnesses who were sitting in the restaurant stated in unequivocal terms that what was passed on by the complainant to the accused was currency notes and the same were clearly visible to them. Recovery of the relevant currency notes by the police from his pocket was not denied by him. It was not the case of the accused that the amount was paid to him by complainant on some other account. The amount could also not be regarded as forming part of the legal remuneration.

Held that the presumption under S. 4(1) was attracted and the guilt of the accused must therefore be held to have

LM/AN/G8/69/LGC/B

been established beyond reasonable doubt (Para 3)

The money was evidently being paid by the complainant to the accused in a public restaurant where several other persons were also present. If the accused therefore told the complainant that he would not accept the notes in the restaurant there was nothing unnatural in his conduct. His initial hesitation must have however been overcome when the complainant put those notes inside the folds of the bills. In doing so however the money must have been taken by the complainant from his pocket and put inside the bills and then passed on by him to the accused within the sight of the witnesses. There was thus no escape from the conclusion that the passing of the money by the complainant to the accused was not the result of any deception or trick practised on him and that the currency notes were accepted by the accused with full knowledge of the fact that what was being passed on to him was money that was not legally due to him.

(Paras 8-9)

D R Kafta, for Appellant D R Sethi for Respondent

JUDGMENT — The appellant B G Goswami was employed as a Storekeeper in the Sewa Kendra run by the Delhi Administration for the benefit of destitutes and beggars. He has been convicted by the Special Judge for an offence under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act 1947 and has been sentenced to 15 months' R I and a fine of Rs 200/- or in default of payment of fine to further imprisonment for a period of three months. He has also been found guilty under Section 161 Indian Penal Code and has been ordered to suffer 15 months' R I for the said offence. The substantive sentences of imprisonment have been ordered to run concurrently. According to the prosecution Madan Singh complainant (PW 1) held a contract for the supply of vegetables to the Sewa Kendra. The accused Goswami told him that if he paid him a bribe of Rs. 50/- all sorts of vegetables supplied by him would be accepted but if he did not do so the vegetables brought by him would be rejected. The complainant promised to pay the bribe after a few days but he had actually no intention to do so and therefore brought the demand of the accused to the notice of Shri Har Narain Singh, DSP Anti-Corruption, on 7-1-1950.

A raiding party was thereupon organised by the DSP who invited Kewal Ram and Ram Rikh two officials belonging to the Sales tax Department and some policemen to join the raiding party. Madan Singh produced five currency notes of Rs 10/- each of the numbers were duly recorded by the DSP in his

proceedings. The complainant was then deputed by the DSP to pay the aforesaid amount to Goswami. Kewal Ram and Ram Rikh were instructed to remain close to the spot where the complainant was asked to make payment of the money to the accused and hear the talk which was to take place between him and the accused and to observe the payment of the bribe. They were also instructed to give a signal immediately after the payment was made. A direction was also given to the complainant that he should make payment of the bribe within the sight of the witnesses and to convince them by his conversation that the money was changing hands as illegal gratification.

2 The raiding party then went to Anand Parbat where the Sewa Kendra is situated while the witnesses took their seats in Kiran Restaurant nearby. The complainant went to fetch the accused and brought him to the same restaurant. He ordered tea and took a seat opposite to the accused. He told the accused that he had brought the promised amount of Rs 50/- but the accused replied that he would not take the money there. The complainant however made over the currency notes along with his bills to the accused and the latter accepted them. On receiving a signal from the witnesses the DSP entered the restaurant along with two other policemen and disclosed his identity to the accused. He caught hold of the accused by the arm because the accused resisted the search of his person. The DSP then asked the Inspector to search the accused. The notes Exhibits P-1 to P-5 which had been put by the accused in the right pocket of his coat were then recovered from his pocket. The numbers of the currency notes were compared with those recorded previously and were found to tally. One of the notes (Exhibit P-5) got torn during the course of struggle between the accused and the police at the time of search. The prosecution case is fully supported by the evidence of the complainant and the two independent witnesses Kewal Ram (PW 1) and Ram Rikh (PW 5).

3 It is true that both Kewal Ram and Ram Rikh who had been directed by the DSP to hear the talk between the complainant and the accused stated that they could not distinctly hear the conversation between the two as the radio in the restaurant was being played at a very high pitch but they both deposed that they saw with their own eyes the currency notes being given by the complainant to the accused and the same being recovered by the Inspector from the same right pocket of the accused's coat in which he had put them after accepting the same.

4. The defence of the accused was that on 7-1-1966 he and one Hira Singh were at the post office to collect the licence for the radio installed at the Kendra when Madan Singh met him and asked him to take his bills. He asked Madan Singh to hand over the bills to the diarist at the office. After that he and Hira Singh went to Kiran Restaurant for taking lunch. Madan Singh also came there and requested him to accept the bills and hand them over to the diarist. On his insistence he took hold of the bills and put them in the right pocket of his coat. The bills were folded at that time. After four or five minutes a gentleman came and caught hold of his arm. He was accompanied by a Sikh gentleman. On inquiring from him as to who he was he was told that he was a D.S.P. He then told him that he had accepted only bills from Madan Singh but when the bills were unfolded on search 5 currency notes of Rs. 10/- each came out. He pleaded that he told the D.S.P. that Madan Singh had quarrelled with him in the past and had falsely implicated him on account of enmity. In support of his defence, the accused examined Hira Singh (D. W. 2) but on a close examination of his statement the learned Special Judge came to the conclusion that the witness, being a colleague of the accused had come to his rescue and that there were serious discrepancies in his statement which clearly established the falsity of his evidence.

5. The failure of the witnesses to hear the conversation however does not seem to me to be of much consequence as it has not been denied by the accused that the currency notes of the value of Rs 50/- were recovered by the police from his pocket. It is not the case of the accused that the amount was paid to him by the complainant on some other account. The amount can also not be regarded as forming part of the legal remuneration of the accused. The case is therefore fully covered by the presumption arising under Section 4(1) of the Prevention of Corruption Act which reads.—

"Where in any trial of an offence punishable under Sec. 161 or Sec 165 or Sec 165-A of the Indian Penal Code it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said Sec 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

While it is thus true that the presumption under Section 4(1) of the Prevention of Corruption Act is attracted to the case and it stands completely un rebutted there is one other aspect of the case which has necessarily to be considered in view of the defence set up by the accused.

6. It cannot be denied that the presumption under Section 4(1) applies only if it is established that the accused had actually accepted the currency notes. On the other hand, if the prosecution evidence falls short of what is required to prove that fact or if it is found that money had either been planted or foisted on him by means of a deception or a trick then the presumption under Section 4(1) can obviously not be pressed into service for the purpose of establishing his guilt.

7. The contention urged on behalf of the accused is that he was duped into pocketing the relevant currency notes under the cover of bills and that there was as a matter of fact no acceptance of money at all. Support for this argument is sought to be found in the statement of the complainant who admitted that the accused refused to have the notes in the restaurant in the first instance, but he accepted the same when they were handed over to him along with the bills. I think this statement cannot be of any help to the accused at all. Firstly, the two independent witnesses Kewal Ram (P. W. 1) and Ram Rikh (P. W. 5) did not refer to any such refusal on the part of the accused and it was not even put to them in cross-examination that any bills had been passed on to the accused along with the currency notes. Both these witnesses stated in unequivocal terms that what was passed on by the complainant to the accused was currency notes and the same were clearly visible to them.

Assuming for the sake of argument that what the complainant stated was true that too would not take away from the effect of his further statement that he had passed on the currency notes to the accused and that the latter had accepted them with full knowledge of that fact although they were passed on along with the bills. The money was evidently being paid by the complainant to the accused in a public restaurant where several other persons were also present. If the accused therefore told the complainant that he would not accept the notes in the restaurant there was nothing unnatural in his conduct. His initial hesitation must have however been overcome when the complainant put those notes inside the folds of the bills. In doing so however the money must have been taken by the complainant from his pocket and put inside the bills and then passed on by him to the accused within the sight of the witnesses.

8. This circumstance therefore does not in any way militate against the evi-

dence of Hewal Ram and Ram Rikh nor does it detract from the evidence of Madan Singh complainant who did say that the accused accepted the currency notes when they were handed over to him along with the bills

9 There is thus no escape from the conclusion that the passing of the money by the complainant to the accused was not the result of any deception or trick practised on him and that the currency notes were accepted by the accused with full knowledge of the fact that what was being passed on to him was money that was not legally due to him. The presumption under Section 4(1) therefore applies to the case in full force. The guilt of the accused must therefore be held to have been established beyond reasonable doubt.

10 The appeal is accordingly dismissed and the conviction of the accused is upheld but the sentence passed on him is reduced to one year R I and a fine of Rs 200/- under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act. His conviction under Section 161 Indian Penal Code is also upheld but the sentence of imprisonment is reduced to one year R I. In default of payment of fine the accused shall undergo further imprisonment for a period of three months. The two substantive sentences of imprisonment as ordered by the trial Court, shall however run concurrently.

Appeal dismissed

1970 Cr L J 670 (Vol 75, C N 164) =

AIR 1970 DELHI 98 (V 57 C 22)

I D DUA C J

Ashish, Petitioner v D C Tewari Respondent

Criminal Revn. No 571 of 1968 D/- 15-1-1969

(A) Criminal P C (1898), S 488 — Scheme and object — Section serves a social purpose and enables discarded wives and helpless deserted children to secure urgent relief of maintenance through Magistrate's Court — Proceedings are relatively summary and cannot be equated to civil suit for maintenance — Orders passed being tentative are subject to final determination of rights of parties by Civil Court and are also liable to be varied with change of circumstances. (Para 6)

(B) Criminal P C (1898) S 488 — Right of minor child to maintenance — Neglect or refusal to maintain — Can be inferred from conduct — Fact that child is in mother's custody and that mother cannot live with her husband are not

material so far as right of child is concerned

The fact that the minor child is living with his mother is not a sufficiently cogent ground by itself for refusing him relief by way of maintenance and this would be all the more so in the case of a child of 5 years. At this age normally speaking the mother is entitled to have his custody. The child's right and his father's corresponding liability in regard to the maintenance is not broadly speaking dependent on the former living with the latter. Neither statute nor any recognised principle provides that a child of such age living with his real mother would merely for that reason lose right of maintenance from his father. The fact that the father and the mother can not pull on together is hardly material so far as the minor child's rights are concerned. Absence of formal refusal to maintain is no answer under the law and it can be implied or inferred even from conduct because even neglect to maintain is sufficient to justify an order under this section. (Para 6)

(C) Criminal P C (1898) S 488(1) — Amount of maintenance — Has to be fixed after taking into consideration all circumstances of case

The trial Magistrate had awarded a sum of Rs 20/- per month by way of maintenance of his minor son of 5 years of age in the custody of real mother who was living apart and was being paid a monthly sum of Rs 90/- by way of interim maintenance under S 24 Hindu Marriage Act 1955. The father whose monthly income came to Rs 540/- per month had also to maintain his own old mother and younger brother who was studying. On a recommendation of the Sessions Judge for enhancement of the amount to Rs 50/- per month.

Held that taking into consideration all the circumstances of the case including the status and standard of the father the amount of Rs 50/- for maintenance of the minor child could on no account be considered unreasonable or excessive. It is wrong to presume that unless the father can spare some money after maintaining himself his old mother and his brother he has no legal obligation to maintain his own minor son of course in accordance with his status and standard.

Even assuming but without deciding that the amount of interim maintenance allowed under S 24 Hindu Marriage Act was intended to include the needs of the minor child Rs 90/- P.M. awarded under S 24 could by no means be considered to be adequate for both the mother and the child to such an extent as to disentitle the minor son to get an order for reasonable amount under S 488 Cr P C. (Paras 7 & 8)

Smt. Mohini Tewari, for Petitioner;
Respondent in person

ORDER:— Shri D. R. Khanna, Additional Sessions Judge, Delhi, has forwarded this revision to this Court with a recommendation to increase the maintenance allowance to Ashish minor fixed at Rs 20/- p.m. by Shri V. N. Chaturvedi, Sub-Divisional Magistrate, Hauz Qazi, Delhi, payable by his father Shri D. C. Tewari. The learned Additional Sessions Judge has recommended that the amount be increased to Rs 50/- p.m.

2. Shri Tewari was married to Smt Mohini Tewari, mother of Ashish minor and the minor child was born on 26-11-1964, in Delhi. Shri D. C. Tewari is stated to be working as a Librarian in the Malviya Regional Engineering College at Jaipur. According to the averments in the application for maintenance, his monthly income is about Rs 700/- and he has not cared to maintain his minor child. The prayer in the application which is based on total neglect and failure of his father to maintain the minor is for payment of Rs 300/- p.m.

3. The father after stating the story of his marriage with the minor's mother, pleaded in the written statement that his wife and her mother had after the marriage started persuading and coercing him to live with them at their house because the minor's grandmother had no other child except his wife. They also wanted Shri Tewari to break off with his widowed mother and younger brother. To this, he obviously did not agree. When his wife saw no hope of persuading him to agree to her point of view, she left the house in August, 1964 on the pretext of Raksha Bandhan. At that time, she was in the seventh month of her pregnancy and thereafter she did not return to her matrimonial home in spite of repeated efforts to persuade her to come back. Having failed in his efforts, he filed an application for restitution of conjugal rights in October, 1965 which was decided by a Subordinate Judge, Delhi, on 29-4-1967, when his wife made a statement that she was ready to accompany her husband to his house at Jaipur. However, when Shri Tewari went to take his wife, she plainly refused to accompany him. This resulted in another application for restitution of conjugal rights in July, 1967. In those proceedings, Shri Tewari pleads to have been paying Rs 90/- p.m. to his wife and child as maintenance allowance in compliance with the order of the Court. According to his case, he is earning about Rs 540/- p.m. It appears from the order of the learned Magistrate that Shri Tewari also objected to the jurisdiction of the Delhi Courts on the ground that he had neither resided within the jurisdiction of the Delhi Courts nor did he last reside within such jurisdiction

with his minor child or with his wife. After considering the evidence led in the case, the learned Sub-Divisional Magistrate upheld the jurisdiction of the Delhi Courts. On the merits, after considering the arguments addressed on both sides, the learned Sub-Divisional Magistrate observed that Shri Tewari was already paying Rs 90/- p.m. to his wife, who is the mother of the minor-petitioner. So observing the learned Magistrate proceeded.

"There are rulings to this effect that the maintenance does not cover high education and the better standard of living. In awarding the maintenance allowance, we have also to see the other circumstances of the respondent also. It is from the record clear that the respondent is maintaining his mother and brother and running a second house in Delhi. He is already also paying Rs 90/- per month to the petitioner's mother. So looking to these circumstances and agreeing with the arguments of the learned counsel for the petitioner I order the respondent to pay Rs. 20/- (Twenty) per month to the petitioner as maintenance allowance from the date of order."

This order, it may be pointed out, was made on 30-8-1968

4. On revision, the learned Additional Sessions Judge observed that Shri Tewari is employed at Jaipur and his total emoluments come to Rs 540/- Shri Tewari's reply, according to the order of the learned Additional Sessions Judge, shows that he was, to quote from the order, "brought up in rich traditions of a decent family life with a special emphasis on education and living in an enlightened educational atmosphere among the top educationists of the country". Because of this reply by Shri Tewari, the learned Additional Sessions Judge felt that it would not be unreasonable that a child of such a person should be educated in a good school. At that time the minor was studying in Frank Anthony Junior School where the monthly fee payable is Rs 24/-. The sum of Rs 20/- p.m. as maintenance was accordingly considered to be clearly inadequate and it was held proper to increase the amount to Rs 50/- p.m. at least. Adverting to the expenses of Shri Tewari, the learned Additional Sessions Judge observed in his order that according to the order of the Matrimonial Court, out of Shri Tewari's salary of Rs 540/- p.m., Rs 83/- are deducted towards Provident Fund, Income-tax and insurance premium, out of the balance of Rs 457/- he had to pay Rs 90/- to his wife and with the rest to maintain himself, his old mother and younger brother, who is studying. Payment of Rs 50/- p.m. by Shri Tewari towards his child was, in the circumstances, held not to be too much.

5 Before me both the minor's mother as his guardian and his father have appeared in person. Shri Tewari has urged that the learned Additional Sessions Judge has failed to consider all the relevant circumstances of the case. According to him he has not refused to maintain his minor child and has emphasised his assertion that whenever he met his wife and child he paid some amount towards the child's maintenance. He has also argued that his wife is not willing to live with him and to redress this grievance he has instituted another suit against her. He has also prayed that I should go into the entire record to see which way justice lies.

6 It is proper at this stage to reproduce Section 488 Cr. P. C.

488 Order for maintenance of wives and children—(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate a Presidency Magistrate a Sub-Divisional Magistrate or a Magistrate of the first class may upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate thinks fit and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order or if so ordered from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order any such Magistrate may for every breach of the order issue a warrant for levying the amount due in manner hereinbefore provided for levying fines and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made.

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him such Magistrate may consider any grounds of refusal stated by her and may make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing.

If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him.

Provided further that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount

within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery or if without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father as the case may be or when his personal attendance is dispensed with in the presence of his pleader and shall be recorded in the manner prescribed in the case of summons-cases.

Provided that if the Magistrate is satisfied that he is wilfully avoiding service or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is or where he last resided with his wife or as the case may be the mother of the illegitimate child.

This section has been enacted with the object of enabling discarded wives and helpless deserted children to secure the much-needed and urgent relief. It is thus intended to serve a social purpose, the desirability and effectiveness of which cannot be over-emphasised. The fact that the minor child is living with his mother is not a sufficiently cogent ground by itself for refusing him relief by way of maintenance and this would be all the more so in the case of a child of the age of Ashish. At this age normally speaking the mother is entitled to have his custody. The child's right and his father's corresponding liability in regard to the maintenance is not broadly speaking dependent on the former living with the latter. Neither statute nor any recognised principle that I know of provides that a child of the age of Ashish living with his real mother would merely for that reason lose right of maintenance from his father. The fact that the father and the mother cannot pull on together is hardly material so far as the minor child's rights are concerned. Shri Tewari's

submission that he has never refused to maintain his child, ignores that formal refusal to maintain is no answer under the law and that it can be implied or inferred even from conduct. It also ignores the legal position that even neglect to maintain is sufficient to justify an order under this section. And then, neglect or refusal to maintain seems to me to mean neglect or refusal to maintain properly and assuming, without holding, that Shri Tewari has, once in a while, given some money or present for the child, as he argues in this Court, that cannot be successfully pleaded as a complete defence to the child's claim to be adequately and regularly maintained according to the means and status of the father. I must not be understood to equate proceedings under Section 488, Cr. P. C., with a regular civil suit for maintenance because it is obvious from the statutory scheme of Chapter XXXVI of the Code that these provisions are relatively summary, designed to afford urgent relief to the needy, neglected wife and child to a limited extent through the Courts of Magistrate. The somewhat summary method of enforcement of orders under this section also highlights the sense of urgency which inspired the enactment of this statutory provision. Such orders are, it is unnecessary to point out, subject to the final determination of the rights of the parties by Civil Court, and are also tentative liable to be varied with change of circumstances.

7. Shri Tewari's opposition to the recommendation of the learned Additional Sessions Judge on the ground that all the circumstances have not been considered is unacceptable on a proper perusal of the order and the record. The fact that after paying additional sum of Rs 30 p m to the minor child (which brings the total monthly maintenance to him under Section 488, Cr. P. C., to Rs 50 p m) Shri Tewari would be left with only about Rs 315 to support himself, his old mother and his younger brother, who is still studying, is certainly a relevant consideration, but the argument based on this circumstance ignores the vital consideration that Shri Tewari's responsibility towards his own minor son is of no less importance, and this responsibility is expressly enforceable under Section 488 of the Code. It is wrong to presume that unless the father can spare some money after maintaining himself, his old mother and his brother, he has no legal obligation to maintain his own minor son, of course in accordance with his status and standard.

8. The further contention that Shri Tewari is already paying Rs 90 p m to his wife, pursuant to an order under Section 24 of the Hindu Marriage Act and that this amount is meant for his child as well, assuming, without holding, the last asser-

tion to be correct, does not render the recommendation of the learned Additional Sessions Judge to be unacceptable because, in view of Shri Tewari's status as represented by him and keeping in view the present high cost of living, Rs. 50 p m can scarcely be considered to be sufficient and certainly not excessive for the maintenance of the minor child. Section 24 of the Hindu Marriage Act is enacted for the purpose of providing, inter alia, maintenance pendente lite and Rs 90 p m can by no means be considered to be adequate for both the mother and the child to such an extent as to disentitle Ashish in the present proceedings to get an order for reasonable amount and Rs. 50 p m can on no account be held to be unreasonable or excessive. I am not expressing any opinion on the question whether or not the amount allowed under Section 24 was meant for the maintenance of child, and indeed I am doubtful if the amount allowed was intended by the learned Subordinate Judge to include the needs of the minor child.

9. The recommendation of the learned Additional Sessions Judge, on an overall view of all the circumstances deserves to be accepted and I hereby accept it and vary the order of the learned Magistrate as suggested. The amount would of course be payable from the date of the order of the learned Magistrate because no recommendation has been made that it should be made payable from the date of the application.

10. Before concluding, I cannot help observing that this is a typical case of absence of proper adjustment on collective deliberation by the husband and the wife genuinely attempting to solve the difficult problem confronting them and arising out of their affection for their respective parents and other near relations. Mrs Tewari and her mother must realise that after marriage, the wife's home is where the husband lives and the husband's family has to be considered by her to be her family. Her mother must properly grasp this vital fact, taking it for granted that after marriage the girl has to go and live with her husband. She must, therefore, adjust herself to the changed situation after her daughter's marriage. Similarly, Shri Tewari and his mother and brother have to face the new situation created by the marriage. The introduction of his wife in his family means that all the family members must welcome her with affection and they must help her in all respects to strengthen her roots in the family life of her husband. Mrs Tewari has to look upon her mother-in-law as her own mother, who in turn must look upon her daughter-in-law as if she is her daughter. The younger brother is also entitled to be looked upon as the child of the family. This of course does not mean that

if Mrs Tewari's mother is unprovided for and is otherwise needy then Mr Tewari must ignore her requirements. Within reasonable limits Shri Tewari must allow his wife to look after her own mother. All this requires joint co-operative effort with good will on all sides and I have no doubt that educated sensible and practical as all the persons concerned in this controversy are and belonging as they do to respectable families with high Indian traditions they will all realise the futility of avoidable litigation which is calculated to bring disharmony and financial difficulties in the family. The litigation in which the parties seem to be involved at the present point of time can neither solve their problem nor bring peace of mind to them leave alone the financial and other difficulties and most of all the unhealthy environments for their own child to whom they owe both legal and moral obligation to bring up as a good human being. In the civil litigation for restitution of conjugal rights that Court has a judicial duty to try to bring about reconciliation between the two spouses and I hope serious and genuine effort would be made to this end. That Court would no doubt use its good offices in accordance with law to remove misunderstandings, if any between the parties and see that the two spouses forget their past differences and begin to live together if for no other reasons at least for the good of their child and their own aged parents. I trust that their aged parents also are anxious to see their children living happily together in the normal way.

Reference accepted and
maintenance enhanced

1970 CRI L J 674 (Vol 76, C N 155) =

AIR 1970 DELHI 102 (V 57 C 23)

HARDAYAL HARRY, J

Gurbachan Singh Appellant v State
Respondent

Criminal Appeal 33 of 1967 D/- 20-3-1969 from Order of Spl J Delhi D/- 3-2-1967

(A) Prevention of Corruption Act (1947) Section 6 — Purpose of sanction

The intention of the legislature in providing for a sanction in respect of the offences covered by Section 6 of the Prevention of Corruption Act is merely to afford a reasonable protection to the public servants in the discharge of their official functions. It is not the object of the section that a public servant who is guilty of the particular offence mentioned in that section should escape the consequences of his criminal act by raising the technical plea of invalidity of sanction.

HM/AN/D512/69/RSK/W

The section is a safeguard for the innocent and is not a shield for the guilty

(Para 16)

(B) Prevention of Corruption Act (1947) S 6 — Sanctioning authority — Public servant employed by Provincial Government loaned to Central Government — Sanctioning authority would be the loaning government and not borrowing government AIR 1962 SC 1573 Rel on.

(Para 19)

(C) Criminal P C (1898) S 196A — Accused charged under Ss 120-B 161, 162, 163 of Penal Code, 1860 — Sanction obtained in respect of offences under Section 120B and S 161 I P C but not in respect of offences under S 120 B and Ss 162 and 163 — Conviction for offences under Ss 120B and 161 I P C can still be maintained AIR 1967 SC 1590 Rel on (Paras 24, 25, 27)

(D) Prevention of Corruption Act (1947) S 6 — Penal Code (1860) Ss 120-B and 163 — Accused who was not entitled to protection of S 197 Criminal P C charged under Ss 120-B 161 162 and 163 I P C — Sanction obtained under S 6(1)(c) — Held if offences under S 120-B and S 163 I P C were outside scope of S 6 of the Act there could be no bar to prosecution of accused under those sections

(Para 20)

(E) Prevention of Corruption Act (1947) S 5 A — Prosecution for offences under Ss 120-B and 161 I P C — Investigation by officer below rank of officers mentioned in S 5-A — Held it could not be said that because sanction was not necessary under S 197 Cr P C it was also not necessary under S 196-A Cr P C because position in so far as offence under S 161 I P C was concerned was same notwithstanding amendment of Act in 1952 by introduction of S 5-A as offence under that section when so investigated would still remain non-cognizable (Para 23)

(F) Prevention of Corruption Act (1947) S 6 — Officer according sanction not examined as witness — His signature proved but there was no evidence to establish that sanctioning officer had applied his mind to the case — Held presumption was that sanction was duly accorded in absence of evidence to contrary — (Evidence Act (1872) S 114) (Para 29)

Cases Referred Chronological Paras

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|---|----|
| (1967) AIR 1967 SC 1590 (V 54) = | |
| 1967 Cri LJ 1401 Madan Lal v State of Punjab | 26 |
| (1962) AIR 1962 SC 1573 (V 49) = | |
| 1962 (2) Cri LJ 510 R R Chari v State of U P | 19 |
| (1954) AIR 1954 SC 455 (V 41) = | |
| 1954 Cri LJ 1161 Ronald Wood Mathams v State of W B | 22 |
| (1949) AIR 1949 PC 117 (V 36) = | |
| 50 Cri LJ 395 Phanindra Chandra Neogy v King | 22 |

1948) AIR 1948 PC 128 (V 35) =
49 Cri LJ 503, H. H. B. Gill v.
King

22

D D Sharma with Tarlochan Singh
odhi, for Petitioner, R L Mehta, for
Respondent.

JUDGMENT:— The appellant in this case was charged with offences under Sections 161, 162 and 163, I P C for attempting to obtain for himself and other persons illegal gratification from two postal employees from Jullundur and Kapurthala, namely Kewal Krishan and P. L. Sachdeva, for getting their names included in the merit list which was to be prepared as a result of the postal examination held in September 1962 by exercising his influence with some other public servants dealing with the matter. He was also charged with conspiracy with some other unknown person or persons and also for attempting to cheat the afore-mentioned Kewal Krishan and P. L. Sachdeva by trying to obtain Rs 500 from each of them by falsely holding out that he would get their names included in the merit list as aforesaid.

2. Learned Special Judge who tried the case found the appellant guilty of an offence under Section 120-B, I. P. C and Section 161, I. P. C only by his order dated 3rd February, 1967 and sentenced him to two years R. I. and a fine of Rs 500 under each of the two counts. In the event of default in the payment of fine, the appellant was also ordered to undergo further rigorous imprisonment for a period of three months for each default. The substantive sentences of imprisonment were however ordered to run concurrently. The appellant being aggrieved by the order of conviction and sentence has come up in appeal to this Court.

3. The main and if I may say so, the only real contention urged on behalf of the appellant is that his trial was vitiated for want of a valid sanction.

4. In order to appreciate the argument of the learned counsel, it is necessary to refer to the sanction-order (Ex P. 1) and the evidence produced by the prosecution in that behalf. It is common ground that at the time when the appellant is alleged to have committed the offence of which he has been found guilty, he was working as a receptionist in the office of the Directorate General Post and Telegraphs, under the Ministry of Home Affairs at New Delhi. Ordinarily therefore, cognizance of an offence under Section 161 I P C. could be taken against him on a sanction accorded by a competent authority in the Ministry of Home Affairs. In the present case however, the sanction (Ex. P. 1) has been granted by the Controller of Printing and Stationery Punjab (hereafter to be referred to as the Controller) by his order dated 13-8-1964.

5. The argument of Mr. Sharma, learned counsel for the appellant, is that there is no evidence on record to establish any connection between the appellant and the office of the Controller.

6. The question for consideration therefore is as to who is the authority competent to remove the appellant from his office as envisaged in Section 6 (1) (c) of the Prevention of Corruption Act 2 of 1947 (hereafter to be referred to as the Act). The prosecution examined Lekh Raj (PW 1) Head Assistant from the office of the Controller to prove the sanction (Ex P. 1). The witness deposed that the sanction-order bears the signature of Shri K. C. Kurian, Controller of Printing and Stationery Punjab. He also stated that the appellant was employed in the office of the Controller and was on deputation from that office to the Government of India, Ministry of Home Affairs. He further stated that the Controller of Printing and Stationery Punjab, Chandigarh, was the appointing and dismissing authority for the staff working under him. In support of his statement the witness produced four letters (Exs P3 to P6) written by the appellant. Exs P4, P5 and P6 are letters dated 30-1-58, 27-2-58 and 14-3-58 respectively addressed by the appellant to the Accounts Officer, Printing and Stationery Department Punjab, Chandigarh, while Ex P3 is a letter dated 22-1-69 addressed by him to the Controller. All these letters are admitted by the appellant to have been addressed by him to the officers concerned. In Ex P. 6 the appellant stated that he had joined the Rationing Department Delhi with the permission of the Accounts Officer, Printing and Stationery Department, Punjab while his claim in Ex P5 was that he had done so after a no-objection certificate to that effect was issued to him by the Accounts Officer under his office memo No 3660-G dated 12-11-1953. In Ex P4 the appellant stated that he was entitled to payment of arrears on account of difference of leave salary and that he has been informed that his service book along with his bill for arrears had been submitted by the Accounts Officer to the Accountant General Simla for pre-audit. He complained in his letter that the payment of arrears was being unduly delayed and requested that early steps be taken to finalise the case. Ex. P. 3 clarifies the position regarding the appellant's claim for difference of leave salary admissible in his case as he states therein that he had taken leave from 29-6-1954 to 19-11-1954 which had been duly sanctioned by the office of the Controller and necessary payment for the said period was also made to him by a cheque for Rs. 321/15As. According to him the payment of that amount was made to him on the basis of the last pay certificate submitted by the Rationing Department.

ment Delhi but since the decision on fixation of pay of Sub-Inspectors in the Department was then under consideration his case for payment of difference of pay was lingering in the office of the Controller for the last two years

7 The argument of the learned Counsel for the appellant however is that the appellant was merely attempting to put forth a claim for establishing continuity of his service for the entire period but there was no evidence to show that his claim was actually accepted by the Controller. I do not think so. If the appellant had no connection with the office of the Controller there would have been no occasion for payment of leave salary to him for the period 29-6-54 to 19-11-54 by means of a cheque for Rs 321/15 As as stated by the appellant himself in Ex P 3. Likewise there would have been no occasion for him to claim payment on account of difference of pay.

8 The appellant proved through DW 12 Shri B M Sharma retired Under Secretary Ministry of Home Affairs two documents Exs D 12 and D 13 in support of his contention that his appointment under the Ministry of Home Affairs was a direct appointment and had nothing to do with his previous appointment in the office of the Controller. Ex D 12 is dated 20-11-54 while Ex D 13 is dated 30-11-54. Both these documents show that the appellant was appointed as a temporary clerk in the Ministry of Home Affairs with effect from the forenoon of 20-11-54. These documents read with Ex P 3 go to establish continuity of service between the last date of leave viz 19-11-54 mentioned in Exhibit P 3 and the date on which he was appointed in the Ministry of Home Affairs. If the appellant was not an employee in the office of the Controller there was no question of his reverting to that office after the abolition of the rationing system in Delhi and proceeding on leave from 29-6-54 to 19-11-54. Likewise if his appointment under the Ministry of Home Affairs was not in continuation of his previous service there would have been no question of his having been appointed in the said Ministry with effect from the forenoon of 20-11-54 i.e. the day immediately following the expiry of his sanctioned leave in the office of the Controller. Similarly if the appellant had no connection with the office of the Controller there would have been no occasion for his service book being retained in that office as mentioned in Ex P 4.

9 Shri Roshan Lal Khanna (P W 20) is the next witness examined by the prosecution in connection with the appellant's appointment in the office of the Controller. He deposed that before partition of the country he had joined the

office of the Controller of Printing and Stationery Punjab at Lahore as a copy holder on 14-3-1933. Gurbachan Singh appellant who had joined that office in 1936 was then working as a copy holder with him. He further stated that Gurbachan Singh worked in that office for six or seven years. His statement finds corroboration from Ex D 15 which purports to be an extract from the service book of the appellant during the course of his employment in Rationing Department at Delhi. According to that document the appellant worked as a copy holder in the Government Printing Press Punjab Lahore from 3-2-1936 to 7-9-1943. On 8-9-1943 he was promoted as Assistant Joint Store-keeper and then reverted as copy-holder from 12-11-43 to 14-11-43. From 15-11-43 to 29-1-44 he was transferred on deputation to the Ordnance Parachute Factory Lahore where he continued to work till 10-10-46. On 11-10-46 he was declared as a substantive temporary Sub-Inspector in the office of Controller of Rationing Delhi. The office of Controller of Printing and Stationery Punjab at Chandigarh being the corresponding office of the Government Printing and Stationery Punjab Lahore his continuity of service in the Department of Printing and Stationery appears to have been upheld and that is why immediately after rationing was abolished in D.P. the appellant hastened to claim his lien over his post in the office of the Controller. His claim appears to have been recognised because of leave having been sanctioned to him for the period 29-6-54 to 19-11-54 till he proceeded on deputation to a post under the Ministry of Home Affairs with effect from the forenoon of 20-11-54.

10 That the appellant held a permanent post in the office of the Controller is also apparent from the letter dated 6-8-1966 (Ex P 52) addressed by Shri G D Gupta Under Secretary to the Government of India Ministry of Home Affairs to the Superintendent of Police Special Police Establishment annexing a copy of the letter dated 17-6-1966 (Ex P 53) addressed by the Accounts Officer in the office of the Controller to the Under Secretary Ministry of Home Affairs. According to Exhibit P 52 the appellant was transferred as a Lower Division Clerk from the office of the Controller where he held a permanent post. The letter also negatives the appellant's claim that he is a permanent hand of the Home Ministry and states that with effect from 1-6-1966 his services had been replaced at the disposal of the Controller. Ex P 53 recognises that the Controller's office is the parent office of the appellant and goes on to add that before he is reverted to that Department his case of suspension must be finally decided.

because action to retire him from service would be taken after the period of suspension is regularised and entries in the service book are completed right upto the date of his reversion to his parent office

11. This evidence leaves no manner of doubt about the appellant being a permanent employee in the office of the Controller.

12. Mr. Sharma questioned the correctness of the statements made in Exs P 52 and P. 53 and strongly urged that both these documents were fabricated during the course of the trial at the instance of the police after the prosecution had failed to prove the appellant's connection with the office of the Controller. Learned counsel argued that both these documents were not available when Shri G D Gupta (P W 24) was examined on 24-2-1965. It was only re-called on 25-10-1966. Meanwhile he had been persuaded by the police to address the letter Ex P 52 along with annexure P. 53 which had been procured during this interval

13. It is no doubt true that Exhibits P 52 and P. 53 came into existence after the close of the prosecution case and the examination of the last defence-witness Inder Singh (DW 11) But that is hardly any reason to suspect that an officer of the status of Shri G D Gupta would stoop so low as to fabricate false evidence with a view to oblige the police

14. After Shri G D. Gupta was re-called and examined, the prosecution was also allowed to examine Shri Rattan Singh (PW 32) who was working as an Assistant in the office of the Controller and had brought with him the appellant's file as maintained in that office. He deposed that before 20-11-1954 the appellant was working in a "confirmed post" as a Reviser in the office of the Controller and that the file brought by him contained an application dated 22-10-53 made by the appellant seeking permission to get his name registered with the Employment Exchange Delhi in search of a better job. The witness further deposed that necessary permission was accorded to him by the Controller on 12-11-1953.

15. To rebut the additional evidence adduced by the prosecution, the appellant was allowed to examine Shri B M Sharma (DW 12) retired Under Secretary, Ministry of Home Affairs. But there is nothing in the evidence of that witness which in any way disproves the prosecution case. The two last exhibits D. 12 and D 13 which relate to the appellant's appointment as a clerk in the Ministry of Home Affairs which were proved through him have already been referred to by me earlier. If anything, those letters establish the continuity of the appellant's service from one department to another without any break.

17. I therefore agree with the learned Special Judge that the sanction required in this case was that of the Controller.

18. It may be mentioned here that Mr. R L Mehta, learned counsel for the State, showed me during the course of his arguments another sanction which had been obtained from the Ministry of Home Affairs before the cognizance of the offence was taken against the appellant. Mr. Mehta however submitted that the sanction order was not placed on file as the prosecution was satisfied that the authority competent to remove the appellant from service was the Controller. Nevertheless Mr. Mehta prayed that if I came to the conclusion that the appellant was an employee under the Ministry of Home Affairs, permission be granted to the prosecution to lead evidence at this stage for proving the sanction accorded by the Ministry of Home Affairs. As I am satisfied that the sanction required in the present case was that of the Controller, I have not felt the necessity of considering Mr. Mehta's prayer for additional evidence. But I must say that if I had even the least doubt in my mind about the validity of the sanction I would not have hesitated to grant Mr. Mehta's prayer for additional evidence as in my opinion the intention of the legislature in providing for a sanction in respect of the offences covered by Section 6 of the Prevention of Corruption Act is merely to afford a reasonable protection to the public servants in the discharge of their official functions. It is not the object of the section that a public servant who is guilty of the particular offence mentioned in that section should escape the consequences of his criminal act by raising the technical plea of invalidity of sanction. The section is a safeguard for the innocent and is not a shield for the guilty.

19. The next contention of the learned counsel for the appellant was that even if the appellant were held to be a permanent employee in the office of the Controller in view of the fact that he was employed at the time of commission of the offence under the Ministry of Home Affairs the sanction required was that of the Central Government. The answer to the argument is furnished by a decision of the Supreme Court in *R R Chari v State of Uttar Pradesh*, AIR 1962 SC 1573 where it was held that if the services of a public servant permanently employed by a Provincial Government or loaned to the Central Government the authority to remove such public servant from office would not be the borrowing government but the loaning government.

20. Mr. Sharma learned counsel for the appellant, then argued that sanction in this case had been accorded under Section 6(1)(c) of the Prevention of Corruption Act, whereas the appellant had been

prosecuted not only for offences under Sections 161 162 and 163 I P C but also for an offence under Section 120-B for which the authority envisaged under Section 6(1)(c) of the Act would not be the proper authority. The argument appears to me to be wholly misconceived for the simple reason that if offences under Section 120 B and Section 163 I P C are outside the scope of S 6 of the Act there could be no bar to the prosecution of the appellant under those sections. The appellant is admittedly not a public servant who is removable from his office by or with the sanction of the State Government or the Central Government and as such he is not entitled to the protection of Section 197 of the Code of Criminal Procedure. That being so I am not aware of any other provision of law to which one might turn for the purpose of discovering the necessity for sanction.

21 Mr Sharma next argued that offences under sections 161 162 and 163 with which the appellant was charged were non-cognizable offences. Since Section 120-B derives its colour from the offences which are said to be the object of criminal conspiracy no cognizance of offences under Section 120-B I P C could therefore be taken in the absence of sanction under Section 196-A Criminal P C.

22 Mr Mehta learned counsel for the State countered the argument by submitting that under Sec. 5-A of the Prevention of Corruption Act 1947 an offence under Section 161 I P C is cognizable so far as investigation by officers of the rank of Deputy Superintendent of Police and an officer not below the rank of Inspector of Police who is specially authorised by the Inspector General of Police. Special Police Establishment are concerned. There was therefore no necessity for sanction under Section 196-A Criminal P C. Mr Mehta also submitted that even otherwise it was not necessary to obtain sanction under Section 196-A, Criminal P C in the case of an offence under Section 120-B read with Section 161 I P C. In this connection the learned counsel invited my attention to two decisions of the Privy Council *H H B Gill v King* AIR 1948 PC 128 and *Phanindra Chandra Neogy v The King*, AIR 1949 PC 117 where it was held that no sanction under Section 197 Criminal P C. was necessary in the case of an offence under Section 120-B read with Section 161 I P C for the simple reason that a public servant in conspiring or accepting or attempting to accept illegal gratification could not be held to have committed the offence while acting or purporting to act in the discharge of his official duty. Both these cases were approved by the Supreme Court in *Ronald Wood Mathams v State of*

W Bengal AIR 1954 SC 455 where it was held that sanction under Section 197 was not necessary for instituting proceedings against a public servant on charges of conspiracy and bribery.

23 I am afraid I cannot agree with Mr Mehta when he says that because sanction is not required under Section 197 Criminal P C there is also no necessity for sanction under Section 196-A Criminal P C in respect of offences under Sections 120-B and 161 I P C even when the investigation of the case is by an officer below the rank of officers mentioned in Section 5-A referred to above as in my opinion the position is so far as an offence under Section 161, I P C is concerned is still the same notwithstanding the amendment of the Prevention of Corruption Act 1947 in 1957 by the introduction of Section 5-A as an offence under that section when so investigated would still remain non-cognizable.

24 In all the three cases cited by Mr Mehta the ratio decidendi is that a public servant while committing an offence of accepting bribe neither acts nor purports to act in the discharge of his official duty and as such the provisions of Sec 197 are not attracted. In the case of an offence of criminal conspiracy with the object of committing a non-cognizable offence to which Section 196-A Criminal P C is attracted there is no such limitation and the section applies to public servants as well as to others alike. There is therefore substance in the argument of Mr Sharma that cognizance of an offence under Section 120-B and Sections 162 and 163 I P C could not have been taken against the appellant for want of sanction under Section 196-A Criminal Procedure Code.

25 The question however is whether that would vitiate the trial as a whole. I have already stated that the appellant has been convicted of offences under Sections 120-B and 161 I P C. He has not been convicted of offences under Sections 162 and 163 I P C. If therefore for want of sanction under Section 196-A Criminal P C the appellant could not be tried for offences under Section 120-B and Sections 162 and 163 I P C that would not affect his conviction under Sections 120-B and 161 I P C.

26 I am fortified in this view by a decision of the Supreme Court in *Madan Lal v State of Punjab* AIR 1967 SC 1590. The accused in that case was charged with offences under Sections 120-B 409 and 477-A I P C. No sanction had however been obtained for the prosecution of the accused for offences under Section 120-B read with Section 477-A, I P C. It was held that the conspiracy to commit an offence is by itself distinct from the offence

to do which the conspiracy is entered into. Such an offence, if actually committed, would be the subject-matter of separate charge. If that offence does not require sanction though the offence of conspiracy does, and sanction is not obtained, the Court can still proceed with the trial as to the substantive offence as if there was no charge of conspiracy.

27. In the present case, there is a valid sanction for the prosecution of the appellant for offences under Section 120-B and Section 161 I P C. If therefore there is no sanction in respect of offences under Section 120-B and Sections 162 & 163 I P C his conviction for offences under Sections 120-B & 161, I P C can still be maintained.

28. Mr Sharma lastly argued that the officer who accorded the sanction had not been examined as a witness and all that had been done was that a Head Assistant (Lekh Raj PW1) from the office of the Controller had been examined. He had only proved the signature of that Officer but there was no evidence to establish that the officer according the sanction, had applied his mind to the facts of the case.

29. There is no merit in this argument. The sanction order (Ex P1) fully sets out the material facts and the offences disclosed by those facts. There is a presumption about official acts having been regularly performed. In the absence of any evidence to the contrary, it cannot be held that the officer granting the sanction acted mechanically without applying his mind to the material placed before him.

30. The next contention urged by Mr Sharma was that this was a case of mistaken identity. From the very outset, the contention appeared to be so utterly devoid of merit that the learned counsel found it almost impossible to introduce any element of acceptability into his argument. He argued that the person actually responsible for the commission of the offence was another person who bore the same name as the appellant and who was employed in the Examination Branch of the Postal Department but the appellant had been falsely implicated in his place because of his enmity with Mr R. K. Nayar (PW 11). To appreciate this contention it is necessary to set out the broad features of the prosecution story. (After examining evidence his Lordship came to the conclusion that defence set up by appellant was palpably false and was rightly rejected by the learned trial Judge—Ed).

31-40. The result of the above discussion is that the appellant's conviction for offences under Section 120-B and Section 161 I P C is maintained. The sentence on each count however is reduced to one year R. I. The sentence of fine is set aside while the sentence of imprisonment is

ordered to run concurrently. The appellant who is on bail should surrender forthwith.

Order accordingly.

1970 ORI. L. J. 679 (Vol. 76, C. N. 186)

AIR 1970 GUJARAT 97 (V 57 C 15) *

AKBAR S SARELA AND B R SOMPURA, JJ.

Manshanker Prabhashanker Dwivedi and another, Appellants v. The State of Gujarat, Respondent

Criminal Appeals Nos 486 and 555 of 1966, D/- 9-9-1968, from judgment of Special Judge, Surendranagar, in Special Case No. 2 of 1966

(A) Penal Code (1860), Sections 161, 21 (9) and 21 (12) (before amendment in 1964) — Senior Lecturer of a Government College — Appointment by University as an Examiner — Acceptance of bribe for giving more marks to a candidate — Accused not guilty either under Section 161 Penal Code or under Section 5(1)(d) of Prevention of Corruption Act — (Civil Services — Bombay Civil Services Conduct and Discipline Rules, Rule 21 — Lecturer of a Government College — University appointing him as an examiner — Government, held, could have no control over him as an examiner — Fact that disciplinary action could be taken for his conduct as an examiner, no criterion) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Ambiguous provision of law — Interpreted in favour of subject) — (Words and Phrases — 'Otherwise' — 'Officer' — Meaning) — (Prevention of Corruption Act (1947), S. 5 (1) (d)).

The accused, a senior Lecturer in a Government college was appointed by the University as an examiner in Physics practical examination at another college centre. It was not suggested that the appointment was because he was a lecturer in a Government college. It appeared that he, while he was such an examiner, received Rs 500 as bribe for giving more marks to one of the students who sat for the examination.

Held, the accused could not be convicted either under Section 161 of Penal Code or under Section 5 (1) (d) of the Prevention of Corruption Act (Para 36).

The ingredients of Section 161, Penal Code are that the accused should be a public servant and secondly, that the act which is a reward or favour was in the matter of doing any official act or done in the exercise of official functions. Though he was a public servant in the sense that he was in the Government service as a

*(Only portions approved for reporting by the High Court are reported here)

EM/GM/C119/69/TVN/D

senior Lecturer in a Government college the bribe in this case was obtained not in connection with any official act or in connection with exercise of his official functions as such servant but in connection with his work as an Examiner of the University. As such Examiner he was not a public servant because he was appointed as such Examiner independently of his being Government servant in a Government college and was being paid by the University fees for the work done for that University. (Paras 34 and 36)

Neither Cl (9) nor Cl (12) of Section 21 of Penal Code which among other clauses denotes as to who are public officers within the meaning of that expression in the Code could also be of no assistance to the prosecution. For Cl (9) to apply the person should be an officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty and from this portion of the clause read in conjunction with the last portion of it it is evident that such pay remuneration or commission must come from the Government. This is implied in the context and the words immediately preceding supply the context when they refer to Government as the paying authority. Any other interpretation would widen the scope of the last part of the ninth clause to absurd limits. The context supplies another indication also in the words 'every officer which means that the person receiving the fee etc. from the Government must hold some office no matter it is humble or an exalted one' (Para 34)

The context of the clause as it stood before amendment in 1964 as a whole indicates that the connection with the Government is necessary either in respect of the payment of the remuneration or in respect of the performance of a public duty. Together with the rule of construction that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve the benefit of the doubt should be given to the subject and against the legislature which had failed to explain itself. It must be held that Cl (9) as it stood then did not attract the current case. The rule of construction above stated has greater force in respect of laws imposing criminal liability. (Para 34)

Clause (12) of Section 21 of Penal Code could not also be applied for the reason firstly that the accused was not an officer in the service of the University and secondly even if it should be assumed to be a local authority the accused could not be treated as being in its service which implies existence of a relationship of master and servant. There was no such relationship between the accused and the University. (Para 35)

It was argued that since under R 21 of the Bombay Civil Services Conduct and Discipline Rules a Government servant could not without previous permission of the Government engage in any work while on duty or on leave other than his public duties he must be held to be a Government servant even when he was an Examiner. The argument was rejected on the ground that from what was contained in the above Rule it did not follow that even as an Examiner he continued to be under control of the Government. Whether in respect of misconduct in that work the Government could institute a departmental proceeding against him was also held not material. (Para 36)

Under Section 5 (1) (d) of the Prevention of Corruption Act two elements are to be satisfied (i) the public servant should obtain for himself or for any other person any valuable thing or pecuniary advantage and (ii) he must have done so by corrupt or illegal means or by otherwise abusing his position as public servant. In this case though the acceptance of the amount could be said to be corrupt or illegal it was not in abuse of his position as a public servant. At the most it could be an abuse of his position as an examiner of the University. It could not be argued that the requirement as to abuse of position as a public servant is attached to the employment of means indicated by the expression 'otherwise and not means which are corrupt or illegal' so that it was sufficient under Section 5 (1) (d) if the receipt of the valuable thing or pecuniary advantage was corrupt or illegal and that it was not further necessary that it should be in abuse of his position as a public servant. The word otherwise was linked with the words corrupt or illegal and could not go with the words abusing his position. The word otherwise should mean by other like means and it was in that sense that the expression must be interpreted. Further the word by before the word otherwise indicated the manner of obtaining the bribe. So the expression abusing his position must go with both. The above construction would also be consistent with the scheme of the section. (Para 39)

The guiding factor for the construction of a clause of this nature is the language used language being construed according to fair common-sense keeping in mind the object of the legislature. The construction placed must be such as promotes and not defeats the object of the Act. The object of the Act is to prevent and deal with corruption and bribery among public servants. It is with reference to this object that the penal provisions must be construed and if so construed the abuse of position would be the necessary ingredient of the offence the abuse being

either by corrupt or illegal means or by otherwise. Such a construction would thus be within the spirit of the enactment AIR 1962 SC 195 & AIR 1962 SC 1821 & AIR 1957 SC 13 and (1862-63) 12 Bom. HCR 1 & (1901) ILR 28 Cal 344 & AIR 1954 S.C. 364 & AIR 1955 SC 404 & AIR 1963 SC 1116 & AIR 1956 SC 476, Rel on. (Paras 38 & 39)

(B) Prevention of Corruption Act (1947), S. 5 — "In the discharge of his duties" — Interpretation — Ingredients of S. 5(1) (d) — (Words and Phrases).

The ingredients of the particular offence in Cl (d) of S 5(1) of the Act are (1) that he should be a public servant, (2) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant; (3) that he should have thereby obtained a valuable thing or pecuniary advantage, and (4) for himself or for any other person. In order to bring the charge home to an accused person under the above clause it is not necessary that the public servant in question, while misconducting himself should have done so in the discharge of his duty. The expression 'in the discharge of his duties' is mere descriptive of the offence and it is not an ingredient thereof AIR 1962 SC 195, Foll (Para 40)

(C) Penal Code (1860), S. 21(12) — "In the pay of" means "in the employment of" — (Words and Phrases — 'In the pay of').

In the context of the provision under S 21(12) of the Penal Code, the word 'pay' must be construed to mean wages or money given for service. "In the pay of" construed in the light of the context of the whole clause would carry the meaning 'in the employment of'. AIR 1935 Bom 333, Foll (Para 35)

Cases Referred: Chronological Paras

- (1963) AIR 1963 SC 1116 (V 50) =
 (1963) 2 Cri L J. 186, Narayanan v State of Kerala 38, 39, 40
 (1962) AIR 1962 SC 195 (V 49) =
 1962 (1) Cri. L J 203, Dhaneshwar v. Delhi Administration 33, 40
 (1962) AIR 1962 SC 1821 (V 49) =
 1962 (2) Cri L J 805, R K Dalmia v Delhi Administration 34
 (1957) AIR 1957 SC 13 (V 44) =
 1957 Cri. L J 1, G A Monterio v State of Ajmer 54
 (1956) AIR 1956 SC. 476 (V 43) =
 1956 Cri L J 837, Ram Krishna v State of Delhi 39
 (1955) AIR 1955 SC 404 (V 42) =
 1955 SCR 1427, Shivanandan v Punjab National Bank 35
 (1954) AIR 1954 SC 364 (V 41) =
 1955 SCR 393, Lakshminarayan Ram Gopal v. Govt. of Hyderabad
 (1935) AIR 1935 Bom 333 (V 22) =
 37 Bom L R 410, Goolbai v. Pestonji 55

(1901) ILR 28 Cal 344=4 Cal W.N.

- 798, Nazamuddin v. Queen Empress 34
 (1872) 4 P.C 184=26 L T 45, Dyke v Elliot, The Gauntlet 38
 (1862-63) 12 Bom HCR 1, Reg. v. Ramajirao Jivbaji 34

In Criminal Appeal No 486 of 1966:

H M Choksi for G A Pandit, for Appellant; G M Vidyarthi, Asst Govt Pleader, for the State

In Criminal Appeal No 555 of 1966:

H. K Thakore, for Appellant, G M Vidyarthi, Asst Govt Pleader, for the State

SARELA, J.:— The appellant in Criminal Appeal No 486/66, Manshankar Prabhshankar Dwivedi (hereinafter referred to as accused No 1), was at the relevant time a senior Lecturer at the D K V College, Jamnagar, which is a Government College. The appellant in Criminal Appeal No. 555/66, Vallabhdas Gordhandas Thakkar (hereinafter referred to as accused No 2) was a legal practitioner taking Income-tax and Sales-tax cases. He also resided at Jamnagar. In April 1964 the Physics Practical Examination for F.Y.B.Sc equivalent to Inter Science was to be held by the Gujarat University and one of the centres was Surendranagar. The accused No 1 had been appointed as the Examiner for Physics Practical. It is in respect of that examination that he is alleged to have accepted a gratification of Rs 500/- other than legal remuneration for showing favour to one candidate Jayendra Jayantilal by giving him more marks in the said examination. It was alleged by the prosecution that he obtained that sum through accused No 2 on 27-4-1964. Therefore, the charge against accused No 1 was under S 161, Indian Penal Code and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947, and the charge against accused No 2 was under Section 165-A of the Indian Penal Code and under Section 5(2) of the Prevention of Corruption Act, 1947 read with Section 114 of the Indian Penal Code. Both these charges against both the accused have been found proved by the learned Special Judge Surendranagar, who by his judgment and order dated 27-5-1966 convicted them of these offences and sentenced each of them to rigorous imprisonment for two years and a fine of Rs 1000/- in default of payment of which to undergo further rigorous imprisonment for six months. Against those convictions and sentences these appeals have been filed.

(2-30) x x x x x x

31. For these reasons we agree with the learned Special Judge that the prosecution case against the accused in respect of the demand and acceptance of bribe of Rs 500/- for the purpose of giving

ing more marks to Jayendra has been made out

32 It is argued on behalf of the accused that even if the prosecution case as to demand and acceptance of the bribe is held to be established neither Section 161 Indian Penal Code nor Section 5(1) (d) of the Prevention of Corruption Act would be attracted in this case. The argument as regards Section 161 Indian Penal Code is that the offence under that section relates to a public servant who attempts to obtain or obtains a bribe and one of the necessary ingredients of the offence is that he does so as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official function favour or disfavour to any person. Therefore the necessary ingredients are firstly that the person is a public servant and secondly that the act which is a reward or favour was in the matter of doing any official act or done in the exercise of official functions. In this case it was argued accused No 1 was no doubt a public servant in the sense that he was in the Government service as a senior Lecturer in a Government College but the bribe in this case was obtained not in connection with any official act or in connection with exercise of his official functions as such servant but in connection with his work as an Examiner of the Gujarat University. As such Examiner he was not a public servant because he was appointed as such Examiner independently of his being Government servant in a Government College and was being paid by the Gujarat University fees for the work done for that University. It has nothing to do with his being a Government servant. It was conceded that if even as an Examiner he was a public servant then as this bribe was obtained for giving more marks it would be in connection with an official act or in exercise of his official functions but as he cannot be called a public servant in relation to his office as such Examiner the basic requirement of Section 161 Indian Penal Code was lacking in this case. As regards Section 5(1)(d) of the Prevention of Corruption Act the argument is that that provision also concerns an offence committed by a public servant and if accused No 1 as an Examiner of the Gujarat University is not a public servant in relation to acceptance of bribe in this case then clause (d) of Section 5(1) would also not be attracted because although he is generally a public servant being in the service of the Government as a senior Lecturer the necessary ingredient for the offence under clause (d) is that he abuses his position as a public servant. In the present case he has no doubt abused his position as an Examiner but not as a Government servant in which capacity only he is a public servant.

33 The learned Special Judge accepted the submission that as a Government servant the offence would not fall under Section 161 Indian Penal Code as the acceptance of bribe was not in the doing of an official act or in the exercise of his official functions as such servant. But the learned Judge took the view that accused No 1 was even as an Examiner a public servant and for that view he relied on clause Ninth of Section 21 of the Indian Penal Code as it then stood. As regards the argument relating to Section 5(1) (d) of the Prevention of Corruption Act the learned Judge took the view that having regard to Supreme Court decision in *Dhaneshwar v Delhi Administration* AIR 1962 SC 195 it was not necessary that the misconduct which is an offence under clause (d) of Section 5(1) should be committed in the discharge of the public servant's duties and therefore the clause is much wider than Section 161 of the Indian Penal Code and even if the offence did not fall under Section 161 Indian Penal Code it would fall under that clause. He also took the view that if the payment is held to have been obtained by corrupt or illegal means it was not necessary that the accused should abuse his position as a public servant or that he should have obtained the money while acting as a public servant.

34 The learned Assistant Government Pleader relied on the Ninth clause of Section 21 of the Indian Penal Code as it then stood. That clause read as under—

'Every officer whose duty it is as such officer to take receive keep or expend any property on behalf of the Government or to make any survey assessment or contract on behalf of the Government or to execute any revenue process or to investigate or to report on any matter affecting the pecuniary interests of the Government or to make authenticate or keep any document relating to the pecuniary interest of the Government or to prevent the infraction of any law for the protection of the pecuniary interests of the Government and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty'

The words on which reliance was placed are 'and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty'. It was not contended either before the lower Court or before us that as an Examiner accused No 1 was an officer in the service or pay of the Government. The contention was that accused No 1 fell within the four corners of the words 'or remunerated by fees or commission for the performance of any public duty' and it was this contention which found favour with the

lower Court The argument is that examining the question papers is in the nature of a public duty and accused No 1 was remunerated for the performance of that duty by fees by the Gujarat University It was argued by Mr Choksi, the learned advocate for accused No 1, that if the last words of clause Ninth on which reliance is placed are read in the context of the words which immediately precede them or in the context of the Ninth clause as a whole it is obvious that when that part of the clause speaks of being remunerated by fees or commission what is implicit is being so remunerated by Government That argument will have to be accepted for more than one reason The clause does not say remunerated by whom If it does not say so the reason obviously is that this is implied in the context and the words immediately preceding supply the context when they refer to Government as the paying authority. Any other interpretation would widen the scope of the last part of the Ninth clause to absurd limits Discharge of functions relating to education may be treated as a public duty Tendering the sick amongst the poor would also be considered as a public duty If the last words of clause Ninth are read without any qualification, an honorary doctor working in a hospital run by a trust and receiving honorarium would be covered by it and would become a public servant The context supplies another indication also in the words "every officer" The person to be remunerated by fees or commission must be an officer The word 'officer' implies the holding of an office In *R K Dalmia v Delhi Administration*, AIR 1962 SC. 1821 paras 285 and 286, it was urged that an Investigator appointed by Government under Section 33(1) of the Insurance Act, 1938, was a public servant in view of the Ninth clause of Section 21 of the Indian Penal Code The Supreme Court pointed out that the Investigator Annadhanam was not an employee of the Government but was a Chartered Accountant who had been directed by the order of the Central Government to investigate into the affairs of the Insurance Company and to report to the Government on the investigation made by him Of course, he was to get some remuneration for the work he was entrusted with Then with reference to Ninth clause of Section 21, Indian Penal Code, the Supreme Court said—

"According to this clause, every officer in the service or pay of the Government or remunerated by fees or commission for the purpose of any public duty would be a public servant A person who is directed to investigate into the affairs of an Insurance Company under Section 33(1) of the Insurance Act, does not ipso facto become an officer There is no office which

he holds He is not employed in service and therefore this definition would not apply to Annadhanam."

Reference may also be made to the observations of the Supreme Court in *G A Monterio v State of Ajmer*, AIR 1957 SC 13 There also the last words of Ninth clause beginning with the words "and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty" were construed The appellant in that case was a class III servant employed as a metal examiner, also called Chaser, in the Railway Carriage Workshops at Ajmer It was argued that he was not a public servant Their Lordships referred to the dictum of West J in *Reg v Ramajirao Jivbaji*, (1862-63) 12 Bom. HCR 1 where it was stated that "the word 'officer' meant some person employed to exercise to some extent and in certain circumstances a delegated function of Government He was either himself armed with some authority or representative character or his duties were immediately auxiliary to those of some one who was so armed" They also referred to a Calcutta decision in *Nazamuddin v Queen Empress*, (1901) ILR 28 Cal. 344 where it was held that "an officer in the service or pay of Government within the terms of Section 21, Indian Penal Code, is one who is appointed to some office for the performance of some public duty" and their Lordships of the Supreme Court went on to say—

"The true test, therefore, in order to determine whether a person is an officer of the Government is (i) whether he is in the service or pay of the Government and (ii) whether he is entrusted with the performance of any public duty If both these requirements are satisfied it matters not the least what is the nature of his office, whether the duties he is performing are of an exalted character or very humble indeed"

These observations indicate that a person to be an officer must hold some office though it does not matter whether the office is humble or exalted The holding of an office implies the charge of a duty attached to that office Now, the person who is remunerated by fees or commission must be an officer Therefore the use of the word 'officer' read in the context of the immediately preceding words where Government is referred to as the paying authority would indicate that the remuneration contemplated by the concluding words is remuneration by Government It will now be convenient to refer what Mr Choksi rightly calls the legislative interpretation of this part of the clause It appears that in December 1964 this clause and clause twelfth were amended Before referring to these amendments it would be convenient to

refer to clause twelfth as it stood before the amendment. That clause read as under—

'Every officer in the service or pay of a local authority or of a corporation engaged in any trade or industry which is established by a Central Provincial or State Act or of a Government Company as defined in Section 617 of the Companies Act 1956

By the amendments introduced by Act 40/1964 the last words of the Ninth clause namely 'every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty' were taken out of that clause and introduced in the new Twelfth clause which after amendment reads as under—

'Every person—

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government

(b) in the service or pay of a local authority a corporation established by or under a Central Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act 1956 (I of 1956)'

It will be noticed that under clause (a) of the said clause which now corresponds to the last part of the old Ninth clause the expression 'every officer' is changed to 'every person' and the words by the Government' are added after the words 'performance of any public duty'. Mr Choksi argued that this amendment particularly the addition of the words by the Government shows the legislative interpretation of the clause under consideration. There is considerable substance in that submission. At any rate the doubt if any which could rise in the interpretation of the last words of the Ninth clause as it stood before its amendment in December 1964 must be resolved firstly by reference to the context of the clause as a whole and that context indicates that the connection with the Government is necessary either in respect of the payment of the remuneration or in respect of the performance of a public duty and secondly by application of the rule of construction to which reference is made by Maxwell on Interpretation of Statutes at page 263 to which Mr Choksi invited our attention. There it is stated that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is particularly so in respect of laws which impose criminal liability. We are therefore of the view that the last

words of clause Ninth of Section 21 of the Indian Penal Code as it stood before amendment are not attracted in this case.

35 It was however argued alternatively by the learned Assistant Government Pleader that the case would at any rate fall under clause Twelfth as it then stood. Clause Twelfth as it stood before the amendment made in December 1964 has been earlier set out. It covered two categories of persons: (i) an officer in the service or pay of a local authority or (ii) of a corporation engaged in any trade or industry which is established by the Central Provincial or State Act or of a Government Company as defined in Sec. 617 of the Companies Act 1956. It is not the contention of the learned Assistant Government Pleader that accused No. 1 would fall in the second category. His contention is that he would fall under the first category. To fall in that category it must be proved firstly that he is an officer in the service or pay of a local authority. Much argument has been advanced before us whether the Gujarat University is or is not a local authority. It is not necessary to decide that question. We shall assume that it is a local authority. Even so it is difficult to hold that accused No. 1 is an officer in the service or pay of that authority. We have earlier pointed out that to be an officer a person must hold office. But the further question is whether he can be said to be in the service or pay of the Gujarat University which for the present is assumed to be a local authority. The word service means according to Concise Oxford Dictionary being a servant' and according to Chambers 20th Century Dictionary 'condition of being servant working for another'. In Ayar's Law Lexicon the definition is 'Being employed to serve another'. Bearing these meanings in mind it is obvious that the expression in the service of implies a relationship of master and servant. It is obvious that there was no such relationship between accused No. 1 and the Gujarat University. Explaining the difference between a servant a contractor and an agent their Lordships of the Supreme Court in *Lakshminarayan Ram Gopal v. Hyderabad Government* AIR 1954 SC 361 accept as correct the following statement of law in Halsbury's Laws of England—

An agent is to be distinguished on the one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given him in the course of his work and independent contractor on the other hand is entirely independent of any control or interference and merely undertakes to produce a specified result. An agent

though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

The same principles of law are reiterated in slightly different words by the Supreme Court in *Shivnandan v. Punjab National Bank*, AIR 1955 SC 404. Therefore, the important test whether or not there is a relationship of master and servant is the existence of right of controlling the manner in which the other does the work. The mode of payment for service, the time for which the servant is engaged, the nature of those services or the power of dismissal may have some relevance as pointed out by the Bombay High Court in *Goolbai v. Pestonji*, AIR 1935 Bom 333, but the right of control as to the manner in which the other does the work is the conclusive test. On this test it cannot be said that accused No 1 was in the service of the Gujarat University. It is also not possible to say that he was 'in the pay' of that University. The word 'pay' here must be construed in the light of the context and would mean wages or money given for service. 'In the pay of' construed in the light of the context of the whole clause would carry the meaning "in the employment of". If that is so, accused No 1, who received on agreement remuneration for certain agreed work, cannot fall in that category. In our opinion, the Twelfth clause as it stood before amendment of December 1964 was not attracted.

36. If, therefore accused No 1 was not a public servant within the meaning of that expression used in Section 161 of the Indian Penal Code with reference to the work in respect of which he accepted the bribe Section 161 would not be attracted. The learned Assistant Government Pleader did argue as a last resort, so far as this Section is concerned, that with respect to the work of examining and assessing the papers on behalf of the Gujarat University accused No 1 can be said to be doing his official act or discharging his official function as a senior Lecturer in the employ of Government. His contention was that this employment as an Examiner could not have been made except with the permission of the Government and therefore with respect to that work he continues to be subject to Government control and as he continues to be subject to Government control, the work that he does although independent of Government work must be treated as work done in the exercise of his official

functions. It is not possible to accept that submission. His being a Government servant is not the necessary qualification for his being appointed as an Examiner. It is not so alleged. It has also not been alleged that his being a Government servant confers on him the advantage of his being appointed as an Examiner. Even if that was alleged, that would not make any difference. It is not even alleged that to be an Examiner accused No 1 should have been a teacher in some institution; though even if that was the necessary qualification it would not make much difference. It is true that under Rule 21 of the Bombay Civil Services Conduct and Discipline Rules to which the learned Assistant Government Pleader invited our attention a Government servant was not without the previous permission of the Government to engage in any work while on duty or on leave other than his public duties. It may, therefore, be assumed that while accepting the work as an Examiner under the Gujarat University the Government had given to accused No 1 the necessary permission as contemplated by Rule 21. But it does not follow that therefore in respect of that work accused No 1 continued to be under the control of the Government. Whether in respect of misconduct in that work the Government could institute a departmental proceeding against him is not a matter for consideration here. Assuming that such a departmental proceeding could be instituted, the scope of the departmental inquiry being very wide, it does not follow that therefore the act falls within the four corners of Section 161 of the Indian Penal Code, that is to say, it is in the nature of an official act or has reference to the exercise of official functions. That argument must, therefore, be rejected.

37. That takes us to the question of construction of clause (d) of Section 5(1) of Prevention of Corruption Act. That clause reads as under.—

"A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

... ..
(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

This provision was amended by Act No 40/64 by omitting the words 'in the discharge of his duty' but the amendment does not make any difference on the question of interpretation of clause (d) having regard to the Supreme Court ruling to which reference will be made presently. The clause lays down two ingredients: (i) the public servant obtains for himself or for any other person any valuable thing or pecuniary advantage and (ii)

he does so by corrupt or illegal means or by otherwise abusing his position as public servant. The first ingredient above mentioned is satisfied in this case. The argument on behalf of accused No 1 is that the second ingredient is not satisfied. It is conceded that if the prosecution case is held proved the means employed by the accused No 1 can be said to be corrupt or illegal but it is argued that this is not enough and it is necessary that there must be an abuse of his position as a public servant and here no such abuse was involved as accused No 1 was at the most abusing his position as an examiner but not as a public servant. The learned Assistant Government Pleader urges that the requirement as to abuse of position as a public servant is attached to the employment of means indicated by the expression otherwise and not means which are corrupt or illegal. If the means are corrupt or illegal says the learned Assistant Government Pleader no abuse of position as a public servant is necessary. In the alternative he argues that even if in respect of employment of corrupt and illegal means the abuse of position as a public servant is necessary there has been such abuse in this case.

38 This calls for construction of the first part of the said clause (d) namely the part covered by the words by corrupt or illegal means or by otherwise abusing his position as public servant. Before construing this part it would be worthwhile to set out the broad principles of construction in such cases. The principles are set out in a passage in the decision of the Judicial Committee in *Dyke v Elliott* The Gauntlet (1872 4 PC 184) quoted by the Supreme Court in *M Narayanan v State of Kerala* AIR 1963 SC 1116. That passage reads as under—

No doubt all penal Statutes are to be construed strictly, that is to say the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that there has been a *casus omnisus* that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand the person charged has a right to say that the thing charged although within the words is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair commonsense meaning of the language used and the Court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. Earlier the Supreme Court

refers to the object of the statute under the Prevention of Corruption Act and the provisions it makes for carrying out that object and goes on to observe

"As it is a socially useful measure conceived in public interest it should be liberally construed so as to bring about the desired object i.e. to prevent corruption among public servants and to prevent harassment of the honest among them."

Therefore the guiding factor for the construction of a clause of this nature is the language used language being construed according to fair commonsense keeping in mind the object of the legislature. The construction placed must be such as promotes and not defeats the object of the Act.

39 With these principles in mind we may now have a look at clause (d). It is obvious that the word 'otherwise' is linked with the words 'corrupt or illegal'. In *Aiyer's Law Lexicon* one of the meanings given to the word 'otherwise' is by other like means and it is in that sense that the expression has been interpreted by the Supreme Court in *M Narayanan's case* AIR 1963 SC 1116 (supra) where their Lordships said

'The word otherwise has wide connotation and if no limitation is placed on it the words 'corrupt', 'illegal' and 'otherwise' mentioned in the clause become surplusage for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words alongwith which it appears in the clause that is to say something savouring of dishonest act on his part.

Now bearing this in mind we have to consider whether the words abusing his position as a public servant go only with the words by otherwise or go also with the words corrupt or illegal means. It will be noticed that the second part of the clause namely the one which relates to the obtaining of the valuable thing or pecuniary advantage relates to the object of the public servant namely the obtaining of a bribe. The first part concerns the manner of achieving that object. The manner is the use of means and use of position. As to the use of means the clause expressly mentions corrupt or illegal. But the legislature does not want to limit itself to these means only and so goes on to use the word 'otherwise'. If the meaning to be given to the word 'otherwise' is as earlier stated the words by corrupt or illegal means or by otherwise form a single clause and do not form two clauses. If that is so the abuse of position as public servant that is referred to is the abuse by corrupt or illegal means or by otherwise. In support of the construction which the learned A

Assistant Government Pleader seeks to put on the clause he relies on the use of the word 'by' before the word 'otherwise'. He says that thereby the legislature expressed the intention to separate two positions. According to him 'by otherwise' would be another manner and it is only in respect of this second manner that it is necessary to prove the abuse of position as a public servant. While the argument is not wholly divorced from the language of the clause the use of the preposition 'by' on which reliance is placed for deriving support to this argument is explainable even on the construction earlier mentioned. The preposition 'by' obviously indicates the manner of obtaining the bribe. If that is so the expression 'abusing his position' must go with both. This construction is consistent with the scheme of the section. As pointed out by the Supreme Court in *Ram Krishna v State of Delhi*, AIR 1956 SC 476, bribery as defined in Section 161, Indian Penal Code, if it is habitual, falls within clause (a) of Section 5(1). Bribery of the kind specified in Section 165, if it is habitual, is comprised in clause (b). Clause (c) contemplates criminal breach of trust by a public servant and the wording takes us to Section 405 of the Code. Then follows clause (d). Clause (e) concerns the position of pecuniary resources or property disproportionate to his known sources of income for which the public servant cannot satisfactorily account. In clauses (a), (b) and (c) the abuse of position by a public servant is clearly implied. Clause (e) also carries the same implication. It would be reasonable to put on clause (d) a construction which is consistent with the other clauses of the sub-section. Such a construction would also keep the offence within the limitation and within the object of the Act. The object is to prevent and deal with corruption and bribery amongst public servants. It is with reference to this object that the penal provisions must be construed and if so construed the abuse of position would be the necessary ingredient of the offence; the abuse being either by corrupt or illegal means or by otherwise. Such a construction would thus be within the spirit of the enactment.

40. It would not be convenient to refer to some observations made in two Supreme Court decisions to which our attention has been invited. In AIR 1962 S C 195 (Supra) in which the expression 'in the discharge of his duties' used in Section 5 was interpreted as being mere descriptive of the offence and not forming an ingredient of the offence, their Lordships set out the ingredients of the offence under Clause (d) in these words:-

"The ingredients of the particular offence in Clause (d) of Section 5(1) of the Act are: (1) that he should be a public

servant, (2) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant, (3) that he should have thereby obtained a valuable thing or pecuniary advantage, and (4) for himself or for any other person. In order to bring the charge home to an accused person under Clause (d) aforesaid of the section it is not necessary that the public servant in question, while misconducting himself should have done so in the discharge of his duty".

This is no doubt not a direct authority on the question as to whether the expression 'abusing his position as public servant' covers the whole of the first part of Cl. (d) but it would appear that that was what was assumed by their Lordships of the Supreme Court for earlier in that very para they stated that:

"The legislature advisedly widened the scope of the crime by giving a very wide definition in Section 5 with a view to punish those who, holding public office and taking advantage of their official position, obtain any valuable thing or pecuniary advantage". The decision which is more to the point, however, is the one in AIR 1963 S. C 1116 (supra). There the Supreme Court was concerned with the meaning and ambit of the word 'otherwise' used in the Clause. They said:-

"Let us look at the clause 'by otherwise abusing the position of a public servant', for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers acts done 'otherwise' than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage."

This is, therefore, the gist of the offence. If that is so it is not possible to divorce the words 'by corrupt or illegal means' from the requirement of abusing the position as a public servant. Later on their Lordships say:

"On a plain reading of the express words used in the clause, we have no doubt that every benefit obtained by a public servant for himself, or for any other person by abusing his position as a public servant falls within the mischief of the said clause." These observations support the conclusion we have reached.

41. The learned Assistant Government Pleader argues that even if that is the true construction of clause (d) the prosecution has proved that there has been an abuse of position as a public servant on the part of accused No. 1. The argument is similar to the one advanced in respect of Section 161 of the Indian Penal Code. The argument is this. The accus-

ed No 1 did not cease to be a Government servant while he was working as an Examiner. In fact he could not have worked as Examiner but for the permission given to him as a public servant and therefore there was some connection however indirect between his office as a public servant and his work as Examiner. His abuse of his position as Examiner would be an abuse of the permission given to him by the Government as Examiner that is to say it is argued it would amount to an abuse of permitted use of his office and if that is so he must be said to have abused his position as a public servant. We consider the argument too farfetched. We have dealt with it earlier and do not think it necessary to add to what we have stated.

42 For these reasons although the prosecution case against the accused has been proved on merits it is not possible to bring the misconduct of either of the accused under any of the offences with which they are charged. They are accordingly entitled to an acquittal.

43 The appeals are therefore allowed. The convictions of and sentences on the appellants are set aside and the appellants are acquitted. Fine if paid to be refunded.

Appeals allowed

1970 CRI L J 688 (Vol 78, C N 167) ==

AIR 1970 KERALA 98 (V 57 C 20)

P T RAMAN NAYAR AG C J

AND V P GOPALAN

NAMBIYAR J

Sanku Sreedharan Kottukallil Veetil Konathadi Kara Accused Appellant v State of Kerala Complainant Respondent

Criminal Appeal No 326 of 1968 and Criminal Revn No 12 of 1968 D/ 3-4-1969

(A) Penal Code (1860) Sections 307 40 88 — Offence under Section 307 — Intention and knowledge required — Mental element described in any of the four Clauses of Section 300 I P C is sufficient — Maxim that every man is presumed to intend the natural and probable consequences of his act discussed — 1967 Ker LT 223 & 1967 Ker LT 689 & 1968 Ker IT 929 Overruled

The offence under Section 307 is complete although the harmful consequences of death do not ensue indeed even if no harm ensues. But the words 'if he by that act caused death' used in the section necessarily imply that the act, namely the bare physical act must be capable of causing death. An act in-

transcantly incapable of causing death like witchcraft or the pulling of the trigger of an unloaded gun cannot constitute the offence whatever may be the actors belief and intention. The mental element or mens rea required is the intention or knowledge necessary for the offence of murder. The mental element described in any of the four clauses of Section 300 is sufficient. It is not necessary that the act should have been done with the specific intention of causing death. 1967 Ker LT 223 and 1967 Ker LT 689 & 1968 Ker LT 929 Overruled. Case law discussed. (Paras 10 14 23)

The word intention is capable of different shades of meaning. In the Penal Code it is used in relation to the consequences of an act the effect caused thereby not in relation to the act itself — the voluntariness required to constitute an act is implied by that very word. Thus in the case of murder the intention required is (omitting clause secondly of Section 300 which rarely comes into play) the intention of causing death or the intention of causing bodily injury sufficient in the ordinary course of nature to cause more or less the malice aforethought of the English law. The Code uses the word 'intention' as is clear from the illustrations to Ss 88 89 and 92 in the sense that something is intentionally done deliberately or purposely in other words is a willed though not necessarily a desired result or a result which is the purpose of the deed. (Para 16)

An inference drawn from the character and circumstances of the act is sufficient proof of intention. Intention and knowledge are a man's state of mind direct evidence thereof except through his own confession cannot be had and apart from a confession they can be proved only by circumstantial evidence. In other words they are matters for inference from all the circumstances of the case such as the motive the preparations made the declarations of the offender and in the case of homicide the weapon used the persistence of the assault and the nature of the injuries actually inflicted as also their location. In the case of what are generally described as unpremeditated offences or as offences committed on the spur of the moment intention may be contemporaneous with the physical act at best of just an instant before and is generally to be gathered from the nature and consequences of the act and the attendant circumstances. It is here that the much criticised maxim that every man is presumed to intend the natural and probable consequences of his act comes into play. Perhaps, in Indian Law the objective test of the maxim would cover every degree of mens rea from

negligence to intention, depending on the degree of probability of the consequences.

(Paras 15, 20)

The natural and probable consequences of a man's act is only one of the factors from which his intention as to the result may be gathered. It is no doubt a very important factor and might sometimes be the only available factor from which the inference of intention is to be drawn. Still, there is no "must" about it, only "may" and the court is not bound in law to infer that a man intended the result of his actions by reason only of its being a natural and probable consequence of those actions. The intention is to be gathered from all the circumstances appearing in the evidence. 1961 A. C. 290 Rel. on.

(Para 22)

Where the assault by accused on an unarmed person was not merely without lawful excuse but was unprovoked and the accused used the knife, a deadly weapon, on a vital part of the victim with such force as to pierce the abdominal wall and cut and bring out the intestines, and there was no case of the accused that the stab fell elsewhere than where he directed it;

Held having regard to all the circumstances that there could be no doubt that the accused must have intended to cause death, or at any rate, to cause such bodily injury sufficient in the ordinary course of nature to cause death. The offence committed by him was one under Section 307.

(Paras 25, 27)

(B) Criminal P. C. (1898), Section 439 (1) and (4) — Accused charged under Section 307, I. P. C. but convicted under Section 326 — No appeal against acquittal under Section 307 — High Court in revision cannot convert acquittal into a conviction but may enhance sentence in respect of offence under Section 326 — Having regard to all circumstances of case and nature of injury inflicted by accused sentence of 18 months enhanced to five years.

(Paras 36, 37)

Cases Referred: Chronological Paras

- (1968) 1968 Ker LT 929 = ILR
 (1968) 1 Ker 681, Krishnan v. Abdulla 1, 31, 40
 (1967) 1967 Ker LT 223 = 1967 Ker LR 219, Moidu v. State of Kerala 1, 29, 35
 (1967) 1967 Ker LT 689, Isaac v. State of Kerala 1, 30, 35
 (1962) 1962-3 All ER 285 = 1962-2 QB 621, R v Grimwood 41
 (1961) 1961 AC 290 = 1960-3 WLR 546, Director of Public Prosecutions v. Smith 18, 21, 22, 41
 (1955) 1955 AC 402 = 1954-3 WLR 762, Lang v Lang 16, 22
 (1951) 35 Cri App 141 = 95 SJ 745, R. v. Whybrow 41
 1970 Cri. L. J. 44.

- (1950) 66 TLR 735 = 1950 WN 218, Hosegood v Hosegood 16, 22
 (1947) 1947 KB 997 = 1947-1 All ER 813, Rex v. Steane 16
 (1932) AIR 1932 Bom 279 (V 19) = 33 Cri LJ 613, Wasudeo v. Emperor 11, 34
 (1918) AIR 1918 Mad 136 (2) (V 5) = ILR 41 Mad 156 = 19 Cri LJ 162 (FB), Vullappa v. Bheema Row 18
 (1891) 1891-2 Ch D 441, Angus v. Callifford 19
 (1867) 4 Bom HCR Cri 17, Reg v. Cassidy 10, 12, 34
 (1838) 8 C & P. 541 = 2 Mood CC 53, R. v. Cruse 31, 40, 41
 S. Easwara Iyer and Thomas John, for Appellant, State Prosecutor, for Respondent.

RAMAN NAYAR AG. C. J.: The accused person in this case, Sreedharan aged 42 was tried by the Additional Assistant Sessions Judge, Kottayam, on charges under Sections 307 and 324 of the Indian Penal Code. The charge under S. 307 related to an assault with a knife on one Balakrishnan, who has been examined as Pw. 1 at the trial, and that under section 324 to an assault on Balakrishnan's brother, Karunakaran, who has been examined as Pw. 2. The learned Judge came to the conclusion that the mens rea necessary for an offence under S. 307 had not been made out — he seems to have thought that a clear intention to cause death was necessary and in doing so, he relied on two decisions by a Single Judge of this court in Moidu v. State of Kerala, 1967 Ker LT 223 and Isaac v. State of Kerala, 1967 Ker LT 689, a third more or less on the same lines Krishnan v. Abdulla, 1968 Ker LT 929 has been brought to our notice in the course of the hearing. He found the accused guilty under section 326 I. P. C. for the assault on Pw. 1 — even so he had to rely on Pw. 1's detention in hospital for over 20 days for holding that the injury, a disembowelling incised wound, was grievous — and under section 324 I. P. C. for the assault on Pw. 2; and he sentenced the accused to suffer rigorous imprisonment for 18 months for the former offence and for four months for the latter, the sentences to run concurrently.

In Calendar revision it was observed that the offence seemed to be really one under section 307 I. P. C. but obviously in view of the prohibition in sub-section (4) of Sec 439 of the Criminal Procedure Code against the conversion of an acquittal into a conviction and the fact that it was possible to impose an adequate sentence for the offence without altering the finding of the Court below, notice was issued to the accused only to show cause against enhancement of his sentence, however, at the hearing the

propriety of the acquittal of the charge under section 307 I P C and of the conviction actually recorded has been fully canvassed by both sides. The revision case came on for hearing before a Single Judge of this Court. He was of the view that the decisions relied upon by the court below required reconsideration and in that view he referred the case to a Division Bench. That is how the case is now before us. Meanwhile the accused had appealed against his conviction to the Court of Session. That appeal has been withdrawn to this Court and has been heard along with the revision case.

2 The case is really a very simple case. At about 7 P M on the 23rd March 1967 when the accused was in the tea-shop of one Kochu Mohamed with his newly married daughter and son-in-law a verbal altercation arose between the accused on the one side and Pw 2 who was also in the shop on the other. According to the accused but not according to Pw 2, the latter used very abusive language. However that might be the accused was so incensed that he beat Pw 2. The shop-keeper, Kochu Mohammed and Pws 3 and 4 who were also there intervened and sent the accused and Pw 2 away in different directions. Pw 2 had not gone far when he met his brother Pw 1 and complained to him of what the accused had done. Pw 1 tried to pacify Pw 2 saying that they could question the accused about it the next day. The accused apparently overheard this and he rushed up to Pws 1 and 2 pushing aside Pw 4 who tried to stop him, shouting that there was no need to put off the matter. Then ignoring Pw 1's expostulations the accused drew the knife M O 1 (a sharp pointed knife with a blade five inches from his waist and stabbed Pws 1 and 2 with it one after the other. The stab on Pw 1 was in the abdomen, and as the medical evidence shows it penetrated the abdominal cavity cut the small intestines in as many as four places and brought out the small intestine and mesentery an injury doubtless sufficient to cause death in the ordinary course of nature but from which Pw 1 luckily recovered after 25 days in hospital. The stab on Pw 2 was in the back and it caused a punctured wound 1" x 1/3 x 1 1/2 deep with a skin deep tail about 3 long according to the medical evidence a simple injury. Then the accused ran away while Pws 1 and 2 fell down on the road.

3 Apart from the victims Pws 1 and 2 two other persons Pws 4 and 5 who were near-by saw the stabbing while another person Pw 3 saw the accused rushing towards Pws 1 and 2 and after the stabbing was over running away from the scene.

4 Pws 1 and 2 were removed to the Moovattupuzha hospital where at 2.30

A M on the 24th Pw 1 made the statement Ex P1 to the Head Constable Pw 7 on which the case was registered and investigated. The accused appeared at the police station at 9.15 P M on 28-3-1967 with the knife M O 1. He was arrested by the Head Constable Pw 8 and the knife was seized from him.

5 When questioned at the preliminary enquiry the accused was content with a bare denial. But at the trial he put forward a case of private defence. After the incident in Kochu Mohammed's tea shop where he had beaten Pw 2 for insulting him in the presence of his daughter and son-in-law by using abusive language he was proceeding to another shop near by when Pws 1 and 2 suddenly came there and assaulted him. To save his life he drew his knife and stabbed them.

6 The accused examined no witness in his defence.

7 On the evidence and on the very statement of the accused there can be no doubt that the accused voluntarily stabbed Pws 1 and 2 inflicting injuries on them. The belated plea of private defence put forward by him is obviously an after thought and there is nothing whatsoever in the evidence that gives the least support to that plea. The accused himself suffered no injury—not that an actual injury is necessary to give rise to the right of private defence reasonable apprehension is enough and he said nothing whatsoever regarding the nature of the alleged assault on him by Pws 1 and 2. (vernacular omitted) is the word used by him but what Pws 1 and 2 actually did he did not choose to say. The prosecution evidence which there is no reason whatsoever to discredit clearly shows that there was no such assault on the accused and that the assault by the accused on Pws 1 and 2 was not merely without lawful excuse but was unprovoked such provocation as the accused had being a thing of the past in any event, not something that could be described as grave and sudden.

8 The question then is what is the offence committed by the accused? Is it only the voluntary causing of hurt or does it amount to attempt to murder?

9 Generally speaking an actor who is a person an offence consists of three elements or ingredients. First the act using the word 'act' as we think that word is used in the Indian Penal Code as restricted to the bare physical act, namely the muscular change and what might be called the concomitant circumstances such as for example the instrument employed and as including no part of its consequences not even the target of the act or as Kocourek * puts it (in

*See Paton's Jurisprudence Third Edition, Foot-note 1 at page 275,

relation to tort) as denoting the external manifestation of the actor's will and as not including any of its result not even the most direct, immediate and intended; secondly, the mens rea or the mental element accompanying the act; and, thirdly, the harmful social consequences of the act which is why the law makes it culpable. The definitions in the Indian Penal Code take note of these elements although in some, the first and the third element together constituting what is generally understood by the terms "actus reus" in English law, are combined in one expression. This analysis of an offence into its three component elements is well exemplified by the definition of, "culpable homicide" in Section 299.

"299 Culpable homicide:— Whoever, causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide".

Here the word, "whoever" supplies the act or; the word, "act" denotes the bare physical act (including such concomitant circumstances as the means employed) done by him; the mental element required is the intention of causing death or bodily injury likely to cause death, or knowledge that the act is likely to cause death, while the injurious social consequences which the law seeks to punish is the resultant death. In some cases, however, of which abetment and attempt are instances, the act is made punishable even if the injurious consequences do not follow provided the necessary mental element is present; in other words, the third of the three elements is dispensed with.

10. This is how the offence of attempt to murder is defined and made punishable by section 307.

"307. Attempt to murder — Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act, caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is hereinbefore mentioned.

Attempts by life convicts — When any person offending under this section is under sentence of imprisonment for life he may, if hurt is caused, be punished with death".

Here the offence is complete although the harmful consequence of death does not ensue, indeed even if no harm ensues. But, it seems to us clear that the words,

"if he by that act caused death" necessarily imply that the act must be capable of causing death. An act intrinsically incapable of causing death like witchcraft or the pulling of the trigger of an unloaded gun cannot constitute the offence, whatever may be the actor's belief and intention. This is how Couch C J put this aspect of the matter in *Reg v. Cassidy* (1867) 4 Bom HCR Cr 17 at p 21.

"The first two heads are framed under section 307. The words of that section are — "Whoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death he would be guilty of murder, shall be punished. Now it appears to me, looking at the terms of this section, as well as at the illustrations to it, that it is necessary, in order to constitute an offence under it, that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things, and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section".

11. This decision was criticised by Beaumont C J in *Wasudeo v Emperor*, AIR 1932 Bom 279 but his Lordship's conclusion expressed in the following words seems to us much the same.

"But if you have an act done with a sufficiently guilty intention and knowledge and in circumstances which do not from their nature afford a defence to a charge of murder, and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accused's control which prevented that result, then it seems to me that the case falls within Section 307".

12. It seems to us clear that the act, namely, the bare physical act, must be an act capable of causing death, at any rate, not one intrinsically incapable of causing death. This, as we have already observed, would rule out such acts as the firing of an uncapped gun as in *Cassidy's Case*, (1867) 4 Bom HCR Cr 17 or of a gun loaded with a blank cartridge even though the actor's intention is to kill and his belief is that the gun is duly loaded. At the same time it would take in instances like those mentioned in the illustrations to section 511 where the failure of the injurious consequences is not due to any inherent defect in the offender's act but due to the absence of something which is in no sense part of that act. And if it would rope in also the case of a man who, intending to kill his enemy fires at what he thinks is his enemy but happens to be only an animal, that, in our view, is not a consequ-

ence to be regretted any more than the case of a failure of the intended result by reason of the actor being a bad shot. In both cases the act namely the bare physical act of discharging a loaded gun no matter where is capable of causing death of course it need not be of the person intended to be killed and the matter is well past the stage of mere thought or preparation the intention having unequivocally manifested itself in an external act beyond the actor's recall although in a practical sense and what the courts administer is practical law it might be possible to say with Rowlatt J that in the former case the man is not on the job at all though he thinks he is, he would be very much on the job if though unknown to him, there was some other person present near enough to be hit while in the latter he is on the job. For unlike as in the latter case or in the case of a man who attempts to pick an empty pocket, it would in practice be difficult to establish the necessary mens rea and therefore well nigh impossible to secure a conviction.

But in the circumstances of the present case there can be no question of the accused's offence falling within section 511 if it does not fall within section 307 there being no question of impossibility whether absolute or relative indeed the learned Public Prosecutor has expressly stated that he stands or falls by Section 307 and is not inviting recourse to Section 511. Therefore we are not called upon to decide whether Section 307 only prescribes a special punishment for an offence under Section 511 in relation to the offence of murder as Sections 121 and 393 for example do in relating to the offence of waging war against the Government and the offence of robbery (in which case it might be said that it need not have gone to the trouble of specially defining the offence of attempt to murder) or whether as held in Cassidy's case (1867) 4 Bom HCR Cri 17 it postulates a higher degree of attempt than Section 511 does so that there can be an attempt to murder which does not come within section 307 but nevertheless comes within section 511 not being excluded therefrom by the words where no express provision is made by this Code for the punishment of such attempt.

13 So much for the physical act necessary for an offence under S 307. What else is necessary is indicated by the words with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder. The words such circumstances like the same words in section 303 would seem to refer not so much to circumstances pointing to the possibility of death as to the circum-

stances which would attract any of exceptions to section 300 perhaps also the general exceptions in Chapter IV although section 6 seems to be a sufficient safeguard so far as the latter are concerned.

14 The mental element or mens rea required is the intention or knowledge necessary for the offence of murder for which we have to go to section 300.

300 Murder—Except in the case hereinafter excepted culpable homicide is murder if the act by which the death is caused is done with the intention of causing death or—

Secondly—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused or—

Thirdly—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or—

Fourthly—If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as afore said.

15 Intention and knowledge are a man's state of mind direct evidence thereof except through his own confession cannot be had and apart from a confession they can be proved only by circumstantial evidence. In other words they are matters for inference from all the circumstances of the case such as the motive the preparations made the declarations of the offender and in the case of homicide the weapon used the persistence of the assault and the nature of the injuries actually inflicted as also their location. In the case of what are generally described as unpremeditated offences or as offences committed on the spur of the moment intention may be contemporaneous with the physical act at best of just an instant before and is generally to be gathered from the nature and consequences of the act and the attendant circumstances. It is here that the much criticised maxim that every man is presumed to intend the natural and probable consequences of his act comes into play.

16 Like most words the word 'intention' is capable of different shades of meaning. In the Indian Penal Code it is used in relation to the consequences of an act the effect caused thereby not in relation to the act itself—the voluntariness required to constitute an act is implied by that very word. Thus,

in the case of murder, the intention required is (omitting clause secondly of Section 300 which rarely comes into play) the intention of causing death or the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, more or less the malice aforethought of the English law, the former being generally described as specific intent or malice and the latter as implied malice or some times as constructive malice, though the use of the latter term seems open to criticism. It seems to us clear from the illustrations to Sections 88, 89 and 92, that the Code uses the word "intention", in the sense that something is intentionally done if it is done deliberately or purposely, in other words, is a willed though not necessarily a desired result or a result which is the purpose of the deed. The surgeon of the illustrations certainly does not desire the harm that may be caused, nor is that his purpose. Nevertheless, the provisions of the sections show that he could have intended the harm, and is saved from being a criminal only by those provisions. Likewise a man who shoots another in the heart and kills him in self-defence might not desire, on the contrary might very much dislike, causing the latter's death. His purpose is not to cause death but to save himself. Yet his case falls squarely within the first clause of Section 300 — he has undoubtedly caused death by doing an act with the intention of causing death—and is saved from being a murderer only by Section 100.

Lang v Lang 1955 AC 402 rather than Rex v. Steane 1947 KB 997 at p 1004 or Hosegood v Hosegood, (1950) 66 TLR 735 illustrates the sense in which the word, intention is used in Section 300 of the Indian Penal Code of course none of these cases was construing that statute. And, once you dispense with desire or purpose, it follows that foresight of the consequences of an act gains the upper hand in determining whether the consequences were intended or not. And the foresight of a particular person is prima facie to be gauged by the foresight of an ordinary, reasonable man, in other words, by what is sometimes disparagingly referred to as the objective test or external stand—as if that were enough to condemn it—of the reasonable and probable consequences of the act.

17. Illustration (a) to Section 106 of the Evidence Act shows that the intention with which a person does an act is generally to be gathered from the character and circumstances of the act. It says that

"When a person does an act with

some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him".

An inference drawn from the character and circumstances of the act is sufficient proof of intention. Thus, if a man uses a knife on another so as to pierce the latter's heart and kill him, the character and circumstances of his act would suggest that he intended to kill him, for, death is the natural and probable, nay, the well-nigh certain, result of such an act. But a surgeon doing this could readily rebut this inference by showing that he did this not with the intention of causing death but with the intention of curing the man of a dangerous disease. Nevertheless the surgeon would still have intentionally caused 'hurt, and can even be said to have intentionally caused bodily injury sufficient in the ordinary course of nature to cause death, and as we have already said, is saved from penal consequences only by reason of the exception in Section 88 of the Code.

18. The maxim to which we have referred, namely, that every person is presumed to intend the natural and probable consequences of his act, is sometimes expressed as if it embodied something more than a permissible inference, something more than the "may presume" of Sections 4 and 114 of the Evidence Act, or at the worst the "shall presume" of Section 4 and created an irrebuttable presumption, the "conclusive proof" of Section 4. A form in which it is thus expressed is that every person must be presumed to intend the natural, reasonable, and probable consequences of his acts whether in fact he intended them or not. In this form it is certainly objectionable and it is the belief, some would have it in the mistaken belief, that it was countenanced in this form by the House of Lords in Director of Public Prosecutions v Smith, 1961 AC 290 as if the mens rea for murder were not the intention in the mind of the alleged offender, but were the foresight of a reasonable man of the likelihood of death, that that decision has come in for so much adverse criticism from quarters both academic and professional. And it is to the maxim in this objectionable, form, "must be taken to intend" that Wallis C J. took exception when, basing himself on paragraph 100 of the first report on the Penal Code by the Indian Law Commissioners; he observed in Vullappa v Bheema Row, ILR 41 Mad 156 at p 162 = (AIR 1918 Mad 136 (2) at p 139) (FB) that Macaulay and the other Indian Law Commissioners regarded the maxim as a fiction which should not be recognised in the Penal Code. But

surely that the Code draws a clear distinction between 'intent' and 'knowledge of likelihood' is no impediment to the latter leading to an inference regarding the former or to same circumstance leading to an inference regarding both

19 But properly viewed namely as a mere objective test enabling a rebuttable inference to be drawn regarding the mental element attending an act we think that the maxim is not merely unexceptionable but indispensable. The whole difficulty it seems to us arises from to borrow the words of Bowen L. J in *Argus v Clifford* 1821-2 Ch D 441 confusing the evidence from which an inference may be drawn with the inference itself which has to be drawn after you have weighed all the evidence. In this connection the following classic statement by Sir William Holdsworth in the History of the English Law Vol III page 374 is worth quoting

The general rule of the common law is that crime cannot be imputed to a man without mens rea. It is of course quite another question how the existence of that mens rea is to be established. The thought of man is not triable by direct evidence but if the law grounds liability upon intent it must endeavour to establish it by circumstantial evidence. Much of that circumstantial evidence will be directed to showing that a man of ordinary ability situated as the accused was situated and having his means of knowledge would not have acted as he acted without having that mens rea which it is sought to impute to him. In other words we must adopt an external standard in adjudicating upon the weight of evidence adduced to prove or disprove mens rea. That of course does not mean that the law bases criminal liability upon an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence.

20 Perhaps in Indian Law the objective test of the maxim would cover every degree of mens rea from negligence to intention depending on the degree of probability of the consequences. If the effect caused by an act is the natural and probable consequence of that act it would we think be right to infer that the actor caused that effect voluntarily as that word is defined in Section 39 of the Code. If the degree of probability is so low so that the effect cannot be described as a natural and probable consequence the inference to be drawn might only be of negligence or rashness little higher it might be that the actor had reason to believe that he was likely to cause the effect still higher it

would be reasonable to infer that he knew that he was likely to cause it and if the degree of probability is so high that the effect may be described not merely as a probable but as a natural, natural in the sense ordinary result of the act it would be reasonable to infer that he intended to cause it. It might be noted that it is on the high degree of probability of the effect of death that the intention or knowledge (to be inferred from among other things the natural and probable consequences of the act) of clauses secondly thirdly and fourthly of Section 300 are equated with intention to cause death of the first clause.

21 So far as the English Law is concerned Section 8 of the Criminal Justice Act of 1967 applies the necessary corrective to the grossness of the rule supposed to have been laid down in 1961 A 290. This section provides that

"A Court or jury in determining whether a person has committed an offence—
(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inference from the evidence as appear proper in the circumstances'. That is a statement of the law which we would adopt. The natural and probable consequences of a man's act is only one of the factors from which his intention as to the result may be gathered. It is no doubt a very important factor and might sometimes be the only available factor from which the inference of intention is to be drawn. Still there is no 'must' about it only 'may' and the Court is not bound in law to infer that a man intended the result of his actions by reason only of its being a natural and probable consequence of those actions. The intention is to be gathered from all the circumstances appearing in the evidence.

22 Much the same thing was said by Denning L. J in 1950-66 TLR 735 with reference to the animus deserendi in other words the intent to bring the married life to an end necessary to constitute desertion for the purpose of divorce.

When people say that a man must be taken to intend the natural consequences of his acts they fall into error: there is no 'must' about it it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that as a man is usually able to foresee what are the natural consequences of his acts so it is as a rule reasonable to

infer that he did foresee and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference then it should not be drawn."

In their book on Criminal Law, Geanville Williams, one of the foremost critics of 1961 AC 290 and Smith and Mogan themselves no admirers of that decision, regard this as a clear exposition of the true place and value of the presumption in the proof of intention. Denning L. J. then thought (as he later, in the light of 1955 AC 402, confessed, mistakenly) that intent in the context of desertion meant that the party must have the desire or purpose to bring the married life to an end. But, as we have seen, neither the desire nor the purpose to bring about the consequences is necessary to constitute intention within the meaning of Section 300 of the Indian Penal Code. With regard to what we might call this lesser intention the presumption to be drawn from the natural and probable consequences of the act is stronger.

23. In English law, in order to constitute the offence of attempt to murder, the specific intent to cause death is necessary though for the completed offence of murder the lesser mens rea of intent to cause grievous bodily harm suffices. What might be called the implied or constructive intent to cause death of clauses secondly, thirdly and fourthly of Section 300 of our Code is not enough. But, in Indian law, Section 307 of the Code makes it quite clear that the mental element described in any of the four clauses of Section 300 is sufficient and that it is not necessary that the act should have been done with the specific intention of causing death. This difference should not be overlooked. We should not have thought it necessary to voice this caution but that we find that in some Indian decisions and in some commentaries on the Code, English cases are cited to make out that the specific intent to kill is necessary without noticing that Section 307 of the Indian Penal Code lays down the law differently.

24. What is the offence committed by the accused in the instant case? We shall first consider the assault on Pw1. The act committed by the accused is the physical movement of stabbing with a sharp pointed knife having a blade five inches long. This is undoubtedly an act intrinsically capable of causing death, or to put it negatively, not intrinsically incapable of causing death. "Death", of course, means the death of a human being—see Section 46 of the Code—and if the act be done with the mental

element described in Section 300 in relation to any human being and if it, in fact, causes the death of that or any other human being Sections 299 and 300 import the doctrine of transferred malice and Section 301 proceeds on the assumption that culpable homicide is none-the-less culpable homicide for the death caused being of a person other than the person whose death was intended—the actor is guilty of murder. The requirement implied by the clause, "if he by that act caused death" in Section 307 is here amply satisfied, and the question is whether the mental element and the circumstances attending the act are such that if death had ensued, the accused would be guilty of murder. In other words, so far as this case is concerned, whether the accused had the mens rea defined in S. 300 of the Code and, if so, whether circumstances attracting any of the exceptions to the section were present of course, by reason of Section 105 of the Evidence Act it would be for the accused to show that they were present.

25. There is here no confession and therefore, no direct evidence of the accused's state of mind. That has to be inferred from the circumstances, and, taking all the circumstances into consideration, we feel no doubt whatsoever that the accused did the act with at least the mental element described in clause thirdly of Section 300, namely, the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, if not with that in the first clause, namely, the intention of causing death. The offence may well be described as unpremeditated and, not unnaturally, there is no evidence of any strong or adequate motive. But, it must be remembered that the accused was incensed with Pw 2's conduct at Kochu Mahommed's tea shop and was apparently still smarting from the insult he had received from Pw 2 in the presence of his newly married daughter and son-in-law. He seems to have flared up when heard Pw 1 saying that he could be taken to task the next day for having beaten Pw 2. The weapon the accused used was a deadly weapon and he used it on a vital part of Pw 1's body with such force as to pierce the abdominal wall and cut and bring out the intestines. The accused has no case that the stab fell elsewhere than where he directed it, and, having regard to all the circumstances, including the nature of the weapon used, the part of the victim's body chosen for the assault, and the injury actually inflicted, an injury which, by its very nature, must necessarily have endangered life, there can be no doubt that the accused must have intended to cause death, or, at any rate,

to cause bodily injury sufficient in the ordinary course of nature to cause death

26 We do not think that in the circumstances of the case any of the exceptions to Section 300 of the Code is attracted. The only exceptions that can conceivably apply are exceptions 1, 2 and 4. So far as exception 1 is concerned Pw 1 offered little if any provocation and we might add that even the provocation offered by Pw 2 was neither grave enough nor sudden enough to deprive the accused of the power of self control. If we may say so such provocation as Pw 2 offered had already been sufficiently redressed by the beating which the accused gave him. So far as Exception 2 is concerned as we have already seen no assault of any kind was threatened on the accused when he acted as he did and there can therefore be no question of his having exercised any right of private defence. Nor was there a sudden fight upon a sudden quarrel so that the accused can be said to have acted in the heat of passion in the course of such fight. Moreover in stabbing an unarmed person in the abdomen with a knife the accused did act in a cruel and unusual manner. Therefore Exception 4 cannot be attracted.

27 We have no doubt that so far as the assault on Pw 1 is concerned the offence committed by the accused is one falling within the second part of the first paragraph of Section 307 of the Indian Penal Code.

28 So far as the assault on Pw 2 is concerned no doubt the physical act committed by the accused was not incapable of causing death. But in a case where the mental element is to be inferred from the nature and circumstances and the consequences of the physical act, there is a difference between the case of an assault with a weapon like a knife where the actor retains control till the last i.e. till the termination of the assault, and the case of an assault with a weapon like a gun where the actor loses control the moment the gun is fired and must thereafter willy nilly let the shot take its course. Although of course as Section 307 itself makes it plain the causing of hurt is not a necessary element of the offence of attempt to murder yet in a case of an assault with a weapon like a knife retained in the hands of the offender till the end and not used as a missile unless there is something to show that there was some external impediment in the way of consummation of the offender's intention it might not be reasonable to infer merely from the harm inflicted that the offender intended to cause graver harm than he actually did inflict. The injury that the accused did inflict on Pw 2 was a simple injury not

sufficient in the ordinary course of nature to cause death and there is nothing to show that he intended anything more. Therefore so far as the assault on Pw 2 is concerned the conviction recorded against the accused under Section 324 of the Indian Penal Code is proper.

29 Every case has to be decided on its own facts and circumstances no two cases are in all respects alike the proper inference to be drawn from proved facts and circumstances is not ordinarily a question of law and although the inference drawn by experienced Judges from similar facts and circumstances might be a useful pointer it must be remembered that not all the facts and circumstances that influence the decision in a particular case appear from the judgment. This is why in reaching the conclusion we have reached regarding the mental element accompanying the accused's acts we have made no reference to the numerous authorities cited at the bar. But we must say something about the two decisions that have been responsible for the present case coming before us and about the third case that has been brought to our notice in the course of the hearing.

In 1967 Ker LT 223 the accused who had been twice thwarted in his attempt to ravish a woman on the second occasion after the woman had as a result of a struggle succeeded in freeing herself from his grasp took a gun which he had kept leaning on a tree near-by—the occurrence took place in a forest where the victim was collecting firewood—and shot her with it in the chest. Thirty-six pellets were found lodged in the victim's body over the abdominal area inside the abdominal muscles. Only one was extracted the rest left where they were since the doctor thought that that would do no harm. The gun was not before Court but the judgment shows that it was said to be 'a sort of sporting gun generally used to scare away birds and wild beasts from the cultivation'. So far as the judgment discloses there was nothing to show that a shot with the gun and the ammunition used was incapable of causing death—indeed the medical evidence to the effect that the injury would have been serious and that it was a fortuitous escape for the injured would indicate the contrary. The trial Court found the accused guilty under Sections 307 and 326 of the Indian Penal Code (Also under Section 354 but with that we are not concerned). But on appeal this Court found that the offence was only one under Section 324 of the Indian Penal Code deserving only a sentence of simple imprisonment for one month.

30. In 1967 Ker LT 689, the accused a squatter on land belonging to a rubber estate took exception to pits being dug in the court-yard of his house by some workmen under the supervision of Pw 5, an Assistant Conductor of the estate. Pw. 5 told the accused firmly that he had come to plant rubber seedlings and that he was determined to do that. The accused after pretending to have submitted to this, and in fact, making a show of helping in the planting, slowly moved backwards towards the verandah of his house, and, picking up an axe, dealt two blows with it on Pw 5's head injuring the right eye with partial protrusion of the eyeball and causing a fracture about 3"x2" of the right parietal bone. The trial Court convicted the accused under Section 307 of the Indian Penal Code but, on appeal, this Court, holding that the blow on the head with the blunt end of an axe could not in the ordinary course of things cause death (a proposition to which we can scarcely subscribe) came to the conclusion that the accused could not have intended to cause the death of the victim — whether, in the face of the fracture of the skull, it could not be held that the accused intended at least to cause bodily injury sufficient in the ordinary course of nature to cause death was not considered—and that his offence was only one under Section 335 of the Indian Penal Code for which a sentence of two years' rigorous imprisonment was enough.

31. In 1968 Ker LT 929, the accused, in the course of a quarrel, stabbed Pw 1 with a knife in the abdomen inflicting a disembowelling wound which fortunately did not prove fatal but rendered the victim unconscious for three days. It was held that the accused was guilty only of an offence under Section 326 of the Indian Penal Code and not of one under Section 307 of the Indian Penal Code. The reasons for this view were stated thus:

"The first ingredient in the offence of attempt to murder is the intention to kill. In *R v Cruse*, (1838) 8 C & P 541, Patterson J. told the jury.—

'Before you can find the prisoner guilty of this felony, (attempt to murder) you must be satisfied that when he inflicted this violence on the child he had in his mind a positive intention of murdering that child. Even if he did it under the circumstances which would have amounted to murder if death had ensued, that will not be sufficient unless he actually intended to commit murder'. So even if the act committed is sufficient in the natural and ordinary course of things to result in death, the accused cannot be charged with attempt to murder

unless he had the intention to kill, from the very beginning. So also the converse, that even if the accused had the intention if the act committed is not capable of causing death or that the act was done with such intention and was not likely in the belief of the accused to cause death he cannot be charged with attempt to murder. Thus we see that the intention is the most important ingredient and when once that is not made out the accused cannot be convicted of attempt to murder, even if the act committed is sufficient to cause death under normal circumstances.

Applying the principles to the facts of present case it has to be held that since the intention to kill was not there, the accused could not be convicted of attempt to murder".

32. We have only this to observe. In each of these cases, unless there were facts and circumstances that do not appear in the judgments, we would have had no hesitation in finding the accused guilty of attempt to murder. In the last mentioned case, the learned Judge following the English law, deems to have thought that a specific intention to kill was an essential ingredient of the offence of attempt to murder. We have already shown that that is not so under the Indian Penal Code, Section 307, and that any of the forms of *mens rea* described in the four clauses of Section 300 is enough.

33. The learned Judge also set out as one of the ingredients to be proved by the prosecution in a case of attempt to murder

"If the act has taken effect the injury is sufficient in the natural and ordinary course of things to cause death".

It is not an essential ingredient of the offence that there should be an injury much less an injury sufficient in the ordinary course of things to cause death.

34. In AIR 1932 Bom 279, *Beaumont C. J.* criticised what he thought was the view taken in *Cassidy's case*, 1867-4 Bom HCR Cr 17, namely, that in order to attract Section 307 of the Code it must be possible to say for certain that the offender's act might have caused death. His Lordship demonstrated the absurdity of such a view in the following words:

"If the reasoning of the learned Judges in that case be right as to the construction of Section 307 and if the act committed by the accused must be an act capable of causing death in the ordinary course, it seems to me that logically the section could never have any effect at all. If an act is done which in fact does not cause death it is impossible to say that that precise act might have caused death. There must

be some change in the act to produce a different result and the extent to which the act done must be supposed to be varied to produce the hypothetical death referred to in Section 307 is merely a question of degree.

35 To rely on these observations as was done in 1967 Ker LT 223 and in 1967 Ker LT 689 (only the last two sentences are actually quoted) for holding that the offence contemplated in Section 307 of the Indian Penal Code is of a hypothetical nature and was therefore not made out is it seems to us to subscribe to the logical conclusion reached in the process of disproof by *reductio ad absurdum*.

36 In the instant case the accused was acquitted of the charge under Section 307 of the Indian Penal Code. There was no appeal against that acquittal and having regard to sub-section (4) of Section 439 of the Criminal Procedure Code we cannot in revision convert the acquittal into a conviction. We can of course set aside the accused's conviction under Section 326 Indian Penal Code and direct a retrial but had we thought of adopting such a course we would not have expressed ourselves so categorically on the merits of the case. Fortunately the ends of justice do not require an alteration of the conviction for it is possible to impose an adequate sentence for the accused's crime even under Section 326 of the Indian Penal Code which permits of as severe a sentence as Section 307 does. Having regard to all the circumstances of the case and the nature of the injury inflicted by the accused we think that a sentence of five years' rigorous imprisonment would be proper.

37 In the result we confirm the accused's conviction under Sections 326 and 324 of the Indian Penal Code as also the sentence awarded to him for the latter offence and dismiss his appeal. We enhance the sentence awarded to him for the offence under Section 326 of the Indian Penal Code from rigorous imprisonment for 18 months to rigorous imprisonment for five years.

38 **GOPALAN NAMBIYAR J** — Except a few observations I have nothing useful to add to the judgment delivered on behalf of the Bench by My Lord the Chief Justice.

39 It is perhaps difficult to reduce to the form of any statable legal principle the cases of attempts to commit an offence which is impossible of commission in the nature of things and the attendant circumstances. Such are the cases of an attempt to kill with an unloaded gun which the offender believes to be loaded, attempt to shoot at a wax model figure believing it to be a living

person in flesh and blood, attempt to cause miscarriage to a woman believed to be pregnant who in fact is not or by administering some thing believed to be deleterious which in fact is innocuous, attempt to pick a pocket that is empty, attempt to steal from a club an umbrella which ultimately turns out to be one's own. These and similar conundrums which are fruitful enough sources for discussion in the academic atmosphere of the lecture hall hardly present the same difficulties for solution in the practical realities of the Court room. The test propounded in the judgment just pronounced that the bare physical act of the accused should have been capable of producing the consequence before a person can be convicted of an attempt seems on the whole to be safe and satisfactory.

40 In 1968 Ker LT 929 a learned Judge of this Court relied on Patterson J's charge to the jury in (1838) 8 C & P 541. The said charge to the jury was as follows:

'before you can find the prisoner guilty of this felony (attempt to murder) you must be satisfied that when he inflicted this violence on the child he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued that will not be sufficient unless he actually intended to commit murder.'

It is necessary to emphasise that in English law for the offence of murder it is enough to show that the killing was with malice aforethought' comprehending all the different types of mens rea comprised in that expression. But for the crime of an attempt at murder it is necessary to show that there was a clear intention to kill. Any other type of mens rea covered by the expression 'malice aforethought' will not do. This has been repeatedly laid down in the English decisions and is clear on the authorities.

41 Patterson J's charge to the jury in 1838 8 C & P 541 has already been noticed. In *R v Whybrow* 1951 35 Cr App 141 the accused by a device constructed by him administered electric shocks to his wife while she was in a bath. Parker J directed the jury that if he did so intending to kill his wife or to do her grievous bodily harm he would be guilty of attempt at murder. The Court of Appeal held that this was a wrong direction. Observing that if the charge is one of attempt at murder the intention to kill is the principal ingredient of the crime Lord Goddard C J expressed himself thus:

Therefore if one person attacks another inflicting a wound in such a way that an ordinary reasonable person must know that at least grievous bodily harm

will result and death results, there is the malice aforethought sufficient to support the charge of murder. But if the charge is one of attempted murder the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought which is supplied in law by proving intent to do grievous bodily harm".

In *R v. Grimwood*, 1962-3 All ER 285, the prisoner had been convicted by Paul J at the Central Criminal Court of attempt to strangle his wife with intent to murder her. No verdict was taken from the jury on two other counts, namely, attempt to suffocate his wife with intent to murder and assault occasioning her actual bodily harm. In the course of his direction to the jury, the learned Judge, basing himself on 1961 AC 290, observed

"He is put before you by his counsel as an ordinary normal minded man and so you should take it in this case that he is an ordinary normal-minded man. The law is that in the case of an ordinary normal man it does not matter what that man contemplates at the moment at all. The test is whether what he did was of a kind where death might well have been the natural and probable result of what he did".

On appeal from the above conviction, Lord Parker C. J. delivering the judgment of the Court of Criminal Appeal observed that the Court was clearly of the opinion that nothing that was said in *Smith's case*, 1961 AC 290, has any application to the offence of attempted murder. Adverting in particular, to the direction to the jury, extracted *supra*, the Lord Chief Justice observed:

"One further matter should be mentioned and that is that, certainly in regard to the first passage which I have quoted in the summing up, it might well have led the jury to suppose that, even if they were satisfied that all that the appellant intended to do was to cause grievous bodily harm, yet if death might well result from such grievous bodily harm an intent to murder had been proved. That again, if that impression was conveyed, was quite clearly a wrong direction. In 1951-35 Cri App

141, Lord Goddard C. J. dealt with that very point".

The learned Chief Justice then noticed the decision in *Whybrow's case*, 1951-35 Cri App 141, and cited the passage from the judgment of Lord Chief Justice Goddard quoted earlier.

42. The above decisions make it clear that the requirement of a higher degree of mens rea, namely, an intention to kill, and nothing short of that, is a special feature of English law in regard to the offence of attempt at murder. The position has been well brought by text-book writers also. (See, for instance, *Smith and Hogan's Criminal Law*, page 146; *Kenny: Outlines of Criminal Law* (16th Edition) page 80). Whatever be the position in English law, the provisions of Section 307 of the Indian Penal Code are, as already pointed out, clearly otherwise. English decisions are therefore not safe guides to follow.

43. As for the much discussed and much criticised maxim, that every person is presumed to intend the natural and/or the probable consequence of his act, I think the scope of its application has been correctly delimited by Section 8 of the Criminal Justice Act of 1967, which we have adopted as laying down a safe rule.

Order accordingly.

1970 CRI. L. J. 699 (Vol. 76, C. N. 168) =

AIR 1970 MADHYA PRADESH 86
(V 57 C 21)

SHIV DAYAL & S P BHARGAVA, JJ.

Kumari Swarnalata Kapoor and others, Appellants v. Jogendrapal Ramrakha Punjabi and others, Respondents.

Appeal No 31 of 1965, D/- 25-4-1969, against decree of Addl Dist J, Jagdalpur, D/- 11-4-1964

(A) Fatal Accidents Act (1855), S. 1-A — Motor accident — Negligence — Accident taking place on off-side of road — Presumption — Principle of *res ipsa loquitur* — Applicability.

Where an omnibus leaves the road and an accident takes place on the off-side and this is proved without more, then the principle of *res ipsa loquitur* is at once attracted. Negligence will be presumed as the cause of the event. Unless the defendant rebuts this presumption, the plaintiff succeeds. To merely point out what the immediate cause of the bus leaving the road was, e.g. there was a tyre burst or that it went into a skid is by itself no rebuttal of the presumption. To displace the presumption, the defendant must prove, or must show from the evidence, either that the immediate cause was due to a specific cause, which does not con-

IM/IM/D902/69/MVJ/D

note negligence on his part but points to its absence as more probable or he must show that all reasonable care in and about the management of the vehicle was taken. The burden in the first instance is on the defendant to disprove his liability AIR 1962 SC 1 Foll

(Para 11)

(B) Fatal Accidents Act (1855) S 1-A — Damages — Quantum of — Factors to be considered

The principles for calculation of quantum of damages are (1) The expectation of the life of the deceased has to be estimated having regard to his age bodily health and the possibility of premature determination of his life by later accidents (2) Having regard to the amounts which the deceased used to spend on his dependents during his lifetime and having regard to other circumstances the amount which is required for future provisions of the dependents is to be estimated (3) The estimated annual sum must be multiplied by the number of years of the estimated span of life of the deceased and that must be balanced by any pecuniary advantage which from whatever source comes to the dependants by reason of the death (4) The burden is on the plaintiffs to establish the extent of their loss AIR 1962 SC 1 Foll

(Para 24)

(C) Motor Vehicles Act (1939) S 95 (2) (b) — Liability of Insurance Company — Bus involved in accident insured against third party risks — Both the parents of claimant travelling in bus and meeting death — Insurance Company held liable under S 95(2) (b) second part to pay Rs 2000/- as compensation for each of the two passengers (Para 29)

Cases Referred Chronological Paras

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|---|-------|
| (1964) AIR 1964 Madh Pra 133
(V 51)=1962 Jab L J 661
Sushma Mehta v Central Pro-
vinces Transport Services Ltd | 5 |
| (1963) 1963 1 All E R 705=1963
AC 837 Hughes v Lord Advocate | 22 |
| (1962) AIR 1962 SC 1 (V 49)=
1962-1 SCR 929 Gobald Motor
Service v Veluswamy | 12 23 |
| (1961) 1961-2 All E R 688=1961-
2 QB 205 R v Spurge | 22 |
| (1948) 1948-2 All E R 460=1949-
1 KB 54 Barkway v South
Wales Transport | 12 |
| (1942) 1942-1 KB 152=111 LJ KB
292 Laure v Raglan Building Co | 12 |
| (1951) 1951 AC 601=1951-2 All
E R 448 Viscount Simon in
Nance v British Columbia Elec-
tric Railway | 24 |
| (1920) 37 TLR 72 Hutchins v
Moulder | 17 |
| (1915) 1915 All E R 426=1916-1
AC 719 British Columbia Elec-
tric Rail Co Ltd v Loach | 12 |

R K Pandey for Appellants Y 5
Dharmadhikari for Respondents Nos 1
and 2 A N Mukerjee for Respondent
No 3

SHIV DAYAL J — This is an appeal under Section 96 of the Code of Civil Procedure from the dismissal of the suit in which the appellants claimed damages from the respondents for the death of their parents resulting from an accident which occurred on February 16 1959 (prior to the constitution of Claims Tribunal under Section 110-A of the Motor Vehicles Act)

2 On February 16 1959 motor bus No MPO 314 belonging to M/s Patni Transport Ltd (respondent No 2) started from Jagdalpur for Jeypore. It was driven by Jogendrapal (respondent No 1) Rawelchand Kapoor and his wife Smt. Rajkumari Kapoor boarded the bus at Jagdalpur. On its way the bus dashed against a tree by the side of the road. Rawelchand Kapoor and his wife received fatal injuries and died instantaneously on the spot. The bus was insured with respondent No 3 Insurance Co against third party risk under the terms of the insurance policy Ex D 3. These facts are admitted.

3 The accident occurred at 7 or 8 miles from Jagdalpur. The bus was heavily loaded. It went beyond the control of the driver and dashed against a mango tree. The appellants through their next friend instituted a suit for recovery of damages on the allegation that the accident occurred due to rash driving, that is at a great speed beyond the control of the driver or alternatively due to negligence of the driver in not applying brakes and allowing the bus to run astray. It was the duty of defendants 1 and 2 to see that the bus had no defect and was fit for being put on the road before it left for Jeypore. The plaintiffs alleged that their father was running a hotel and was earning Rs 5000/- annually. Keeping aside his personal expenses he spent Rs 3000/- annually on the maintenance of the plaintiffs and could have done so for at least 35 years more. At the time of the accident their father was only 36 years of age and in a healthy state of body. Due to the accident the plaintiffs lost the protection and care of their parents. Services of a nurse had to be engaged which cost them Rs 60/- per month for some time at least. The plaintiffs claimed Rs 25000/- as damages.

4 The defence was that the accident did not occur due to any rashness or negligence on the part of the driver. It was further pleaded that the accident occurred owing to sudden breakage of the main spring of the bus and that the bus had been checked up at Jagdalpur and it was found fit before it left for Jeypore.

It was, however, admitted that Rawelchand Kapoor and Smt Rajkumari Kapoor had boarded the bus at Jagdalpur, that both of them were injured in the accident and that they died instantaneously at the spot. The quantum of damages claimed was also disputed. Bar of limitation was pleaded. The maintainability of the suit was also challenged. The Insurance Co. defendant No. 2 (herein respondent 3) contended that its liability was limited to Rs 2,000/- only.

5. The learned trial Judge found that the suit was maintainable and was not barred because of the constitution of the Claims Tribunal under the Motor Vehicles Act. The accident occurred on February 16, 1959 on which date there was no Claims Tribunal constituted. It is true that before the date of the institution of the suit, though after the accident, a Claims Tribunal had been constituted for Raipur, but the right to sue could not be taken away retrospectively by constitution of a Claims Tribunal. That is what was held in *Sushma Mehta v Central Provinces Transport Services Ltd*, AIR 1964 Madh Pra 133.

6. The learned trial Judge further held that the suit was within limitation inasmuch as the plaintiffs were entitled to the benefit of Section 6 of the Limitation Act, 1908, which was then in force as all the plaintiffs were minors.

7. On the merits of the case, the Tribunal held that there was no rashness or negligence on the part of the driver of the bus and, therefore, neither the driver nor the owner of the vehicle was liable to pay damages. The trial Judge in a half-hearted manner dealt with issues Nos. 7 and 8 relating to the quantum of damages and held that it was not proved that the deceased Rawelchand was earning Rs 5,000/- annually and was saving Rs 3,000/- or any other sum per annum. The trial Judge did not arrive at any amount, which could be awarded to the plaintiffs as damages, in case they were found entitled to damages from the defendants. All that he held was that the plaintiffs could not prove the amount that they claimed. As regards the liability of the Insurance Co., the learned trial Judge held that it was liable only to the extent of Rs 4,000/-.

8. The learned trial Judge has decided the question of negligence against the plaintiffs on the findings that (1) The plaintiffs could succeed on their own strength and not on the weakness of the defendant, though the defendants tried to show that they were in no way rash or negligent (2) From the evidence on record, it is not established that the driver was driving fast or that he was driving with divided attention. Admittedly, he was not driving on the wrong side.

The road was clear and without any obstruction. The driver did not expose himself to any risk, nor did he commit any breach of duty imposed by law. (3) The accident was due to the breakage of the main spring and it was a case of pure accident. (4) No presumption could be drawn that it was due to rashness or negligence of the driver. The learned trial Judge observed: "such a presumption would be ill-founded as great many such occurrences are due to accident beyond the control of the driver". (5) "It also finds place in the evidence of Jogendrapal that before the bus left the Motor Stand, it was checked by the Booking Clerk and was not overloaded".

9. Thus, in substance, the trial Judge came to the conclusion that the bus was not being driven at an excessive speed, nor with divided attention, nor on the wrong side of the road; the learned trial Judge thinks that rashness or negligence consists only in these things. We shall presently point out that the evidence produced by the defendants was unreliable and the defendants could not prove want of negligence. The learned trial Judge took into consideration the report of the Motor Vehicles Inspector, who was not produced as a witness. He was summoned twice and served, but did not appear, and the defendants then gave him up.

10. Now, the plain facts are these. The bus, while it was running, suddenly, went offside the road and struck against a tree. Almost every passenger in the bus got some injury. Both the parents of the appellants died instantaneously. It is in evidence that one of the legs of Rawelchand was cut off and was hanging. It was not as if there was any obstruction on the road or that there was an imminent danger in front, which the driver had to avert. *Res ipsa loquitur*, the event speaks for itself. It is obvious enough that the bus struck against a tree with a great velocity. Otherwise, two passengers sitting inside the bus could not die instantaneously, apart from the fact that almost every passenger would not have received injury. The presumption is that the bus must have been driven in such a manner that it was not under the control of the driver.

11. The law is clearly this (1) Where an omnibus leaves the road and an accident takes place on the off-side and this is proved without more, then the principle of *res ipsa loquitur* is at once attracted. Negligence will be presumed as the cause of the event. Unless the defendant rebuts this presumption, the plaintiff succeeds. (2) To merely point out what the immediate cause of the bus leaving the road was, e.g., there was a tyre burst or that it went into a skid is by itself no rebuttal of the presumption. (3) To displace

the presumption the defendant must prove or must show from the evidence either that the immediate cause was due to a specific cause which does not connote negligence on his part but points to its absence as more probable or he must show that all reasonable care in and about the management of the vehicle was taken.

(4) The burden in the first instance is on the defendant to disprove his liability.

12 Lord Summer succinctly said in *British Columbia Electric Rail Co Ltd v Loach* (1915) All ER 426

'The inquiry is a judicial inquiry. It does not always follow the historical method and begins at the beginning. Very often it is more convenient to begin at the end, that is at the accident and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a casual agency but of the responsible agent. When that has been done it is not necessary to pursue the matter into its origins for judicial purpose they are remote.'

It must at once be remarked that the learned trial Judge did not bear in mind the principles laid down by their Lordships in *Gobald Motor Service v Veluswami* AIR 1962 SC 1. It is necessary to bear in mind the facts of that case and the principles laid down in it because that decision applies to the present case on all fours. In that case it was found that the central bolt of the left rear spring suddenly gave way while the bus was running. The accident took place not on the main road but on the off-side uprooting a stone of the drain and attacking a tamarind tree 25 feet away from the said stone with such velocity that its bark was peeled off and the bus could stop only after travelling some more distance from the said tree. Their Lordships observed—

'The said facts give rise to a presumption that the accident was caused by the negligence of the driver.'

In *Barkway v South Wales Transport*, (1948) 2 All ER 460 the immediate cause of the omnibus leaving the road was a tyre burst. The following propositions were laid down—

(i) If the defendant's omnibus leaves the road and falls down an embankment and this without more is proved then *res ipsa loquitur* there is a presumption that the event is caused by negligence on the part of the defendant and the plaintiff succeeds unless the defendant can rebut this presumption. (ii) It is no rebuttal for the defendant to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre burst, since a tyre-burst per se is a

neutral event consistent and equally consistent with negligence or due diligence on the part of the defendant. When a balance has been tilted one way you can not redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laure v Raglan Building Co*, 1942-1 KB 152 where not a tyre burst but a skid was involved. (iii) To displace the presumption the defendant must go further and prove (or must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable or (b) if they can point to no such specific cause that they used all reasonable care in and about the management of their tyres.

These principles were fully approved and adopted by the Supreme Court in AIR 1962 SC 1 (supra).

13 Their Lordships also quoted 23 Halsbury (Simonds) 671, paragraph 956 which read thus—

'An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine applies a presumption of fault is raised against the defendant which if he is to succeed in his defence must be overcome by contrary evidence. The burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part. Where therefore there is a duty on the defendant to exercise care and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue the burden is in the first instance on the defendant to disprove his liability. In such a case if the injurious agency itself and the surrounding circumstances are entirely within the defendant's control, the inference is that the defendant is liable and this inference is strengthened if the injurious agency is inanimate.'

14 In the present case also the principles directly apply. Here also the bus went off-side and struck against a tree. It must have been with great velocity, otherwise it was not possible that two passengers would have died instantaneously on the spot.

15. The defence is that the accident was caused due to the sudden breakage of a main spring. It may first be seen whether the breaking of the spring was the cause of the accident or was its effect. The function of the springs is to support the body of the vehicle to avoid jerks when it is in motion. It has no connection either with the steering wheel or the brakes. Therefore, it is patent enough that the spring broke as a consequence of the vehicle striking against a tree.

16. It is not wholly without significance that the bus was running down a slope (per evidence of Natrajan D W. 3).

17. But assuming (though not holding) that the spring broke before the impact, the burden was still on the defendants to prove want of negligence. It was for them to prove that reasonable care had been taken in spite of which the spring broke. Neither the driver, nor the mechanic (and this was the only evidence produced by the defendants) gives the cause of the breaking of the spring; for instance, that there was a big boulder or some such other obstruction on the road which struck against the spring and broke it. All that the driver and Sub-Inspector of Police state is that there was a sound like "Thak", but neither of them says that the spring struck against any heavy article or obstacle. If the defence hypothesis were to be accepted, the only possible cause of the breaking of the spring was that it was worn out due to age. This also would mean negligence because the spring was not replaced by a new one even when it had run for 10 years. Neither the mechanic, nor the driver says that the original spring had been replaced by a new one. See also *Hutchins v. Maunder*, (1920) 37 TLR 72.

18. Jogendrapal (D W 9), the driver of the bus, says that while the bus was running on the 7th mile, there was a sound like "Thak", and there was a skid. He applied the brakes and tried to bring back the vehicle on the road, but it struck against a tree. He says that the main leaf of the spring had broken so that it was not possible to keep the vehicle under control. He admits that there is no direct connection between the main spring and the brakes. He denied that the defect of the spring caused the vehicle struck against the tree. He even denied that the bus struck against the tree with great force. His evidence is unreliable.

19. S. L. Dubey (D W. 2) who is a Sub-Inspector of Police stated that he was a passenger in that bus. When it reached the 7th mile from Jagdalpur towards Jeypore, there was a skid all of a sudden and the bus struck against a mango tree. He says that before the skid, there was some sound like "Kat Kat" and from this the witness inferred that

some part had broken. He says that almost all the passengers received injuries. He also got an injury below an eye. He filed a challan regarding this accident, although the investigation was done by another Sub-Inspector. This witness says nothing about the speed at which the bus was running. Almost all the passengers received injuries, which itself shows that the bus must be running at a high speed and must have attacked the mango tree with a very great force. He does not say that the main spring broke.

20. Natraaj (D W 3) was produced by the defendants to show that the bus had been checked up. He was a Foreman in the employment of defendant No 2. He says that the bus had left for Jeypore at 2 P M and at midday he had checked up the bus. It was in perfect order and there was no defect. But he does not give the details of the checking. He does not specifically say that he had checked the springs. He says that after the accident he went to the spot. He saw that the front main spring of the right side had broken. He says that when the spring breaks, the vehicle skids and goes out of the control of the driver. The bus was of 1949 model and the accident occurred in February 1959. Thus, a thorough check up was every time necessary, as the vehicle was 10 years old. This witness stated that there was a slope where the accident occurred and that the speed of the bus should not have been more than 15 to 20 miles per hour. These things the driver himself did not say. Then this witness says that when brakes are suddenly applied, the vehicle could skid to 8 to 10 feet but according to the driver himself, it had gone at least 15 feet off-side. It is thus clear that the evidence of this witness is useless.

21. On this analysis, it must be said that the defendants did not prove that the vehicle had been thoroughly checked up and all that was necessary to do was done, to ensure that the spring would not break, as was required of them having regard to the fact that it was used for carrying passengers.

22. Shri Dharmadhikari contended that the burden had shifted to the plaintiffs. He relied on *Hughes v Lord Advocate*, (1963) 1 All ER 705; *R v Spurge*, (1961) 2 All ER 688. In our opinion, these decisions do not help the respondents in this case. It is in evidence of the driver and the mechanic, both produced by the defendants, that the danger was foreseeable. The driver was aware of the tendency of the vehicle to skid and to go out of control, if the main spring broke. The facts of the latter case, relied on by Shri Dharmadhikari are not apposite.

23. Recalling the dicta in *Gobald Motor Service*, AIR 1962 SC 1 (supra)

it must be said here also that it is evident from the picture of the accident that the bus must have been driven at a high speed. Thus the defendants are clearly liable and the finding reached by the trial Court must be set aside.

24 Adverting now to the question of quantum of damages the Supreme Court has restated the principles laid down by Viscount Simon in *Nance v British Columbia Electric Railway* 1951 AC 601 which may be summed up thus: (1) The expectation of the life of the deceased has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by later accidents. (2) Having regard to the amounts which the deceased used to spend on his dependants during his lifetime and having regard to other circumstances the amount which is required for future provision of the dependants is to be estimated. (3) The estimated annual sum must be multiplied by the number of years of the estimated span of life of the deceased and that must be balanced by any pecuniary advantage which, from whatever source comes to the defendants by reason of the death. (4) The burden is on the plaintiffs to establish the extent of their loss.

25 In the present case there is positive evidence of Bansilal (PW 1) who is the brother of the deceased. He says that the deceased was doing hotel business in partnership with one Shaligram. The income of each of them was Rs 500/- per month. There was an argument constructed on the language used by the witness DONO KI MASIK AMADANI 500/- THAI and it was argued for the respondents that Rs 500/- per month was not the income of each of the partners but of both the partners. But this interpretation is not correct when the immediately following sentence is read. The witness says: SAL KA DO DHAI HAZAR RUPAYA RAWEL CHAND APANE KISSE MLN SE BACHATA THA. If the income of both had been Rs 6000/- a year calculated at Rs 500/- per month then the share of Rawel Chand would have been only Rs 3000/- annually and he could not save Rs 2500/- out of it. Thus the correct reading of the deposition will be that the income of each of them was Rs 500/-. In ordinary parlance the expression DONON KI AMADANI 1000/- HAI is sometimes used to mean that the income of each of them is Rs 1000/-. The statement of Bansilal and the manner in which we have read the above statement is supported by the evidence of Shaligram (PW 2). He says that he and Rawel Chand were running the New Punjab Hotel. The share of each was half. They were also carrying on business in bakery within the hotel. From the bakery and the hotel business, both of them were

earning Rs 900/- to Rs 1000/- per month. Rawel Chand had a good standard of living. He used to get between Rs 500/- and Rs 600/- a month and from it he used to spend about 250 on his children and himself and used to save Rs 250/- per month. They both lived in the same house separately.

26 The age of Rawel Chand was 36 years at the time of the accident. The youngest child Naresh Kumar (appellant No 4) was in the mother's lap. His age was six months at the time of the accident and the age of the eldest daughter was about 9 years. In between them is a boy whose age was 6 years at that time and a girl whose age at that time was 4 years.

27 The plaintiffs are thus two brothers and two sisters their ages being 9 years, 6 years 4 years and 6 months respectively. In this accident they lost both their parents. There is evidence of Bansilal that Rawel Chand was in a healthy state of body and that he would have lived at least for 30 to 35 years more. In our opinion this was a fair estimate of the span of Rawel Chand's life. But we need not go to that extent and it would be sufficient to calculate the loss of the plaintiff owing to the death of their father on the basis that each of them would have had the benefit of financial support from him till each of them completed education and the girls were married. Roughly we will put the age at 22 for this purpose. Now it will be only a reasonable and modest estimate that having regard to his standard of living Rawel Chand would have spent and would have continued to spend Rs 50/- per month on each child. Thus the loss to plaintiffs was as follows:

(1) Plaintiff No 1 at Rs 600/- per year for 13 years	Rs 7 800 00
(2) Plaintiff No 2 for 16 years at Rs 600/- per year	Rs 9 600 00
(3) Plaintiff No 3 for 18 years at Rs 600/- per year	Rs 10 800 00
(4) Plaintiff No 4 for 21 years at Rs 600/- per year	Rs 12 600 00
Total	Rs 40 800 00

Calculating this at Rs 40/- per month per child it comes to Rs 32 640/-. In this mode of calculation, we have ignored that the deceased would have spent more on the marriages of the children and that they would have continued to get something from him even after attaining the age of 22 years.

28 In the present appeal the appellants have claimed Rs 24 000/- only. Even after taking into consideration the fact that by depositing the lump sum amount they would get interest, we are of the opinion that the amount claimed is from every angle reasonable compensation.

29. As regards the liability of the Insurance Co. since the bus involved in the accident was insured against third party risks and since both the parents of the appellants were travelling in that bus, the insurance company, by virtue of Section 95(2) (b) (second part), is liable to pay Rs. 2,000/- as compensation for each of the two passengers

30. Shri Dharmadhikari, learned counsel for the Transport Co (respondent No 2), urged that the insurer had charged extra premium of Rs 95/-. This appears to be so from the statement of the premium charged as entered in the Policy, but that merely shows that it was in respect of limited liability for 38 passengers at Rs 2/8/- per head. But, Shri Dharmadhikari could not show either from the policy, or from any other evidence, that by charging this additional premium, the liability became unlimited as provided in Section 95(2)(c).

31. The appeal is allowed. The judgment and decree passed by the trial Court are set aside. Instead, a decree for Rs 24,000/- and costs in both the Courts shall be passed in favour of the appellants against Jogendrapal, the driver, and M/s. Patny Transport Ltd., the owner of the vehicle, (respondents 1 and 2 respectively) jointly and severally. The Insurance Co., (respondent No 3) shall be liable jointly and severally to the extent of Rs. 4,000/- out of the decretal amount

Order accordingly

1976 CRI. L. J. 705 (Vol. 76, C. N. 169) =

AIR 1970 MADRAS 198 (V 57 C 52)

KRISHNASWAMY REDDY, J.

Public Prosecutor, Appellant v. Pitchaiah Moopanar alias Pitchaiah Pillai, Respondent

Criminal Appeal No. 492 of 1966, D/- 16-10-1968, from Order of S. J., Madurai in Cr Appeal No. 103 of 1965.

Penal Code (1860), Sections 304-A, 337, 338 and 290 — Accused, a layman, putting up a building employing masons — Masons constructing it negligently — Collapse of building resulting in the death of several inmates—Accused held could not be convicted — (Tort — Negligence — Collapse of building).

Where the accused, the manager of a school, had a building put up at a cost of Rs 35,000 employing masons therefor and the masons constructed the same with excess of sand in the mortar, the building collapsed killing several inmates, and the evidence showed that the accused was a layman who had to depend on others skilled in the matter of putting up buildings:

Held, that the accused could not be held guilty for the negligence of the persons

who actually constructed the building which negligence was the *causa causans* for the collapse of the building. The fact that the accused's act might have been the *causa sine qua non* was not sufficient. AIR 1965 SC 1616, Foll.

(Paras 9 and 11)

Cases Referred. Chronological Paras
(1965) AIR 1965 SC 1616 (V 52) =

1965 (2) Cri LJ 550, Mohd.

Rangawalla v. Maharashtra State 10
Asst. Public Prosecutor, for Appellant;
V. Rajagopalachari, for V. V. Raghavan, for Respondent.

JUDGMENT: This appeal has been preferred by the Public Prosecutor against the order of acquittal of the respondent by the Sessions Judge, Madurai, in C. A. No. 103 of 1965 by his judgment dated 18-2-1966, setting aside the conviction and sentence imposed by the Special Additional First Class Magistrate, Madurai, in C. C. No. 1 of 1964 under Sections 304-A, 337, 338 and 290, I. P. C.

2. The prosecution case is briefly this: The respondent Pitchaiah Moopanar was the Manager and correspondent of the Saraswathi Higher Elementary School, Maninagar Second Street, Madurai. At about 12 noon on 4-4-1964, a portion of the building collapsed while classes were being held in the school resulting in the death of 35 girl students and a middle aged woman. Further, 16 students sustained grievous injuries and 142 students sustained simple injuries. A cow and two calves died, and one cow was injured. The Collector of Madurai directed P. W. 215 Sri. Jayapalan, Executive Engineer, to inspect the building and submit a report as to the cause for the collapse of the building. An enquiry was also held by the Revenue Divisional Officer, Madurai. Certain broken pieces of brick masonry construction were examined by P. W. 214 Sri Muthukumaran, Research Officer at the Research Laboratory of the Soil Mechanics and Research Division of the Public Works Department and he gave his opinion. After receiving the report of P. W. 215, based upon the report of P. W. 214, the Inspector of Police, B North Circle, Madurai, filed a charge-sheet against the respondent under Sections 304-A, 336, 337, 338, 288 and 290 read with 109 I.P.C.

3. It is the case of the prosecution that the respondent who was the Manager of the said school was responsible for the proper upkeep and maintenance of the building in which the school was being conducted and that he had not exercised that amount of reasonable care expected of him in constructing and maintaining the building. The respondent had taken on lease the vacant portion around a Samathy on a monthly rent of Rs. 7 from P. W. 205 Karuppan Chethiar to whom the site belonged and was conducting the school in tiled shed. Subsequently, he took permission from P. W. 205 for constructing a double

storeyed building on the site and after the building was constructed an agreement was entered into between the respondent and P W 205 that the respondent was to pay Rs 250 per month as rent, that this amount was to be deducted from the value of the building which was fixed at Rs 32,000 and that after the entire amount is wiped out by adjustment of rent, P W 205 would become the owner of the building.

The prosecution suggested that the respondent, with a view to make profit out of running of the school and since the building itself would not belong to him after some time got the building constructed with bad materials and without proper technical advice and assistance and in violation of certain orders passed by the Municipality and thus was rash and negligent in putting up the building in a hurried manner without devoting any care expected of a prudent man. It was also suggested that even after the construction of the building he was not attending to the repairs of the building then and there even when he had come to know that the building required immediate repairs.

4 The prosecution let in evidence to show that the respondent submitted a plan for the construction of building prepared by P W 203 Meenakshisundaram an unlicensed Surveyor and after the plan was approved by the Municipality, he made deviations from the approved plan and constructed the building and that in spite of notice to remove the deviations he disobeyed the orders of the Municipality and completed the construction hurriedly and that as a result he was prosecuted and sentenced to pay fine. The prosecution has further tendered evidence that in respect of the construction of the building lime mortar used was prepared by the respondent himself using almost double the quantity of sand that would be mixed with lime and that he had not taken any technical advice whatever but constructed the building with the aid of Cooly masons.

Evidence was also tendered that the pillars both in the ground floor and in the first floor were heavily overloaded, that the excess load on the masonry pillars had resulted in cracks to the building that in spite of such cracks no attempt was made by the respondent to take proper technical advice even at that time and that he was callously indifferent to the safety to the building as well as the persons who used it. It is also the case of the prosecution that besides the cracks on the walls of the building, in some places the beams had sagged on account of overloading and that casuanna posts had been given as props to support the bent beams and that even then the respondent had not taken proper steps to ensure the safety of the building.

5 The respondent contended that he had taken proper technical advice from one Nataraja Pillai, a Retired Assistant Town

Planning Officer of Madurai Municipality and after getting his advice he entrusted the work of construction to the mason. P W 206 Ramaswamy Naidu deposed that he was not a skilled person, that he was not responsible for mixing of mortar using more quantity of sand that he was not supervising the construction as he did not know the technique of construction and that the said Nataraja Pillai was supervising the construction. He further added that he was effecting repairs whenever he was told about the necessary repairs to be done that he did not construct the building with profit motive that the immediate cause of the fall was really the action of a mason who tampered with a pillar which required repairs and that he was neither rash nor negligent in the construction of the building or its upkeep. The respondent examined nine witnesses to substantiate his case.

6 The learned Magistrate after hearing the evidence tendered by the prosecution found that the respondent constructed the building at a cheap cost with a profit motive and without taking proper technical advice and that that itself would be a rash and negligent act and therefore convicted the respondent.

7 On appeal the learned Sessions Judge acquitted the respondent by his well reasoned judgment after having discussed all the points raised by both sides. He ultimately found that the respondent was not a skilled person that he had to depend upon the mason for the construction of the work and that the respondent could not have known as to what kind of mortar and what quantity of mortar should be used as it was not within his knowledge. The learned Judge accepted the version of the respondent that the work has done by the mason Ramasami Naidu (P W 206) and that the respondent could not be held liable for the rash and negligent act. The learned Sessions Judge also found that the respondent would not have constructed the building in a hurried manner by using bad materials as he had put his own money spending a sum of Rs 32,000 for the purpose of occupying it at least for ten years so that the amount spent by him could be wiped out by adjustment of rent for ten years.

8 There cannot be any doubt that the building collapsed as a result of which unfortunately 35 school children died and several others were injured. The main question is whether the collapse of the building was due to the rash or negligent act of the respondent. The learned Public Prosecutor reiterated the same points urged on behalf of the prosecution before the appellate Court, but stressed before me that the act of the respondent in not having attended to immediate repairs by taking technical advice after having come to know that it required such repairs should be held to

be a rash and negligent act on his part. He relied upon the evidence of P. W. 208 Paramanandam, the carpenter. P. W. 208 stated that a few months before the collapse of the school building the respondent sent for him to inspect the beams of the building. He found one beam of the ground floor and one beam of the first floor bent.

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9. It is not the case of the prosecution that the respondent himself constructed the building. It is not disputed that he sought the assistance of the masons and the masons constructed the building. If the masons had not done the work properly and if they had been negligent in not mixing the lime mortar in proper proportions, the respondent could not be made liable for the negligence of those persons who actually constructed the building, who are supposed to be skilled. The respondent is a layman. He, therefore, cannot be held liable for the negligence of the persons who actually constructed the building which negligence is the causa causans for the collapse of the building.

10. In Mohd. Rangawalla v. Maharashtra State, AIR 1965 SC 1616, it is held that death must be direct result of the rash or negligent act of accused and the act must be efficient cause without intervention of another's negligence, and it must be the causa causans, and it is not enough that it may have been the causa sine qua non.

11. In the result, I find, taking an all round view of the case, that the prosecution has not established beyond reasonable doubt that the school building collapsed causing the death of several persons and injuries to several others by the rash and negligent act of the respondent. In any event, I do not see any compelling reason to reverse the order of acquittal, by the learned Sessions Judge.

12. It is of course unfortunate that several school children died as a result of the collapse. If the Municipal authorities had taken care to inspect the building periodically being a public institution, this unfortunate incident could have been probably avoided. It is gratifying to note that immediately after this incident, the State has brought a legislation to control and regulate the construction, upkeep and maintenance of the public buildings. It is at least expected in future that the authorities concerned would be vigilant and take that much of the care expected of them to inspect the buildings, wherein public institutions are housed, and, if they find such buildings are unsafe, to take immediate appropriate action as they deem fit.

13. The appeal is dismissed.

Appeal dismissed.

1970 CRI, L. J. 707 (Vol. 76, C. N. 170)=

AIR 1970 SUPREME COURT 549

(V 57 C 121)

(From Madras: 1969 Mad LW (Cri) 274)

S. M. SIKRI, G. K. MITTER,
K. S. HEGDE, A. N. RAY AND
P. JAGANMOHAN REDDY, JJ.

Lennart Schussler and another, Appellants v. Director of Enforcement and another, Respondents.

Criminal Appeals Nos. 113 and 163 of 1969, D/- 14-10-1969.

(A) Defence of India Rules (1962), Rule 132A (since repealed by Defence of India (Amendment) Rules, 1965) — Prosecution for offence under Rule cannot be launched subsequent to its repeal as there is no saving provision under the Defence of India (Amendment) Rules (1965) — AIR 1970 SC 494, Foll.

(Para 6)

(B) Penal Code (1860), Ss. 120B, 120A — Foreign Exchange Regulation Act (1947), Section 21 (1) — Contract contemplated under Section 21 (1) — Nature — Section 121 (1) does not cover criminal conspiracy similar to Section 120B — Complaint in respect of illegal acquisition of foreign exchange — Allegation therein that two accused agreed to obtain foreign exchange illegally — Framing of charge under Section 120B — Maintainability.

A complaint in respect of illegal acquisition of foreign exchange filed against the two accused contained the following allegations:

P, one of the accused, who was the Managing Director of a Company entered into agreement with a foreign Company for supply of raw material to his company. Under the agreement the foreign company also agreed to over-invoice the value of goods and give credit of the over-invoiced amount to the personal account of P. Another accused, L, a foreigner, also entered into agreement with P, by which he agreed to help P in opening the account in a foreign bank and to deposit in bank the amounts credited to P's account by the foreign company from time to time and to intimate P secretly about the accounts. All these agreements were entered into outside India and before coming into force of Foreign Exchange Regulation Act or Rule 132-B of Defence of India Rules. Acquisition of foreign exchange in this manner was not an offence at the time of the agreement between P and L, none-

LM/AN/F190/69/DVT/M

theless, L agreed to assist P in the belief that he would be assisting P in acquiring foreign exchange illegally. L continued to help P even after acquisition of foreign exchange in such manner became offence under the law.

Held (Per Majority, Mitter & Hegde, JJ contra), on the allegations in the complaint both the accused could be charged under S 120B, Penal Code as it seemed that the several alleged acts of both the accused were in furtherance of the alleged conspiracy to obtain foreign exchange illegally. (Para 10)

Held, further that the alleged agreement between the two accused was not one which transgressed Section 21 (1) of the Foreign Exchange Regulation Act. Hence Section 120B would apply. Agreement between P and the foreign company if proved, would however, fall within the mischief of Section 21 (1). (Para 8)

The combined effect of the several provisions of Section 21 does not lead to the view that sub section (1) covers a case of criminal conspiracy similar to Section 120B. Section 21 does not in terms deal with an agreement to commit an offence or a legal act in an illegal way but merely provides that an agreement or contract by itself ought not to evade or avoid the provisions of the Act. The contracts or agreements contemplated under Section 21 are those which are entered into during the course of commercial transactions and it is the intention of the legislature to prohibit that such contracts or agreements ought not to provide for the evasion or avoidance of any of the provisions of the Act either directly or indirectly. The words "directly or indirectly" do not take in any agreement to do illegal acts in future. 1969 Mad LW (Cri) 274, Affirmed.

(Para 8)

(C) Penal Code (1860), Sections 120A, 120B — Agreement to do illegal act — Acts not amounting to offence done by one conspirator in furtherance of that agreement — He is still liable to be convicted under Section 120B.

Where the agreement between certain persons is a conspiracy to do or continue to do something which is illegal it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the

object they wanted to achieve. Consequently, even if the acts done by a conspirator in furtherance of the criminal conspiracy do not strictly amount to offence, he is liable to be convicted under Section 120B. LR 3 HL 305, Ref to

(Para 9)

(D) Penal Code (1860), Section 120A — Essentials of offence — Agreement between two or more persons — When constitutes conspiracy — Continuance of agreement — Effect.

The first of the offences defined in Section 120A, Penal Code which is itself punishable is a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If in the furtherance of the conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy of the plot they can not be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence in which case no overt act need be established. An agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement. (Para 8A)

Cases Referred Chronological Paras
(1970) AIR 1970 SC 494 (V 57) =

Rayala Corporation (P) Ltd
v The Director of Enforcement
N Delhi 3 6 20 21 29

(1968) Cr Misc Petns Nos 978 and
980 of 1968 = 1969 Mad LW (Cri)
98 Rayala Corporation (P) Ltd
v Director of Enforcement,
Delhi 8

(1951) 1951 2 KB 425 = (1951) 1
All ER 917, Rex v Barnett 26
LR 3 HL 305, Lord Chancellor
in Denis Dowling Mulcahy v
Queen 9

The following Judgments of the Court were delivered by

JAGANMOHAN REDDY, J. (on behalf of Sikri and Ray, JJ. and himself): The Director of Enforcement, New Delhi, filed complaint on February 16, 1969 before the Chief Presidency Magistrate, Madras against Lennart Schussler, accused No. 1, and M. R. Pratap, accused 2 Managing Director, the Rayala Corporation Ltd. hereinafter referred to as A.1 and A.2 respectively under Section 120-B I. P. C. and Sections 4 (3), 5 (1) (a) and 9 of the Foreign Exchange Regulation Act (VII) of 1947 (hereinafter called the Act). Two Criminal Miscellaneous Petitions, one filed by A1 being No. 459 of 1969 and the other filed by A2 being No 621 of 1969 for quashing the complaint were dismissed by the Madras High Court by a common judgment against which these two appeals by certificate have been filed.

2. The complaint which is in respect of the acquisition of 88913.09 Swiss Kronars in contravention of the Act states that on reliable information received by the Assistant Director of Enforcement, Madras that A2 was utilising his position as Managing Director of the Rayala Corporation Ltd. in acquiring foreign exchange illicitly, on December 20, 1966, a search was conducted of the premises of the said company in the presence of A2, Jaga Rao and the legal adviser of the company one Sita Ram. During the search certain documents were recovered and seized, one of which was a letter dated the 25th March, 1965 in Swedish language from the Associated Swedish Steels A. B Sweden, known as ASSAB to A1 with the enclosures. The Rayala Corporation Private Ltd. was a concern manufacturing Halda typewriters for which purpose certain materials were being imported from Sweden. The firm with which initially the transactions were being entered into was known as A. B. Atvidabergs, later known as Facit AB, of which A1, a Swedish national, has been the export manager. It is alleged that in August 1963, A2, Jaga Rao and A1 met together at Stockholm and agreed to a plan regarding purchase of certain raw materials, namely, Steel alloy sheets directly from ASSAB instead of purchasing them from Atvidabergs. At that meeting A2 informed A1 that henceforth he would buy material on behalf of his company from ASSAB instead of M/s Atvidabergs. A2 further informed A1 that the arrangement made between him

and the ASSAB was to over-invoice the value of goods by 40 per cent of the true value and that he should be paid the difference of 40 per cent on account of the aforesaid over-invoicing by crediting it to his personal account, and that since under the laws of India this acquisition by him was unlawful and had to be kept secret, it should not be mentioned in the Official correspondence of Messrs. Rayala Corporation with the Swedish firm. He requested the first accused to help him in opening the account in Svenska Handels Banken, Sweden, in order not to transfer the money lying to his credit in Atvidabergs but also to have further deposits to his personal account from ASSAB on account of the difference between the actual value and the over-invoiced value. A1 agreed to act as requested by A2. A2 made arrangement with ASSAB to intimate to A1 the various amounts credited to A2's account and asked A1 to keep a watch over the correctness of the account and to further intimate to him the account position from time to time through unofficial channels and whenever A1 came to India. A1 is said to have agreed to comply with this request. Subsequently in November 1965 A1 came to India when he is said to have brought the incriminating letter dated the 25th March 1965 which was seized. He is said to have also agreed at that time with A2 to continue to help him to accumulate foreign exchange illegally in the same manner. In September 1966 also A1 arrived at Madras where he stayed for a month and at that time also he brought further details of the account. The gravamen of the charge is set out in paragraph 9 of the complaint as follows:— "Thus it is clear that A 1 and A 2 agreed to commit illegal acts, namely, acquisition by A 2 of foreign exchange illicitly and retaining the same abroad without surrendering the same to the Government of India and also to defraud the Government of India of foreign exchange thereby contravening Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132A of the Defence of India (Amendment) Rules, 1964 and further that between August 1963 and 1966, A 1 and A 2 in pursuance of the said agreement did commit acts in contravention of Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132A of the Defence of India (Amendment) Rules, 1964 and thereby committed offence punishable under Section 120B of the Indian Penal Code,

read with Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132A of the Defence of India (Amendment) Rules, 1964"

3 The complaint also refers to the fact that C C No 8736 of 1963 had already been filed against the Rayala Corporation Private Ltd. In view of this reference it is necessary, for a better appreciation of the issues involved in this petition, to give a brief account of the earlier proceedings taken by the Directorate of Enforcement in this regard. It appears that the earlier notice sent by the Enforcement Directorate dated the 25th August, 1967, was for the contravention of the Act in respect of 244,713 70 Swiss Kronars alleged to have been deposited in A 2's bank account, which amount included 88,913 09 Swiss Kronars. This notice was followed by a further show cause notice under Section 23 (3) of the Act dated the 4th November 1967, to A 2 as to why he should not be prosecuted in respect of 88,913 09 Swiss Kronars. A 2 in his reply of November 13, 1967 to the show cause notice of the 25th August, 1967 denied the allegations. The Enforcement Director further issued another show cause notice dated the 15th November, 1967, to the other directors of the Corporation and its General Manager, Jaga Rao in continuation of the notice dated the 25th August asking them to show cause why adjudication proceedings should not be instituted. On November 29, 1967, A 2 replied to the notice of the 4th November 1967, denying the allegations. Thereafter on January 20, 1968 the Director of Enforcement issued a notice to the Rayala Corporation to show cause why it should not be prosecuted for violation in respect of 88,913 09 Swiss Kronars. Two months later namely, on March 16, 1968 a revised show cause notice was issued to the Corporation and A 2 superseding the notice of 25th August 1967 and intimating to them that they were prosecuting the Corporation and A 2 for the contravention of the Foreign Exchange Regulation Act in respect of 88,913 09 Swiss Kronars. Four days thereafter the Director of Enforcement filed a complaint against the Corporation and A 2 under Rule 132A of the Defence of India Rules and Sections 4 (1), 4 (3) and 5 (1) (e) of the Act. Both the Corporation and A 2 filed Criminal Misc Petns being respectively Nos 978 and 950 of 1968 (reported in 1969 Mad LW 93) for quashing the complaint but the High Court of Madras dismissed these petitions in Octo-

ber 1968. Two appeals by certificate preferred against that order, being Criminal Appeals Nos 18 and 19 of 1969 (reported in AIR 1970 SC 494) were allowed by this Court on July 23, 1969, setting aside the order of the High Court rejecting the applications under Section 501 A of the Code of Criminal Procedure for quashing the proceedings against the appellants therein. While the above proceedings were pending, A 1 who happened to be a passenger travelling by an aircraft from Singapore to Karachi via Palam was detained on November 27, 1968 by the officers of the Office of the Enforcement Directorate when the aircraft which had landed at Palam on November 26, 1968, for refuelling had to be temporarily grounded due to engine trouble. On November 30, 1968, the Enforcement Directorate served a notice for adjudication on A 1 in his capacity as a director of the Rayala Corporation which was purported to be in continuation of the previous adjudication notice dated August 25, 1967 issued to the company under Section 23C of the Act. These allegations were also denied by A 1 on the 30th January 1969 and on 5th February, 1969, A 1 filed a writ petition in this Court for the issue of a writ of habeas corpus. It is however unnecessary to narrate the various stages of this and the subsequent petitions for directing A 1's release and for according him permission to leave this country for Sweden. The subsequent writ petition filed by him after the withdrawal of the first one filed on 5th February 1969 came up for hearing along with these criminal appeals and this Court on the 10th September, 1969 while allowing the writ petition to be withdrawn passed a consent order permitting A 1 to depart from India provided he furnishes bank guarantee in the foreign exchange equivalent of Rs 1,50,000/- in Swedish Kronars and on his undertaking to appear before the Chief Presidency Magistrate Madras or any other Magistrate to whom the complaint case might be transferred at the time of the disposal thereof.

4 The main question in these appeals is whether A 1 can be charged in respect of acts alleged against him in the complaint with an offence under Section 120B Indian Penal Code or with offences under the several provisions of the Act and Rule 132A of the Defence of India Rules read with Section 120B Indian Penal Code.

5 Before considering this question it is necessary to mention that at the time

of the alleged agreement between A 1 and A 2 at Stockholm neither the Defence of India Rules nor the Foreign Exchange Regulation Act contained any provision specifically making it an offence for a person resident in India to acquire foreign exchange abroad. Rule 132A of the Defence of India Rules was added on 21st January, 1964, by Defence of India (Amendment) Rules 1964 by which dealings in foreign exchange by persons other than an authorised person were prohibited. This provision remained in force till 31st March, 1965, when it was repealed. Section 4 of the Foreign Exchange Regulation Act was also amended as from 1st April, 1965, so as to prohibit the buying or otherwise acquiring or borrowing or selling or otherwise transferring or lending to any person other than an authorised dealer any foreign exchange without the previous general or special permission of the Reserve Bank. It is therefore apparent that at the time when the alleged agreement between A 1, A 2 and Jaga Rao is said to have taken place in Stockholm in August 1963, it was neither an offence under the Defence of India Rules nor under the Act to acquire foreign exchange in a foreign country. But it is contended by the learned Solicitor General that pursuant to that agreement A 1 continued to help and agreed to help even after it became an offence under the Defence of India Rules or under the Act and consequently no exception can be taken to the complaint against A 1. At any rate, Section 21 (1) of the Act would cover such agreements which are offences and consequently the accused can be charged with Section 120B, Indian Penal Code. On the other hand, learned counsel for the appellants Shri Asoke Sen submits that firstly, there was no mention of any allegation against A 1 in the several show cause notices issued either to the Rayala Corporation or to the directors of that Corporation or to A 2 but it is an afterthought brought about by the machinations of Jagga Rao who was hostile and inimical to A 2, secondly, as it appears on the enquiry made by A 2 at the instance of the Enforcement Directorate from Svenska Handels Banken, Stockholm, that in fact there is no account as alleged either in the name of the Rayala Corporation or in the name of the Managing Director of the Rayala Corporation, that is, A 2, there would be no basis for the complaint; and thirdly, the agreement alleged does not either come under Section 120B, Indian Penal Code or would

amount to a contravention of any of the provisions of the Act including Section 21 (1) thereof. It would not be necessary at this stage to go into these questions because that has to be seen is whether, assuming the facts as stated in the complaint to be true, A 1 and A 2 could be charged with the offences specified therein. The answer to this question must depend upon the nature of the part which A 1 agreed to play in the acquisition of the foreign exchange under which agreement he is said to have continued to participate in the conspiracy by rendering help to A 2 in acquiring foreign exchange even after 21st of January, 1964, and also till after the amendment of Section 4 (1) of the Act.

6. Under Section 120B there must be an agreement between two or more persons to commit an offence or where the agreement does not amount to an offence in the doing of an act which is legal, in an illegal way there should also be established an overt act. In so far as the offence under Rule 132A of the Defence of India Rules is concerned, in 1963 what Pratap did was not an offence, nor was it an offence under the Act as Section 4 was amended with effect from 1st April, 1965. In so far as any acts which may be considered to constitute an offence under Rule 132A of the Defence of India Rules, it has been held by this Court in Criminal Appeals Nos. 18 and 19 of 1969, D/- 23-7-1969 (reported in AIR 1970 SC 494), Rayala Corporation etc. v. Director of Enforcement, that no prosecution can be launched for an offence under that provision subsequent to the repeal as there is no saving provision thereunder.

7. It is then contended that the agreement entered into in 1963 continued to be effective even after the acquisition of foreign exchange became an offence after the amendment of the Act on 1st April, 1965, and at any rate after this amendment an agreement by A 1 to assist A 2 was again said to have been arrived at in Madras in 1965. It is, therefore, necessary to examine whether such an agreement would constitute an offence and if so under what provision of law. The agreement in Madras has a reference to the initial agreement in Sweden. This alleged agreement between A 1 and A 2, as set out in the complaint, can be briefly stated to consist of the following, namely, in August 1963, A 2 asked A 1 to help him (a) to open an account in Svenska Handels Banken, Stockholm, (b)

to get the money lying to A 2s credit with Atvidabergs accumulated by him as a result of over invoicing transferred to Prataps account with the bank and (c) to keep a watch on and check the correctness of the account of the acquisitions from time to time and not to mention anything in the official correspondence but to give information otherwise. Even in Madras in 1965 A 1 is alleged to have agreed to keep a watch on the account and bring him statements of the account. The offence by A 2 under the Act would consist of getting the goods which the Rayala Corporation was purchasing over invoiced by 40 per cent so that permission to remit foreign exchange from India to the extent of the amount of the over invoice could be obtained from the Reserve Bank and after money is received in Sweden by the Swedish Company that company was to credit Prataps (A 2) account with 40 per cent of the over invoice price. If these facts are established they certainly amount to a contravention of Clause (1) and Clause (3) of Section 4 which provide that where any foreign exchange is acquired by any person other than by any authorised dealer for any particular purpose or where any person has been permitted conditionally to acquire foreign exchange the said person shall not use the foreign exchange so acquired otherwise than for that purpose or as the case may be fail to comply with any condition to which the permission granted to him is subject and where any foreign exchange so acquired cannot be so used or as the case may be the condition cannot be complied with the said person shall without delay sell the foreign exchange to an authorised dealer. Now it is alleged that A 2 Pratap has in breach of this condition on which foreign exchange was released to the Rayala Corporation to pay the actual cost of the goods has not only not complied with the conditions on which the permission was granted but has also committed default in not selling the foreign exchange so acquired by him without delay to an authorised dealer.

8 Before dealing with the question whether the agreement of A1 to help A2 amounts to criminal conspiracy punishable under Section 120B I P C it will be convenient first to dispose of the submission that Section 120B I P C does not apply because Section 21 (1) covers the same ground. It would appear that the alleged agreement between A1 and A2 is not one which transgresses Section 21

(1) of the Act. What Section 21 (1) provides is that the provisions of the Act must be avoided or evaded by the agreement or contract itself. The contracts or agreements are those which are entered into during the course of commercial transactions and it is the intention of the legislature to prohibit that such contracts or agreements ought not to provide for the evasion or avoidance of any of the provisions of the Act either directly or indirectly. This assumption is made clear by the subsequent sub section in which the legislature is anxious to preserve the integrity of these transactions by providing that any reference to any act being done without the permission of the Central Government or Reserve Bank shall not render the agreement invalid and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or Reserve Bank shall not be done unless such permission is granted. Sub section (3) provides that notwithstanding anything in the Act or any provision in the contract that anything for which permission has to be obtained from the Central Government or Reserve Bank shall not be done without that permission no legal proceedings shall be prevented from being brought in India to recover any sum which apart from any of the said provisions and any such term would be due whether as a debt damages or otherwise but subject to the certain conditions provided in Clauses (a) to (c) therein. Similarly sub section (4) states that nothing shall be deemed to prevent any instrument being a bill of exchange or promissory note in spite of any prohibitions in the Act and notwithstanding anything contained in the Negotiable Instruments Act. The combined effect of the several provisions of Section 21 does not incline us to the view that sub section (1) covers a case of criminal conspiracy similar to Section 120B. Section 21 does not in terms deal with an agreement to commit an offence or a legal act in an illegal way but merely provides that an agreement or contract by itself ought not to evade or void the provisions of the Act. The agreement entered into between ASSAB and A 2 Pratap would if proved, come within the mischief of S 21 (1) but the agreement such as the one alleged to have been entered into between A 1 and

A 2 does not itself evade or avoid any of the provisions of the Act, rules or directions. The words directly or indirectly do not take in any agreement to do illegal acts in future.

8-A. It now remains to be seen whether the alleged agreement which A 1 and A 2 arrived at in Stockholm in 1963 and again in Madras in 1965, would, if established, amount to a criminal conspiracy. The first of the offence defined in Section 120A Penal Code which is itself punishable as a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If in the furtherance of the conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy or the plot they cannot be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. It is also clear that an agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement.

9. As has been noticed earlier at the time A 1 and A 2 entered into an agreement though A 2 thought it was an offence to acquire foreign exchange by the method he was employing it was not in fact an offence. It is none the less alleged that A 1 agreed to help in the belief that what he is doing would be to assist A 2 to acquire foreign exchange illegally. This agreement continued and A 1 was assisting A 2 even after the acquisition of foreign exchange became illegal and is said to have agreed even after he came to Madras in 1965 to continue to help in acquiring the foreign exchange. It is however contended that the agreement of A 1 with A 2 does not amount to a criminal conspiracy because all that A 1 has

agreed to do was to help A 2 to open an account in the Swedish Bank, have the amounts lying to the credit of A 2 with Atvidabergs to that account and to help A 2 by keeping a watch over the account. It is true that none of these acts amounts to an offence, because the opening of the account in the Bank and having the amounts transferred from Atvidabergs was not an offence in August 1963, and there is nothing to show that A 1 had not completed that part of the agreement relating to Atvidabergs and the opening of the account with the bank before January, 1964, or that he had rendered the assistance after that date. If this part of the agreement does not amount to a conspiracy to do an unlawful act, then it is submitted that the subsequent watching over the account and sending or bringing a statement of the account of A 2 relating to the acquisition of the foreign exchange does not amount to an offence. The agreement which constitutes an offence, it is said is the one between A 2 and ASSAB. The subsequent act of A 1 was neither necessary to acquire nor does it further the acquisition of the foreign exchange in contravention of the provisions of the Act and is therefore not an offence under S. 120B of the Penal Code. This argument would postulate that the several acts which constitute it can be split up in parts and the criminal liability of A 1 must only be judged by the part he has played. It appears to us that this is not a justifiable contention, because what has to be seen is whether the agreement between A 1 and A 2 is a conspiracy to do or continue to do something which is illegal and if it is, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. As observed by Willis, J., in his 11th answer given on behalf of the Judges when consulted by the Lord Chancellor in *Denis Dowling Mulcahy v. Queen*, LR 3 HL 305 at page 317:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself,

and the act of each of the parties promise against promise, *actus contra actum* capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means"

10 In this case on the allegations A 2 asked A 1 to help him in acquiring foreign exchange illegally and A 1 agreed to help him. This agreement though initially may not have been an offence was none the less an offence subsequently but A 1 did not withdraw from it and was said to have continued to carry out that agreement. A 1's help was necessary for A 2's design because otherwise he would not know whether ASSAB was in fact crediting his account in the bank with the amount of over invoice. Only when ASSAB credited A 2's account could he be said to have acquired the foreign exchange till then it was only an understanding or agreement under which if it is enforceable a debt would be created in favour of A 2. The knowledge that the amount was being credited from time to time was an essential part of the agreement between A 1 and A 2 and would be in furtherance of illegal and unlawful design to acquire foreign exchange contrary to the provisions of the Act. It consisted in, as has already been stated A 1 keeping a watch over the accounts, his coming over to India on several occasions, his bringing a letter in reply to his letter with a statement of account annexed in November 1965 from ASSAB to himself, in which the amount of foreign exchange credited by ASSAB to A 2's account with Svenska Handels Banken was mentioned, his statement at the time of handing it over that he brought the letter in person as he did not want to send it by post in view of the nature of the transaction and his further agreeing in Madras with A 2 that he will continue to help him. The several acts of A 1 are all acts in consequence of the agreement which had its origin in Sweden. A 2 Pratap one of the conspirators also in furtherance of that conspiracy obtained foreign exchange invoices which were over priced with a view to acquire the same in Sweden. It would therefore appear that on the allegations contained in the complaint A 1 and A 2 could be charged with an offence under Section 120B.

11 These appeals are accordingly dismissed with a word of caution that nothing that has been stated here should be taken as establishing any of the facts required to constitute the offence which if the prosecution case has to be sustained

must be proved at the trial in accordance with law.

12 MITTER, J — These two appeals by certificate arise out of a common judgment of the Madras High Court in Cr. M. P. 469/1969 and Cr. M. P. No 621/1969 the object of both being to quash the complaint in C. C. No 5438 of 1969 on the file of the Court of the Chief Presidency Magistrate, Egmore, Madras. Cr. M. P. 469 of 1969 was by Lennart Schussler while Cr. M. P. 621/1969 was by M. R. Pratap. The complaint before the Chief Presidency Magistrate was filed on February 16, 1969, by the Director of Enforcement against Schussler and Pratap under Section 120 B of the Indian Penal Code read with various sections of the Foreign Exchange Regulation Act, 1947.

13 In order to appreciate how the complaint came to be made, it is necessary to note a few facts which preceded it. The Rayala Corporation Private Ltd., (hereinafter referred to as the Corporation) used to manufacture Halda type writers and in that connection import materials through A. B. Atvidabergs, Sweden later known as Facit AB. M. R. Pratap was the Managing Director of the Corporation. Schussler, a Swedish national has been export manager of Facit AB for many years. He became a director of the corporation in April 1968. On information received about violation of the Foreign Exchange Regulation Act (hereinafter referred to as the Act) the Enforcement Directorate raided the premises of the corporation at Madras on 20th and 21st December 1966 and seized certain records. According to the information at the Directorate a plan had been hatched in August 1963 between Pratap, Schussler and one Jaggarao General Manager of the Corporation, in Stockholm regarding purchase of raw materials by the corporation directly from a firm known as ASSAB instead of Facit AB to give effect to an arrangement already made by Pratap with ASSAB to over invoice the value of the goods imported by the corporation by 40% of their true value thereof and the difference of 40% to be paid to the personal account of Pratap. The part played by Schussler was to help Pratap in opening an account in Svenska Bendela Banken, Sweden (hereinafter referred to as the bank) and to transfer the moneys lying to his credit to Facit AB and to have further deposits made to his personal account on account of over invoicing by ASSAB. It is the case of the Directorate that Pratap Ltd

been acquiring large amounts of foreign exchange abroad by the above means from before 1963 and had retained the same abroad to put it beyond the reach of the Government of India. On August 25, 1967, the Enforcement Directorate sent a notice to the corporation and Pratap alleging violations of Sections 4 (1) and 9 of the Act calling upon them to show cause why adjudication proceedings under the Act should not be had. The notice was not only in respect of 88,913.09 Krs. but an additional sum making a total of 244,713.70 Sw. Krs. alleged to have been deposited in a bank account. This was followed by a further show cause notice dated November 4, 1967, from the Directorate to Pratap under Section 23 (3) of the Act for prosecuting him under the Act in respect of 88,913.09 Krs. On November 13, 1967, Pratap replied to the show cause notice dated August 25, 1967, denying the allegations. On November 15, 1967, the Directorate sent show cause notices to the other Directors of the Corporation and its Manager in continuation of the notice dated 25th August, asking them to show cause why adjudication proceedings should not be instituted. On 29th November, 1967, Pratap denied the allegations in the notice dated 4th November. On 20th January, 1968, notice was issued by the Director of Enforcement to the Corporation to show cause why it should not be prosecuted for the violation of the Act in respect of 88,913.09 Sw. Krs. On March 16, 1968, a revised adjudication show cause notice was issued by the Director of Enforcement to the Corporation and Pratap superseding the notice dated August 25, 1967, and informing them that they were prosecuting the Corporation and Pratap for 88,913.09 Sw. Krs and adjudicating in respect of 1,55,801 Sw. Krs. On March 20, 1968, the Director of Enforcement filed a complaint against the Corporation and Pratap under Rule 132-A of the Defence of India Rules and Sections 4 (1), 4 (3) and 5 (1) (e) of the Act. The Corporation and Pratap filed Cr. M. Ps. 978 and 980 of 1968 for quashing the complaint. The High Court of Madras dismissed these petitions in October 1968. The appeals preferred to this Court on a certificate were disposed of in July 1969, quashing the complaint.

14. Schussler happened to be a passenger travelling by an aircraft from Singapore to Karachi via Palam in November 1968. When the aircraft touch-

ed at Palam for a short space of time engine trouble was noticed and all the passengers including Schussler were asked to spend the rest of the night at a hotel until the aircraft became airworthy once more. Before Schussler could board the plane the next day i.e., 27th November, 1968, he was taken to the Enforcement Directorate Office and interrogated. His departure from India was prohibited at the instance of the Director of Enforcement under the Foreigners Order of 1948. On November 30, 1968 Schussler was served with an adjudication notice dated November 15, 1967, under Section 23-C of the Act in his capacity as Director of the Corporation and the notice was described as in continuation of the previous adjudication notice dated 25th August, 1967, issued to the company. On 13th December, 1968, Schussler replied to the show cause notice denying the allegations. On January 21, 1968, Schussler was served with another adjudication notice similar to the notice of 16th March 1968 in his capacity as Director of the Corporation under Section 23C of the Act. On 30th January, 1969, Schussler denied the allegations in the last adjudication notice. On February 5, 1969, Schussler filed a Writ Petition in this Court for the issue of a writ of habeas corpus etc. On 17th February, 1969, when the said Writ Petition came up for hearing before this Court a statement was made on behalf of the respondents that a complaint C. C. No. 5438 of 1969, had already been filed in the Court of the Chief Presidency Magistrate, Madras, under Section 120-B, Indian Penal Code read with different sections of the Act. A suggestion was then made that Schussler might be permitted to leave India by giving security by way of a bank guarantee for Rs 1,50,000/-. Ultimately, on April 21, 1969, when the Writ Petition came up for hearing before this Court a consent order was made and the respondent agreed to withdraw the order dated November 30, 1968 under the Foreigners Act on condition that Schussler should move for bail before the Chief Presidency Magistrate and then apply for permission to the Foreigners Registration Officer to leave India. The Chief Presidency Magistrate granted bail to Schussler on two sureties but his application for permission to the Foreigners Registration Officer was rejected on the objection raised by the Additional Director, Enforcement. On April 30, 1969 Schussler filed Writ Petition No. 144 of 1969 for the issue of a

went of habeas corpus directing the respondents, the Foreigners Regional Registration Officer and others, to allow him to leave the territory of India and for other reliefs. This Writ Petition came up for hearing before this Court along with the above Criminal Appeals Nos 113 and 163 of 1969 on 8th September. On 10th September the Court ordered that the Foreigners Regional Registration Officer would permit him to leave India on condition of his giving a bank guarantee for 155,800 Sw Krs and on his undertaking to appear before the Chief Presidency Magistrate Madras or any other Magistrate to whom the complaint case might be transferred at the time of disposal.

15 The complaint in this case filed on February 16 1969 by the Director of Enforcement recites that to the knowledge of Schussler Pratap had before August 1963, acquired foreign exchange amounting to 756,529 Sw Krs by getting Facit AB to over invoice the goods imported by the Corporation by 40 per cent of their true value and that in August 1963 an agreement was arrived at in Stockholm between Pratap Schussler and Jaggurao for the opening of an account in the name of Pratap in the bank with the help of Schussler not only to transfer the moneys lying to the credit of Pratap in Facit AB but also to cause further deposits to be made in the said account from Assab on account of similar over invoicing by Assab of the value of the goods to be bought by the Corporation. Support for the case of the Directorate that Pratap had been acquiring foreign exchange illicitly by the above device of over invoicing and retaining the same abroad in a Swedish bank was said to be received as a result of the search of the premises of the Corporation in December 1966 and in particular the seizure of the letter dated March 25, 1965 from Assab to Schussler in reply to Schussler's letter (not in the record) to the Assab. Reference is made in the complaint to several invoices and other documents seized during the course of search allegedly lending support to the case of the Directorate. According to the complaint such device had been adopted by the Corporation and Pratap in respect of 14 invoices involving 88,913.09 Krs which had been released and secured for import of goods but was actually not utilised for the purpose and kept back abroad credited to the personal account of Pratap thus violating the order made by the Central Government by Notification

dated 25th September 1958 No F 1 (67) E/57 under Section 9 of the Act. This amount of 88,913.09 Sw Krs was said to have been acquired surreptitiously in the year 1964-65 by Pratap without the previous or general permission of the Reserve Bank of India and Pratap had failed to offer the same to the Reserve Bank or to any authorised dealer within one month from the date of the acquisition in terms of the notification mentioned. The complaint goes on to relate that the letter of 25th March, 1965 was brought by Schussler in person to India when he came here in November 1965. The complaint also alleges that in November 1966 Schussler agreed with Pratap "to continue to help him and accordingly did help him to accumulate foreign exchange illegally in the same manner. Thereafter even later when Schussler became Director of Rayala Corporation similar transactions were continued by him and Pratap." In September 1966 Schussler came to Madras bringing further details of the said account. The complaint winds up with the statement that Schussler and Pratap had agreed to commit illegal acts namely, acquisition by Pratap of foreign exchange illicitly and retaining the same abroad without surrendering it to the Government of India and to defraud the Government of India of foreign exchange thereby contravening Sections 4 (3) 5 (1) (e) and 9 of the Act and Rule 132 A of the Defence of India Rules 1962 and further between August 1963 and 1966 Schussler and Pratap in pursuance of the said agreement did commit acts in contravention of the said sections of the Act and the said Rule 132 A and thereby committed an offence punishable under Section 120 B of the Indian Penal Code read with the said sections of the Act and the said rule.

16 The relevant provisions of the Act may now be noticed. Sub section (1) of Section 4 of the Act as originally provided that

Except with the previous general or special permission of the Reserve Bank no person other than an authorised dealer shall in India and no person resident in India other than an authorised dealer shall outside India buy or borrow from or sell or lend to or exchange with any person not being an authorised dealer, any foreign exchange."

The above was considered to be sufficient to attract the ban on acquisition of foreign exchange by other means e.g. by over invoicing the price of goods import

ed as was alleged to have been done by the Corporation and Pratap. The section as amended with effect from April 1, 1965 contains the words "or otherwise acquire" in between the words "by" and "or borrow from" and the words "or otherwise transfer" in between the words "sell" and "or lend to". Rule 132-A of the Defence of India Rules was promulgated on January 21, 1964 and cured the lacuna in Sec. 4 (1) of the Act as from the said date. But this rule was omitted from the rules by a notification dated March 30, 1965 in view of the amendment of Section 4 (1) which became effective from April 1, 1965.

17. Section 4 (3) prohibits the use of any foreign exchange for a purpose other than for which it was given and runs as follows:

"Where any foreign exchange is acquired by any person other than an authorised dealer for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be used or, as the case may be, the conditions cannot be complied with, the said person shall without delay sell the foreign exchange to an authorised dealer"

18. Section 5 contains certain restrictions on payments. The provision, Section 5 (1) (e), reads:

"Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally by the Reserve Bank, no person in, or resident in, India shall—

(a) to (d) x x x x

(e) make any payment to or for the credit of any person as consideration for or in association with —

(i) the receipt by any person of a payment or the acquisition by any person of property outside India;

(ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside India;

xx xx xx xx xx."

Section 9 reads:

"The Central Government may, by notification in the official Gazette, order every person in, or resident in, India—

(a) who owns or holds such foreign exchange as may be specified in the notification, to offer it, or cause it to be offered for sale to the Reserve Bank on behalf of the Central Government or to such person as the Reserve Bank may authorise for the purpose, at such price as the Central Government may fix, being a price which is in the opinion of the Central Government not less than the market rate of the foreign exchange when it is offered for sale;

(b) who is entitled to assign any right to receive such foreign exchange as may be specified in the notification to transfer that right to the Reserve Bank on behalf of the Central Government on payment of such consideration therefor as the Central Government may fix:

Provided that the Central Government may by the said notification or another order exempt any persons or class of persons from the operation of such order:

Provided further that nothing in this section shall apply to any foreign exchange acquired by a person from an authorised dealer and retained by him with the permission of the Reserve Bank for any purpose."

19. The other provisions which are necessary to note are—

"Section 21 (1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.

Section 23 (1) If any person contravenes the provisions of Section 4, Section 5, Section 9, Section 10 or sub-section (2) of Section 12, Section 17, Section 18A or Section 18B or of any rule, direction or order made thereunder, he shall—

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudicated by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both

(1A) If any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a Court, be punishable with im-

prisonment for a term which may extend to two years, or with fine, or with both

xx xx xx xx
(3) No Court shall take cognizance—

(a) of any offence punishable under sub section (1) except upon a complaint in writing made by the Director of Enforcement or

(aa) xx xx xx xx

(b) of any offence punishable under sub section (1A) of this section or Section 231 except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by a general or special order

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission

23C (1) If the person committing a contravention is a company every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly

Provided that nothing contained in this sub section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention

23D (1) For the purpose of adjudicating under Clause (a) of sub section (1) of Sec 23 whether any person has committed a contravention the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if on such inquiry, he is satisfied that the person has committed the contravention he may impose such penalty as he thinks fit in accordance with the provisions of the said Section 23

Provided that if at any stage of the inquiry the Director of Enforcement is of opinion that having regard to the circumstances of the case the penalty which he is empowered to impose would not be adequate, he shall instead of imposing any penalty himself make a complaint in writing to the court.

(2) While holding an inquiry under this section, the Director of Enforcement shall have power to summon and enforce the attendance of any person to give evidence or to produce a document or any other thing which, in the opinion of the Director of Enforcement, may be useful for, or relevant to, the subject matter of the inquiry

xx xx xx xx
Of the two agreements mentioned in the complaint the one arrived at in August 1963 was not unlawful. Section 4 (1) of the Act did not make it unlawful for anyone to acquire foreign exchange abroad. Any foreign exchange acquired by Pratap after January 21, 1964 when Rule 132-A of the Defence of India Rules was promulgated would be an unlawful acquisition but there could be no conspiracy under Section 120 A in respect of the agreement arrived at in August, 1963. In paragraph 7 of the complaint it was only Pratap who was charged with contravention of Section 9 of the Act in respect of 88913 09 Sw Krs but the agreement of November, 1965 stands on a different footing. According to paragraph 8 of the complaint Schussler agreed with Pratap at Madras in November, 1965 to help him to accumulate foreign exchange as before by getting the same credited to his account in the bank. This agreement would be one in violation of Sections 4 (1) and 9 of the Act. However any violation of Section 4 (1) or Section 9 or Section 4 (3) and Section 5 (1) (e)—the last two provisions being hardly applicable to the facts of the case—would be offences under the Act, in respect whereof the Director of Enforcement was competent to levy penalty under Section 23 (1) (a) of the Act after following the procedure for adjudication prescribed in Section 23D of the Act or alternatively by making a complaint in court under Section 23 (1) (b).

20. The recent judgment of this Court in Cr As 18 and 19/1969 dated 23-7-1969 (reported in AIR 1970 SC 491) arising out of the complaint in Case No 8736 of 1968 has laid down that before a complaint can be filed under Sec. 23 (1) (b) the Director of Enforcement must not only initiate proceedings under Section 23 (1) (a) but proceed with the inquiry under Section 23-D (1) and form an opinion in course thereof that having regard to the circumstances of the case, the penalty which he was empowered to impose under Section 23 (1) (a) would not be adequate and that it was necessary

to make a complaint in writing to the court instead of levying a penalty himself.

21. Mr. Sen arguing the appeal of Schussler contended that the Act was a complete Code containing provisions not only for punishment of violation of different sections of the Act but also a conspiracy to commit acts prohibited under the Act which might otherwise have been amenable to the jurisdiction under Sections 120-A and 120-B of the Indian Penal Code. In this connection, he referred to the provisions in Section 21 (1) of the Act. Under Section 21 (1) any agreement which could directly or indirectly evade in any way the operation of the provisions of the Act or any rule, direction or order made thereon was forbidden. The contravention of Section 21 (1) does not find a place in Section 23 (1) of the Act but it would be an offence covered by Section 23 (1A) and any contravention of Section 21 (1) would be punishable upon conviction by a court with imprisonment for a term which may extend to two years or with fine or with both. The punishment is the same as the one prescribed under Section 23 (1) (b) and is greater than that laid down in Section 120-B (2) of the Indian Penal Code.

22. The learned Solicitor-General arguing the case of the respondents contended that Section 21 (1) did not touch a criminal conspiracy which is covered by Section 120-A of the Penal Code. I find myself unable to accept this argument. An agreement which can form the basis of a criminal conspiracy under Section 120-A may, inter alia be one to do or cause to be done an illegal act or an offence. Under Section 21 (1) of the Act any agreement which directly or indirectly evades in any way the operation of the Act etc. is forbidden. An agreement by two persons whereby one agrees to help the other by facilitating transfer of foreign exchange from a foreign exporter into the banking account of that other is an agreement the object whereof is not only the acquisition of foreign exchange but the retention of it abroad. This is clearly an agreement to evade the operation of the provisions of the Act relating to the illegal acquisition and retention of foreign exchange.

23. In my view, the Act is a complete Code with regard to the offences specified by it though it is not a self-sufficient Code with regard to the procedure to be followed irrespective of the provisions of the Criminal Procedure Code. It is true

that there are different sections in the Act regarding the power to search persons believed to have secreted any documents which will be useful or relevant to any proceeding under the Act (Section 19A), to arrest any person believed to be guilty of an offence punishable under the Act (19-B), to stop and search conveyances (19-C), to search premises (19-D), to examine persons during the course of any enquiry in connection with any offence (19-E), to summon persons to give evidence and produce documents in connection with enquiries (19-F), to retain custody of documents (19-G) which are not in consonance with the provisions of the Procedure Code. Section 24A contains a very special rule of evidence regarding the proof of documents seized and the evidentiary value thereof at complete variance with the Indian Evidence Act. Some of these powers are more drastic and are in addition to similar powers contained in the Code of Criminal Procedure. But so far as the violation of the different provisions of the Act, or rule or direction or order made thereunder are concerned, the Act is a complete Code including in its ambit a criminal conspiracy to acquire foreign exchange abroad illicitly and retaining the same abroad by reason of the provisions of Section 21 (1).

24. The judgment of this Court in Cr. As. Nos. 18 and 19 of 1969 (reported in AIR 1970 SC 494) lays down that a complaint under Section 23 (1) (b) cannot be launched before the Director of Enforcement has taken up the adjudication proceedings and made some inquiry in those proceedings and formed the opinion that it was necessary to have resort to the more drastic provision of conviction by a court as envisaged by Section 23 (1) (b).

25. No proceedings have been started either against Schussler or Pratap in pursuance of the notices dated 30th November, 1968 and 21st January, 1969. It would therefore appear that in respect of the substantive offences for contravention of the different sections of the Act, the Director of Enforcement cannot at present make a complaint as he has not followed the procedure laid down in Section 23D of the Act. It would therefore be absurd to allow him to file a complaint for violation of Section 21 (1) by making a charge under Section 120-B, I P. C. when the overt acts alleged are contraventions of different provisions of the Act, punishable only under S. 23 (1) (b).

by following the procedure indicated in Section 23 D. To allow the prosecution to be proceeded with at this stage would in effect be stultifying Sec 23 (1) (b) by allowing the establishment of commission of offences punishable only by following a procedure not yet adopted by the Director of Enforcement.

26 Mr Sen relied on the decision in *Rex v Barnett*, 1951 2 KB 425 in aid of his contention that when a statute makes unlawful that which was lawful before and appoints a specific remedy that remedy and no other must be pursued. In that case a number of persons alleged to be dealers in scrap metal were charged on account of an indictment to the effect that they conspired together and with other persons unknown, to contravene the provisions of Section 1 of the Auctions (Building Agreements) Act 1927 by being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction. What in effect had happened there was that the prosecution alleged that a number of persons had agreed to form a ring and in pursuance of that agreement they attended at auction sales where cable and other Ministry of Supply commodities were being sold and that after some representatives of the ring bid for and acquired goods on behalf of the ring they were re-auctioned and the profits shared by the ring in an agreed proportion. The forming of a ring in order to bid at an auction in the way indicated was not an offence at law up to the passing of the Act of 1927 and it was therefore submitted on behalf of the persons who had been convicted on account of indictment at the Central Criminal Court before the Court of Criminal Appeal that as the agreement was not an offence under the common law and only became one under the Act of 1927 the procedure laid down by the Act should be followed. The submission on behalf of the prosecution was that the indictment alleged was a conspiracy which was something different from the offences which the Act created. It was pointed out by the Court of Appeal that although it was possible to frame a charge alleging conspiracy to contravene this Act in any given set of circumstances the court must ascertain what in fact was alleged. According to the court

"In alleging the conspiracy to contravene the Act particulars are given and those particulars are 'by being dealers agreeing to offer and accept considera-

tion as an inducement or reward for abstaining from bidding at sales by auction'". This Court is of opinion that those particulars of this particular conspiracy describe in terms offences which the Act creates, or are substantially the same". The same can be said on the facts of this case. The particulars of conspiracy alleged in this case are offences which the Act has created. In my view the Director of Enforcement must first take up the adjudication proceedings, it being open to him in the course thereof to form an opinion that the penalty which he may impose will not be adequate having regard to the circumstances of the case whereupon he can make a complaint in writing to the court. He can at the same time make a complaint about the agreement to evade the operation of the provisions of the Act calling for punishment under Section 23 (1A) of the Act. The agreement with overt acts alleged for proving a conspiracy under Section 120-B I P C is in reality an offence under Section 23 (1A) read with Section 21 (1). The complaint does not lie at this stage and must be quashed.

27 In the result I would allow the appeals and quash the complaint made on 16th February, 1967.

28 HEGDE, J I have gone through the judgment just now read out by my esteemed colleague Mitter, J. I agree with him that these appeals should be allowed following the rule laid down by this Court in Criminal Appeals Nos 18 and 19 of 1969 D/- 23 7 1969 (reported in AIR 1970 SC 494). In my opinion it is a fundamental principle of law that what cannot be done directly should not be permitted to be done indirectly.

29 From the facts and circumstances of the case I am satisfied that the complaint with which we are concerned is not a bona fide one. It has been filed with a collateral purpose viz to justify the unlawful detention of Schussler, in this country. It may be noted that in the first complaint filed by the Director of Enforcement the allegation was that the Rayala Corporation and its Managing Agent Pratap had contravened the provisions of the Foreign Exchange Regulation Act. When that complaint was pending trial Schussler came to deplane in this country due to some engine trouble in the plane in which he was travelling. That occasion was waived to detain him illegally in this country. I am convinced that Schussler's detention in this country was unjustified.

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